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STATE OF MONTANA
Case Number: DA 20-0604

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0604

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PRESTON CSOO ROSSBACH,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Leslie Halligan, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court properly denied Appellant's challenge of a juror for cause.

2. Whether, when viewing the evidence in the light most favorable to the prosecution, the State presented sufficient evidence supporting the jury's verdict convicting Appellant of two felony murders predicated on his accountability for attempted robbery during which two people were murdered.

3. Whether the district court properly denied Appellant's motion to dismiss the felony murder charges based upon his claim that as a matter of law he could not be found legally accountable for attempted robbery and guilty of felony murder because his co-defendant committed the crimes.

4. Whether the district court properly exercised its discretion in limiting Appellant's cross-examination of two witnesses, with whom he was previously incarcerated, without infringing upon Appellant's confrontation rights.

5. Whether the district court properly denied Appellant's motion for a new trial based on an alleged *Brady* violation.[1]

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

STATEMENT OF THE CASE

By Amended Information, the State charged Appellant Preston Rossbach (Rossbach) with two counts of deliberate homicide, felony murder, one count of assault with a weapon, two counts of tampering with or fabricating physical evidence, and two counts of intimidation.[2] (Docs. 65, 68.) Regarding the two counts of felony murder, the State alleged that on October 18, 2018, Rossbach attempted to commit, committed, or was legally accountable for the attempt or commission of a robbery, and during the robbery or immediately after, Rossbach or any person legally accountable for the underlying crime caused the deaths of Jason Flink (Jason) and Megan McLaughlin (Megan). (Doc. 68 at 2.)

The district court conducted a jury trial from March 2, 2020, through March 17, 2020. (3/2/20-3/13/20 Transcript of Jury Trial [Tr.]; 3/17/20 Transcript of Verdict [Verdict Tr.].) During jury selection, Rossbach challenged prospective Juror Simenson (Simenson) for cause. (Tr. at 665.) The district court denied the challenge. (Tr. at 673.) Rossbach used a peremptory challenge to remove Simenson. (Doc. 304.)

When the State rested, Rossbach moved to dismiss the two felony murder counts, arguing that, assuming a robbery occurred, Rossbach's co-defendant,

[2] During trial, the district court granted the State's motion to dismiss one count of tampering with evidence. (Doc. 317.)

Jonathan Whitworth (Whitworth) committed the robbery and the two murders, so as a matter of law the jury could not convict Rossbach of felony murder. (Tr. at 2260-66; Doc. 316.) The district court denied the motion. (Tr. at 2400-01.)

The jury found Rossbach guilty of two felony murders. (Verdict Tr. at 19-20.) The jury unanimously concluded that Rossbach was legally accountable for the offense of attempted robbery, and unanimously concluded that a person legally accountable for the offense of attempted robbery had caused the deaths of Jason and Megan. The jury also found Rossbach guilty of assault with a weapon, tampering with evidence, and two counts of intimidation. (*Id*. at 19-22, 27; Doc. 329.)

On April 13, 2020, Rossbach filed a motion for judgment notwithstanding the verdict or, alternatively, a motion for a new trial on numerous grounds including that the State had failed to timely disclose a letter from one of the informants. (Doc. 332 at 17-18.) The State responded and Rossbach replied. (Docs. 335-36.) The district court denied Rossbach's posttrial motions. (Doc. 351, attached to Appellant's Br. as App. B.)

For the felony murder convictions, the district court imposed concurrent 60-year prison sentences, with 10 years suspended. For the assault with a weapon conviction, the district court imposed a 10-year concurrent prison sentence. For the tampering with physical evidence conviction, the district court imposed a 5-year

concurrent prison sentence. For the two intimidation convictions, the district court imposed 5-year concurrent prison sentences. (Doc.364.)

STATEMENT OF THE FACTS

I. The crimes

In 2018, Kaleb Williams (Kaleb) moved from Browning, Montana, to Missoula, Montana. (Tr. at 1162.) Raven Lamere (Raven) is Kaleb's distant cousin. In October 2019, Raven lived in room 208 at the Mountain Valley Inn in Missoula. Kaleb routinely stayed with Raven. (Tr. at 1162, 2054.) Kaleb knew that Raven sold methamphetamine. (Tr. at 1162-63, 2054.)

When Kaleb got off work on October 18, 2018, he met up with his friend Taylor Luedtke (Taylor). They cruised around for a couple of hours, then Taylor dropped Kaleb off at the Mountain Valley Inn. Raven was in her room with two females whom Kaleb did not know. Kaleb drank two beers before he went to bed. Raven and the two females left the hotel room. Kaleb did not know where they went. (Tr. at 1165-66.) When Kaleb fell asleep, there was no one else in the room. (Tr. at 1167.)

Eva Curnow (Eva) is Jason's mom. On the evening of October 18, 2018, Eva and Jason watched football at a Missoula sports bar. They were celebrating because Jason had had a promising job interview that day and had won $1,200 at a

casino. Eva later recalled seeing Jason's purple watch while they were together watching football. He had owned the watch for five years and wore it every day. (Tr. at 1572-73; *see* State's Ex. 174, depicting Jason wearing his watch.) Eva and Jason parted ways around 10 p.m. Jason planned to meet friends. This was the last time Eva saw her son alive. (Tr. at 1570-71.)

On October 18, 2018, Candice Gordon (Candice), Carla Creemedicine (Carla), and Megan were all staying with Candice's cousin. Candice had known Megan since high school. (Tr. at 1053-54.) Megan was Carla's best friend. (Tr. at 141-42.) In the evening, the three of them went to Raven's hotel room. (Tr. at 1057.) When they arrived, Raven and Kaleb were there. (Tr. at 1057.) Kaleb was sleeping. (Tr. at 1058.) The four females smoked meth. (Tr. at 1060-61.) Taylor came and picked up Raven and Carla because Carla wanted to purchase a phone. (Tr. 1060-61.) Kaleb, another male (Jason), Megan, and Candice remained in Raven's room. (Tr. at 1067.) Candice left the room to go outside and smoke a cigarette. (Tr. at 1067-68; *see also* State's Ex. 22 at 01:24.)

LaBenza Charlo (LaBenza) was 19 years old at the time of trial. In October of 2018, she and her boyfriend, Josiah Senecal (Josiah), lived with her mom. (Tr. at 816-17.) LaBenza met Rossbach for the first time around October 14, 2018. Rossbach was with Whitworth and someone named Ty. (Tr. at 820.) The three of them were in a big work truck that was white, loud, and high off the ground.

LaBenza and Josiah got into the truck and went to Westside Lanes & Fun Center. (Tr. at 820-21.)

At this time, LaBenza had been using methamphetamine as much as she could and was "middling," meaning that if someone needed meth, she would broker a deal for them. LaBenza got her meth from Raven. (Tr. at 821-22.) LaBenza and Josiah had arranged for Whitworth to purchase drugs from Raven many times, including on October 14, 2018. (Tr. at 823.)

On the evening of October 18, 2018, Whitworth messaged Josiah that he wanted to purchase more meth. (Tr. at 829-30.) Whitworth also told Josiah that the last meth he had purchased from Josiah and LaBenza had put Rossbach's brother in the hospital, so he wanted to talk to the person who provided Josiah and LaBenza the drugs. (Tr. at 977.)

LaBenza got Whitworth $40 worth of meth. Whitworth showed up at LaBenza's mom's house in the same big, white work truck. Josiah took the meth out to Whitworth. (Tr. at 830-31.) Josiah later confirmed that State's Ex. 29 depicted the truck in which Whitworth arrived. (Tr. at 978; State's Ex. 29.) Ty was driving, Rossbach was in the front passenger seat, and Whitworth was in the back seat. The group told Josiah that the meth they had purchased four days earlier was "bad shit" and had put Rossbach's brother in the hospital. They wanted LaBenza to come out. (Tr. at 984.)

LaBenza confirmed that Josiah came inside and said "they" wanted LaBenza to come out. She declined twice, but eventually complied. (Tr. at 830-31.) LaBenza got into the truck. Ty was in the driver's seat, Rossbach was in the front passenger seat, and Whitworth, Josiah, and LaBenza sat in the back seat. Rossbach, Whitworth, and Ty seemed hostile, as if they were upset about something. Whitworth told LaBenza he trusted her about as far as he could throw her and weighed the newly purchased methamphetamine. LaBenza felt uneasy. (Tr. at 831-32.)

The group wanted to speak with the person who sold LaBenza meth because they said that the meth they had purchased four nights prior had put Rossbach's brother in the hospital. LaBenza agreed to go to the Mountain Valley Inn and talk with Raven about the drugs and let her know that someone had gotten sick from the meth. LaBenza described the ride to the hotel as weird. She could feel that the three men had a problem with her and something was not right. (Tr. at 833-34.)

At the hotel, Ty parked the truck. LaBenza intended to go in and talk with Raven on her own. (Tr. at 836.) Rossbach announced that one would stay and one would go, referring to LaBenza and Josiah. (Tr. at 838, 840.) This seemed odd to LaBenza. LaBenza got out of the truck along with Rossbach and Whitworth. LaBenza walked ahead. (Tr. at 842.) Josiah remained in the truck with Ty. Josiah

had seen Whitworth with a gun that night but did not think much of it because in the drug world everyone has a gun. (Tr. at 986-88.)

On the way to Raven's room, Whitworth threatened LaBenza that if anything was funny, the next bullet would be for her. LaBenza assumed that Whitworth had a gun. (Tr. at 856-57.) LaBenza led Rossbach and Whitworth to Raven's room and knocked on the door. Megan opened the door. (Tr. at 842.) The three of them entered the room. LaBenza asked about Raven. Megan said she had gone to Walmart. Along with Megan, there was another male in the room who LaBenza did not know but thought his name was Jason, and Kaleb was sleeping on the bed. LaBenza asked if "they" had anything, and "they" all said no, they were waiting for Raven. (Tr. at 844-45.) LaBenza, Rossbach, and Whitworth all walked back out of the room. (Tr. at 851.)

Moments later, LaBenza knocked on the door again at Whitworth's insistence. Megan opened the door. (Tr. at 849.) LaBenza now thought there might be a robbery. After LaBenza, Rossbach, and Whitworth re-entered the room, Megan sat down in a chair. (Tr. at 850, 852.) LaBenza asked Megan and Jason if they had any personal drugs. They said no, except that Jason offered a dab pen for vaping THC oils. (Tr. at 857-58.) LaBenza declined. Jason offered the dab pen to Rossbach and Whitworth. Whitworth responded, "fuck no." (Tr. at 859.)

LaBenza later vaguely remembered seeing a gun within her peripheral vision on the left-hand side of her face. (Tr. at 859.) Rossbach was to her right. Whitworth was to her left. (*Id*.) She heard the gun go off. LaBenza quickly crouched down, closed her eyes, and put her hands over her ears. (Tr. at 861.) LaBenza heard Megan scream and Jason yelling stop. (Tr. at 860-61.)

Everything happened quickly. Whitworth ran by LaBenza and said, "Let's go." (Tr. at 861.) LaBenza followed Whitworth out of the room. Something that looked like a pen dropped, Whitworth told her to grab it, but then said never mind and they took off running. The dropped item did not resemble a knife to her. Rossbach was not with them, and LaBenza did not see him. (*Id*.) LaBenza thought that Rossbach was still in the room. She followed Whitworth back to the truck and they both jumped inside. (Tr. at 863-64.)

Kaleb later recalled waking up feeling all sticky and like somebody had kicked him in the side. He sat up and saw someone at the foot of his bed. Kaleb was angry. As he got to his feet, he felt a sharp pain in his side. As the person near Kaleb started to run, Kaleb reached for him with his right arm. He did not see the person's face, but later recalled that the person had bushy hair. Kaleb was in pain and felt foggy. (Tr. at 1167-68.) He was bleeding and saw "lots" of blood. (Tr. at 1170.) Kaleb prayed, thinking he was going to die as he saw bodies lying on the floor. (Tr. at 1170-71.)

As Candice walked back towards the hotel door that night, she heard loud banging or shots. (Tr. at 1069-70.) Candice went to the back door that she had wedged open and heard people frantically running down the stairwell. She heard a male voice say, "Where's my fucking brother?" (Tr. at 1069-71.)

After Candice heard the loud bangs, she felt scared and had chills. (Tr. at 1069-70.) Instead of entering the back door, she walked to the hotel's front entrance. (*Id*.) She saw two people run out the back door towards the alley. Candice entered the hotel through the front door and went to the stairwell around the corner. She saw a male flying down the stairs, who almost ran into her. The male rushed past her and went out the door. (Tr. at 1072-73.) Ty was about to drive off, when Rossbach came out the hotel door and ran to the truck. (Tr. at 863.)

As Candice walked towards Raven's room, she saw that the door was open. When Candice stepped into the room, she saw the young male (Jason) and Megan lying on the floor. She could not see Kaleb. Candice turned and left, asking the girl across the hall to call 911. (Tr. at 1075-76.) Candice was frightened and went back downstairs to wait for the police to arrive. (Tr. at 1077.) Candice did not know Rossbach, Whitworth, or LaBenza. (Tr. at 1059.)

Back at the truck, LaBenza heard Whitworth tell Rossbach something like, "now they were outlaws." (Tr. at 865.) Rossbach said something like "No witnesses." (Tr. at 865.) LaBenza thought that Whitworth and Rossbach were

discussing whether to kill her and Josiah. (Tr. at 866.) Josiah recalled that Rossbach had shown Whitworth a tattoo on his arm that said "Outlaws" and Whitworth had said, "You earned that shit, Bro." (Tr. at 991.)

When they arrived back at LaBenza's house, Rossbach put his seat back into LaBenza's legs and put a knife to her face. Rossbach told LaBenza that she did not see anything. LaBenza was scared. (Tr. at 867.) Josiah confirmed that Rossbach had pushed a knife into his and LaBenza's faces and said that they "didn't fucking see nothing." (Tr. at 991.) Josiah asked Whitworth, "What the hell's going on?" Rossbach stuck the knife in Josiah's face and said, "Shut the fuck up." (*Id*.) Whitworth looked at Rossbach and gave him a nod. Rossbach lifted the seat up. Josiah was positive that Rossbach kept the knife on his person and later identified the knife Rossbach had pulled on him and LaBenza as the knife depicted in State's Ex. 32. (Tr. at 992; State's Ex. 32.) While Rossbach still had his seat back with the knife out, he asked Josiah, "Do you know what we did in that room?" (Tr. at 994.)

Whitworth said he needed to use the bathroom. Rossbach said, "One stays and one goes." (Tr. at 868.) LaBenza took Whitworth inside. LaBenza thought he was going to shoot her. (Tr. at 868-69.) Whitworth left the house and LaBenza immediately locked the door. She let Josiah in a bit later. (Tr. at 870.) LaBenza was barely able to talk. (*Id*.)

LaBenza was afraid to go to the police. Rossbach had threatened her not to say anything and held a knife to her face, saying that she did not see anything. (Tr. at 872.) She tried to hide from Rossbach and Whitworth because she was frightened. She believed that if she told anyone what she had witnessed Rossbach and Whitworth would kill her. (Tr. at 872, 880.) LaBenza did not perceive that Whitworth was bullying Rossbach during the events on October 18, 2018. (Tr. at 902.)

LaBenza received an immunity letter from the State. (Tr. at 877-78; State's Ex. 21.) LaBenza understood the letter to mean that the State would not use her testimony against her if she told the truth about the events that transpired leading up to Rossbach's criminal case. (Tr. at 878.) During her testimony, LaBenza acknowledged that she was incarcerated on drug charges. (Tr. at 878-79.)

Josiah did not receive anything from the State in exchange for his trial testimony. At the time of Rossbach's trial, Josiah was incarcerated in Lake County on drug charges. Josiah did not have a cooperation agreement with the State regarding his testimony. (Tr. at 973.) Josiah had been friends with Whitworth for several years, but had only recently met Rossbach. (Tr. at 974.) Josiah knew Raven through LaBenza. In October 2018, Josiah was also "middling" meth—meaning he would get meth from Raven and sell it to Whitworth. (Tr. at 976.)

On October 19, 2018, Officer Suazo of the Missoula Police Department (MPD) responded to a dispatch of an assault at the Mountain Valley Inn. (Tr. at 781-82.) Candice was outside waiting when Officer Suazo arrived. She led him up to Raven's room. (Tr. at 784-85.) Office Suazo entered the room and saw a male lying on the bed who was bleeding. Officer Suazo then saw two bodies on the floor. (Tr. at 785.) As he walked closer, he saw one of the bodies was a male who was dead. He was holding a vape pen between his fingers, suggesting that he was recently deceased. (Tr. at 786.) The other body was a female who was also dead. (*Id*.) Officer Suazo radioed dispatch and returned to the bed. He recognized the male on the bed from prior encounters as Kaleb, who was in obvious pain, bleeding, and pleading for help. (Tr. at 787-88.)

Kaleb had been shot on his right side under his arm pit. He also had stab wounds on his arm, hand, and face. (Tr. at 1172-73; State's Exs. 34-43.) Paramedic Melissa Deibert cared for Kaleb on site. (Tr. at 1202-03.) Kaleb obviously had a life-threatening injury and had lost a lot of blood. Deibert identified a gunshot wound to the shoulder. (Tr. at 1206-07.) Kaleb's vital signs indicated that he was moving into decompensated shock. (Tr. at 1208-09.) He also had a collapsed lung and rib fractures. (Tr. at 1216.) Kaleb uttered that the male had a knife but became quiet after that statement. (Tr. at 1209.)

Officer Gillhouse arrived shortly after Officer Suazo and began photographing the scene. (Tr. at 799, 805-806; State's Exs. 2-20.) Officer Bilbrey arrived at 1:16 a.m. and obtained the surveillance video from the hotel. (Tr. at 942-43.) Officer Bilbrey retrieved still photos from the video depicting three people fleeing from the hotel and the white pickup in which those people had arrived at the hotel. (Tr. at 943-44; State's Exs. 23-38.) Two of the photos depicted a female wearing black leggings and a hoodie. (Tr. at 946; State's Exs. 23-24.) One photo depicted a male, wearing a bandana, a hoodie, and blue jeans, who exited the hotel with the female. (Tr. at 946; State's Ex. 25.)

Another photo depicted the other male, who left the hotel alone after the female and the first male. (Tr. at 947; State's Ex. 27.) And another photo showed the second male running down the hallway. (Tr. at 948; State's Ex. 28.) The second male was wearing brown pants and a beige or orange jacket with a gray hoodie underneath it. (Tr. at 949.) Sergeant Erbacher of the MPD later closely examined this photograph, identifying Rossbach as the male depicted in the photograph. It appeared to Sergeant Erbacher that Rossbach was holding a gun or a knife in his left hand. (Tr. at 1299-1305.)

The surveillance camera videotaped the truck the three people were in upon arriving and leaving the hotel. (Tr. at 943.) Officer Gillhouse determined that the registered owner of the truck was Paul Kelly (Paul), who operates the company

Kelly Tree Service. (Tr. at 949.) This led investigating officers to 14010 Morman Creek Road, near Lolo, where Rossbach, Whitworth, and Ty all resided. (Tr. at 950-51.)

On October 18, 2018, Paul lived at 14010 Morman Creek Road in Lolo. (Tr. at 1636.) There was a small cabin on the property and a one-room stone house with a loft, referred to as the rock house. (*Id*.) Paul stayed in the cabin with his father. Rossbach, Whitworth, and Ty all stayed in the rock house. (Tr. at 1637.) All three worked for Paul. Paul did not allow them to drive the work truck during non-business hours. (Tr. 1637-39.)

Another person living on the property later found a sack out in a field with clothing and a knife inside. (Tr. at 1650.) Paul contacted the police and took them to the sack. (Tr. at 1681, 2061-63; State's Ex. 206.) Near the sack, officers also found a knife with a wooden handle and a fixed blade. (Tr. at 2065; State's Exs. 209-10, 212-14.) Officers repeatedly looked for the gun used to kill the victims, without success. (Tr. at 2067-69.) Investigators also found a pair of shoes and a red bandana in the brush along the creek bed. (Tr. at 2177-78.)

Ty had known Rossbach all his life and did not want to testify at Rossbach's trial. (Tr. at 1001-02.) Ty worked with Rossbach and Whitworth and lived with them on the property outside of Lolo in the rock house. (Tr. at 1043-44.) Ty

explained that Rossbach is not a follower, and that Rossbach would never do something just because Whitworth wanted him to do it. (Tr. at 1037.)

On the evening of October 18, 2018, Ty, Rossbach, and Whitworth took the work truck to get food and cigarettes. (Tr. at 1007.) They were not supposed to be driving the work truck. (Tr. at 1095.) Ty said the three of them went to McDonald's and Walmart. He reluctantly admitted that they had gone to a house and picked up two other people, one of whom was Josiah. Ty drove the group to the Mountain Valley Inn and parked the truck. Ty admitted that Rossbach, Whitworth, and LaBenza left the truck and were gone about 10 minutes. Rossbach returned to the truck last. Everyone was acting normally. Ty could not remember if Rossbach said anything. (Tr. at 1022-23.)

Ty testified that after the three of them finally returned to the rock house, Whitworth told Ty and Rossbach he loved them and would take the fall for everything. Ty just thought he was being dumb. (Tr. at 1038.)

Detective Manraksa identified the dead bodies in the hotel room as Jason and Megan. (Tr. at 1363, 1370.) State Medical Examiner Dr. Prasher completed the autopsies of Jason and Megan. (Tr. at 1577-78.) In conducting Jason's autopsy, Dr. Prasher did not find any jewelry, including a watch. If he had, he would have documented it. (Tr. at 1590-81.) Someone shot Jason three times. There was no evidence of close-range fire. (Tr. at 1586, 1601.) Jason sustained a gunshot wound

to the right side of his head that injured his skull and brain and likely rendered him unconscious. It was a fatal wound that would have caused rapid death. (Tr. at 1585.)

Jason also sustained sharp force injuries caused by a knife. (Tr. at 1590.) Jason had a stab wound to his cheek, and incised wounds to his face, neck, and right hand. Injuries to hands and forearms are often classified as defensive injuries. (Tr. at 1597.) Dr. Prasher concluded Jason's manner of death was homicide. (Tr. at 1600.)

Someone shot Megan four times, twice in the head, once in the neck, and once in the left arm. (Tr. at 1603.) One of the gunshot wounds to the head was potentially survivable but the other was fatal. (Tr. at 1605-07.) Dr. Prasher concluded that Megan's manner of death was homicide. (Tr. at 1611.)

In processing the hotel room, Detective Manraksa found nine bullet casings. Based on the bullet casings, along with the subsequent autopsy results, Detective Manraksa believed the shooter fired nine bullets in the hotel room. (Tr. at 1466.)

Detective Manraksa photographed the property at 14010 Morman Creek Road and participated in the search of that property. (Tr. at 1396-97.) While searching the rock house, Detective Manraksa removed a shop-vac that was peculiarly placed on top of a stack of tires, and found a jacket. By looking at the hotel's video surveillance, Detective Manraksa determined this was the coat

Rossbach was wearing while he was at the hotel. Someone had shoved the coat down into the tires. (Tr. at 1403-04; State's Exs. 73, 132.) Detective Manraksa also found the pants Rossbach had been wearing at the hotel. (Tr. at 1404; State's Exs. 74, 133.) There were spots on the left pant leg that could have been blood. (Tr. at 1414.)

Detective Manraksa also photographed the white Kelly Tree Service work truck found at the Morman Creek property. (Tr. at 1406; State's Ex. 138-144.) This truck looked like the truck depicted in the Mountain Valley Inn surveillance video. (Tr. at 1406; State's Ex. 29.)

Greg Schulz is an intelligence analyst for the State of Montana. (Tr. at 1618-19.) Shulz enhanced the Mountain Valley Inn surveillance video depicting Rossbach running down the hallway. (Tr. at 1621-22; State's Ex. 189.) Schulz observed that Rossbach had an object in his left hand. (Tr. at 1627.) Schulz had an original photo from the video and an enhanced photo from the video sequentially, as Rossbach was running down the hall. (Tr. at 1631-32; State's Exs. 190-199.)

Kegan Salter (Kegan) met Rossbach in jail in May 2019. Kegan was Rossbach's cellmate for about a month and a half. Rossbach and Kegan got along well. (Tr. at 1845-46.) Kegan also knew Whitworth and saw him in a jail hallway once. Whitworth and Kegan resided in different pods of the jail. Kegan never communicated with Whitworth while he was in jail. (*Id*.)

Rossbach told Kegan he was in jail for a double homicide and faced 220 years in prison. He told Kegan that someone had ripped off him and Whitworth. (Tr. at 1849-50.) They had planned to rob whoever had ripped them off. Rossbach and Whitworth wanted drugs or money. (Tr. at 1852.) Rossbach, Whitworth, and Ty took a work truck, picked up a girl named LaBenza from her house, and took her to a hotel. Her boyfriend came too. When they got to the hotel, Ty and the boyfriend stayed in the truck. Rossbach, Whitworth, and LaBenza went inside. (Tr. at 1851.) Rossbach said he was armed with a knife, and Whitworth had a Colt. 380. (Tr. at 1857.)

When they first got to the room, LaBenza said that the person they wanted was not there. They left the room but then went back inside. (Tr. at 1859.) When there were no drugs and someone offered them a dab pen, Rossbach said "Shoot these motherfuckers," and they started shooting. Rossbach said he stabbed a guy in the neck, and a girl in the stomach and the neck. (Tr. at 1851-52.) He said he stabbed the guy in the neck right after he got shot, and that guy had seized up when the bullet hit him. (Tr. at 1860.) Rossbach also said the girl was pregnant. (Tr. at 1865.)

Rossbach said there was another guy on the floor who tried to go after him. He said he got that guy in the arms. (Tr. at 1851-52.) When Rossbach realized Whitworth and LaBenza were no longer in the room, he ran down to the truck, and

they went back to LaBenza's house. (Tr. at 1852-53.) When they arrived, Rossbach put his seat back, pinned LaBenza while holding a knife, and told Whitworth not to leave any witnesses. (Tr. at 1853-54.) Rossbach said that Whitworth got rid of the gun and he stuck the knife in the ground at his uncle's house. Rossbach also said he changed his clothes and put them in a Walmart bag. (Tr. at 1863.)

One day Rossbach told Kegan that he thought he and Whitworth both might get off as long as neither of them testified against each other. (Tr. at 1854.) Kegan reported that Rossbach was in a gang called Outlaws for Life. Rossbach had an O4L tattoo on his forearm. (Tr. at 1855.) Kegan did not have access to Rossbach's court documents and never read any of the police reports in this case. (Tr. at 1863.)

Kegan acknowledged that he was facing a significant amount of prison time and was worried about going to prison in Montana. Because Kegan testified and his name became public, he believed that if he went to prison in Montana someone would kill him. (Tr. at 1864-65.) At one point, Kegan had a preliminary cooperation agreement with the State, but he violated the terms of the agreement, so he had no agreement in place. (Tr. at 1870-71; State's Ex. 202.) Kegan knew he was going to prison and there was a risk that another prisoner would kill him because he testified against Rossbach. Kegan thought the risk was worth it. (Tr. at 1919.)

Jesse Hopkins (Jesse) knew Rossbach because they were both incarcerated at the Missoula County Detention Center on the same cell block in November and December 2019. (Tr. at 1863-64, 1974.) Rossbach's cellmate introduced Jesse to Rossbach. (Tr. at 1966.) Rossbach told Jesse he had agreed to participate in a robbery at a Missoula hotel with Whitworth. Rossbach mentioned that Ty and LaBenza were also part of the robbery. (Tr. at 1966-67.) Rossbach said that, once in the hotel room, Whitworth pulled out a gun and shot three people before the gun "went dry." Whitworth had told Rossbach to step in with the knife and stab a guy named Jason Williams. Rossbach said this guy lived. (Tr. at 1968.) Rossbach told Jesse he had armed himself with a knife before entering the hotel room. (*Id*.) Rossbach said the planned robbery was over drugs and money, and he knew about the plan before going to the hotel. Rossbach claimed that LaBenza planned the robbery. (Tr. at 1968-70, 2021.)

Rossbach told Jesse that after the group left the hotel, he threatened LaBenza with the knife, telling her that if she said anything about what happened he would kill her. (Tr. at 1969.) Jesse knew of Kegan but had never discussed Rossbach's case with Kegan. Jesse did not have access to or read any of the police reports related to Rossbach's case. Jesse recalled reading a newspaper article about the case, but he only recalled that there had been a shooting at a Missoula hotel. At the time Jesse read the article, he did not yet know Rossbach. (Tr. at 1971.)

Jesse had a cooperation agreement with the State, but the agreement was not in place when he provided Detective Blood with Rossbach's statements to him. (Tr. at 1977-79; State's Exs. 203-04.) Jesse understood that if he was honest with Detective Blood, the State might enter into a cooperation agreement with him. (*See* State's Ex. 204.) Jesse explained that it was very risky for him to testify against Rossbach. (Tr. at 2021.)

Tera Tackett (Tackett) is the unit manager for the Missoula County Detention Center. (Tr. at 2027.) Tackett confirmed that Rossbach and Kegan were cellmates from May 20, 2019, through June 28, 2019. (Tr. at 2030.) The two got along well. (Tr. at 2032.) Rossbach and Jesse lived in the same pod of the detention center from November 20, 2019, through December 4, 2019. (Tr. at 2035.) Tackett observed Rossbach and Jesse having conversations. (Tr. at 2036-37.) Tackett confirmed that Rossbach had a tattoo on his arm. The jail staff photographed the tattoo. (Tr. at 2039; State's Ex. 205.)

Detective Erickson closely reviewed the surveillance video from the Mountain Valley Inn and took still photos from the surveillance video. (Tr. at 2169; State's Exs. 215-221.) One of the still photos showed Whitworth, wearing a bandana on his head and a hoodie sweatshirt, getting into the rear seat on the driver's side of the Kelly Tree Service truck. He was holding a black handgun in his right hand. (Tr. at 2170; State's Ex. 218.) Whitworth is right-handed. (Tr. at

2186.) Another of the photos depicts Rossbach wearing brown pants and a tan jacket. Rossbach is left-handed. (Tr. at 2171, 2186; State's Ex. 215.)

Detective Erickson developed a timeline from the surveillance video. On October 18, 2019, at 11:46 p.m., Jason arrived at the Mountain Valley Inn. At 11:50 p.m., Raven exited the hotel room. Taylor exited the hotel at 12:28 a.m. Carla and two other females exited the hotel room at 12:29 a.m. At 12:45 a.m., the white Kelly Tree Service truck parked in the alley by the Mountain Valley Inn. At 12:55 a.m., Candice exited the west stairwell of the hotel into the parking lot, and Rossbach, Whitworth, and LaBenza entered the front east-facing doors of the hotel. Between 12:56 and 12:59 a.m., the three entered, exited, and re-entered Raven's hotel room. (Tr. at 2191-94.)

At 1 a.m. and 58 seconds, Whitworth and LaBenza exited Raven's room, running towards the west exit of the hotel. At 1:01 a.m. and 3 seconds, the two exited the west stairwell door into the parking lot. At 1:01 a.m. and 9 seconds, Rossbach exited Raven's room running eastbound down the hallway. At 1:01 a.m. and 26 seconds, Candice re-entered the hotel through the front doors and bumped into Rossbach at the edge of the stairwell. At 1:01 a.m. and 39 seconds, the Kelly Tree Service truck exited the alley. At 1:03 a.m., Candice entered Raven's room and then quickly exited. At 1:06 a.m. Candice spoke with Officer Suazo in the hotel parking lot. (Tr. at 2194-97.)

Jason's watch was not with his body. Eva searched everywhere and never found his beloved purple watch. (Tr. at 1573.) She did find $1000 of Jason's winnings from the casino, but never found the other $200. (Tr. at 1800-01.)

II. The trial process

A. Juror selection

When the prosecutor asked the prospective jurors about how they would react to learning that a witness had received a benefit from the State in exchange for testimony, Simenson responded:

> It wouldn't—it wouldn't affect me, as far as what I thought of them. I'd want their information. So, you know, I'm gonna assume that the State did its due diligence and, you know, so that I can rely on what that person's saying.

(Tr. at 571.) Simenson added that the oath was meaningful to him. (*Id*. at 571-72.)

Defense counsel later gave the following hypothetical:

> Yeah. So say there's a witness I call that says, I saw the car. The car was red. And you tend to believe the guy, that it was red. I'm gonna shift this a little bit to assessing credibility, the difference between proof and belief.
>
> What if you heard that I, the defense attorney, heard from that witness and he came to me beforehand and said, I will come to your trial and testify that the car's red if you give me a million dollars. And I said, Bingo, I like that. I need you to say that. Here's a million dollars. Would you view that witness's credibility differently?

(Tr. at 559-60.)

Defense counsel then questioned Simenson about this topic based on his assessment that, if the State offered a witness a deal to testify, he would presume that the State did its due diligence. (Tr. at 662.) Simenson responded:

> Yeah, I would. I would expect that they at least, like, checked out what these people had to say before they just—you really cannot convince me that, you know, the county attorney's gonna be, Okay, yeah. Well, we'll take 20 years off your sentence just for you to [say] something. You know, that's—you know, that would make—ruin your case. So I—that's what I'm saying is, like, the State—I'm going to assume that the State has checked out the story before somehow, before they made that offer.

(Tr. at 662-63.) Simenson said he would still consider that the witness was getting something for testifying, but he would be more skeptical of defense counsel's million-dollar hypothetical because:

> I mean, for all I know, you didn't do anything to back up what, you know, what the offer—you know, what that person's saying: Yes, this is what I said. Where I would assume that the State would be—that they would be checking that out before offering any kind of deal.

(Tr. at 663.)

Defense counsel responded:

> So—and again, I don't want to put words in [your] mouth, but it seems to me that what you're saying is just from whatever life experience you have, that the benefit of the doubt with you lays [sic] with the State a little bit. You're assuming they're doing things the right way. Is that—and correct me if I misstated that somehow, please.

(Tr. at 663-64.)

Simenson explained that he was stating that he assumed the State would check into the witness's claims before entering a deal with a witness but acknowledged that he "can't know that." (*Id*.) Simenson elaborated:

> So I would have to go with, you know, what the State brought for a witness, whether or not they've gotten a deal. I would still have to consider they're credible unless I've been shown otherwise.

(Tr. at 664-65.) Defense counsel challenged Simenson for cause. (Tr. at 665.)

Simenson clarified that he would not assume that a witness who received a benefit from the State automatically lacked credibility. (Tr. at 666.) He stated that he did not have a bias in favor of the State. (Tr. at 666.) And he clarified that he would also expect defense counsel to exercise due diligence before putting an incentivized witness on the stand. (Tr. at 667.)

Simenson volunteered that he would not automatically favor the State over the defendant. (Tr. at 668.) After further questioning, another prospective juror interjected:

> That wasn't the hypothetical. The hypothetical was the defense was gonna pay a million dollars to have a person testify to something that was—to testify to a specific thing. And so it's not equivalent to what the—you left out part of the hypothetical on—
>
> . . . .
>
> So that's where he got stuck.

(Tr. at 671.) Simenson assured the court that he would give the same consideration to the State and to the defense. He did not prefer one side over the other. (Tr. at

672-73.) The district court denied Rossbach's challenge of Simenson for cause. (Tr. at 673.)

B. Cross-examination of Kegan and Jesse

At the final pretrial conference, defense counsel expressed his intention to cross-examine Kegan, Jesse, and Charlo about their drug use in the year preceding the crimes. (Tr. at 309-11.) The State responded that a year was too long, but did not object to, for example, allowing testimony concerning Charlo's drug use around the time of the crimes. (Tr. at 311.)

Defense counsel expressed his intent to extensively cross-examine Kegan and Jesse about their prior criminal histories to show that they "are well-versed in the criminal justice system" and "well-versed in what losing liberty means." The State acknowledged that *some* of Kegan's and Jesse's prior criminal histories were relevant and admissible and that Rossbach could cross-examine both witnesses on their motives for testifying. (Tr. at 317-18.) The court indicated that it would put limitations on cross-examination of these witnesses but would discuss that with the parties out of the presence of the jury as the trial evolved. (Tr. at 324-25.)

When defense counsel asked what he could share with the jury during opening statements, the court responded that defense counsel could discuss any agreements Kegan and Jesse had negotiated with the State in exchange for trial testimony. (Tr. at 325.) The court indicated that defense counsel could generally

discuss that these two witnesses had criminal histories and faced prison sentences, which could impact their motives for testifying at trial. (Tr. at 326.) Defense counsel stated that if he intended to go into more detail, he would bring the matter to the court before opening statements. (Tr. at 326-27.) He discussed Charlo, Kegan, and Jesse extensively during his opening statement, including their criminal histories and motivations for testifying at trial. (Tr. at 770-74.)

The court and the parties returned to this topic before Kegan or Jesse testified. (Tr. at 1807.) The State indicated that it was appropriate for defense counsel to question the witnesses about any prior crime that reflected on their truthfulness. (Tr. at 1808.) Defense counsel indicated that he intended to question the witnesses about all prior convictions. For example, defense counsel remarked that Jesse had a robbery conviction. Defense counsel explained, "the type of offenses they have also inform how people might react. It's common wisdom that people react different to violent-type crimes." (Tr. at 1808.)

The State responded that defense counsel could question the witnesses about specific prior offenses having to do with truthfulness, and generally on what prison time the witnesses had served because that "might aggregate [their] time if [they] were convicted now." (*Id*.) The State urged that, otherwise, "the specifics of the offenses and the convictions don't come in." (*Id*.)

Defense counsel argued that he should also be allowed to question Kegan about any pending charges because this would demonstrate his "willingness to break the law." (*Id*. at 1812.) Defense counsel urged that he should be able to bring in matters showing Kegan's inability to abide by court orders or his lack of respect for the law. (Tr. at 1823.) The district court ruled that defense counsel could inquire into the specifics of prior convictions that related to the witness's honesty and about past and future prison time. (Tr. at 1827.) The State conceded that Kegan's methamphetamine use was relevant. (Tr. at 1828.) Defense counsel objected to any limitations on cross-examination, stating that the limitations violated Rossbach's right to cross-examine and confront witnesses. (Tr. at 1830.)

During cross-examination, defense counsel questioned Kegan about his pending criminal charges, his desire to seek leniency, his willingness to work as a confidential informant, his gang activity in prison and the gang's willingness to lie for other members, his facing a 25-year prison sentence with no parole, and his having written a letter to the State indicating that he was refusing to testify at Rossbach's trial unless he was sure he was not going to prison. (Tr. at 1910-1925.)

Defense counsel stated that he intended to question Jesse about all his prior convictions in detail, including juvenile offenses and any pending charges. (Tr. at 1946-48.) The State suggested, like with Kegan, that the court allow defense counsel to question Jesse about doing time in the past and facing prison time,

which might have motivated him to enter into a cooperation agreement with the State to testify at Rossbach's trial. (Tr. at 1951.) The court instructed defense counsel that he could ask Jesse about spending time in jail and/or prison generally because that could have motivated him to enter into a cooperation agreement with the State. (Tr. at 1955.) The court also allowed defense counsel to question Jesse about any sentence he might be facing on pending charges. (Tr. at 1998.)

Defense counsel also wanted to question Jesse about a recent burglary of a residence where Jesse had worked, referred to as the Shelby residence. (Tr. at 1949.) Defense counsel asserted that Jesse and his husband were pawning items stolen from the residence and that Jesse had forged his signature on checks. (Tr. at 1950.) The State responded that there was a case pending against Jesse but it was not a forgery case. Jesse's defense counsel for the pending criminal case informed the court that Jesse denied any involvement in a forgery. She explained that the cooperation agreement in Rossbach's case did not call for Jesse's charges to be dismissed, and that Jesse denied any deception or dishonesty related to the pending charges. (*Id*.)

In urging the court that he should be allowed to cross-examine Jesse about any pending charge related to the Shelby family, defense counsel explained that Jesse had admitted to pawning items his husband gave him but claimed that when Detective Kedie interviewed him regarding the offense, the detective "repeatedly

notes the belief that he's being deceptive and he's lying to him until confronted with a piece of physical evidence." (Tr. at 1953.)

The district court preliminarily ruled that defense counsel could not cross-examine Jesse about the specifics of the pending charges involving the Shelby family. (Tr. at 1955.) After defense counsel's continued objection, the court allowed him to call Detective Kedie to make an offer of proof that Jesse had been dishonest with Detective Kedie. (Tr. at 19-57-59.)

During the offer of proof, Detective Kedie explained that the Shelby residence had been burglarized and rings, coins, and checks were stolen. Some of the stolen items were pawned. (Tr. at 2094-95.) Some stolen checks were forged. The Shelby family suspected Jesse and his husband Nick because they were both working for the family, had access to the residence, and knew the family was away the day of the burglary. (Tr. at 2095-97.)

Detective Kedie explained that he understood had Nick forged the checks and deposited the money into an account Nick and Jesse jointly held. (Tr. at 2095.) Defense counsel asked Detective Kedie if he believed Jesse was being honest during his interview. Detective Kedie responded that he could not make a judgment on Jesse's level of honesty. Detective Kedie asked Jesse questions and documented his answers. (Tr. at 2098.) If Jesse answered a question incompletely, Detective Kedie would confront him with facts he had established. (Tr. at 2099.)

When defense counsel suggested that Jesse denied any knowledge of the crimes being investigated, Detective Kedie responded:

> Well, he denied having any *personal involvement with the actual burglary*. If you'll notice in my narrative, it does say that one of the things I confronted him about was, prior to my even speaking with him, he had sent a letter to the county attorney's office outlining the various roles of the two individuals involved.

(Tr. at 2100 (emphasis added).) During the interview, Jesse consistently placed the blame on his husband Nick, and Detective Kedie could not say that was untrue. (Tr. at 2101.)

After the offer of proof, the district court ruled it had not established that Jesse was untruthful during his interview with Detective Kedie, although he may, at times, have given incomplete information before Detective Kedie provided further prompting. (2104-05.)[3]

Defense counsel cross-examined Jesse about a letter he wrote to the prosecutor asking for release from custody on pending charges and immunity in another case. (Tr. at 2016.) Defense counsel established that Jesse was currently serving a 25-year prison sentence and had about 12 years remaining to serve. (Tr. at 2017.)

[3] Rossbach called Zerita Shelby to provide testimony that Jesse had the reputation for being untruthful. (Tr. at 2283-84.)

SUMMARY OF THE ARGUMENT

The district court correctly denied Rossbach's challenge of Simenson for cause. Simenson did not express fixed opinions or statements that raised serious questions about his ability to serve impartially. Rather, Simenson was confused by defense counsel's hypothetical, but firmly expressed his ability to serve impartially.

Rossbach was an active participant in an attempted robbery that resulted in the deaths of two people who were at the wrong place at the wrong time. The State wove together compelling evidence that established Rossbach, who proudly displayed his Outlaws for Life tattoo after participating in two brutal murders, was an active participant in the criminal conduct rather than merely present at a crime scene. The district court properly denied all Rossbach's motions to dismiss related to the felony murder charges.

This Court should decline to consider Rossbach's assertion that the State should have been required to corroborate Kegan's and Jesse's testimony as if they were accomplices because he raises it for the first time on appeal without asking this Court to invoke plain error review and without proving that plain error review would be appropriate. Regardless, the State corroborated their testimony.

The district court gave Rossbach wide latitude in cross-examining Kegan and Jesse about their motives to testify falsely against him, but the court also

carefully and reasonably imposed restrictions that protected Rossbach's confrontation rights without turning Rossbach's trial into a trial about Kegan's and Jesse's past criminal conduct and poor decision-making.

Finally, the district court properly denied Rossbach's motion for a new trial based on a claimed *Brady* violation because Rossbach did not and could not prove that a letter from Jesse the State disclosed during trial was valuable impeachment evidence that would have resulted in a reasonable probability of a different outcome.

ARGUMENT

I. The standard of review

This Court reviews a district court's denial of a challenge to remove a prospective juror for cause for abuse of discretion. A district court abuses its discretion if it denies a challenge for cause when the prospective juror's statements during voir dire raise serious doubts about the juror's ability to be fair and impartial or actual bias is discovered. *State v. Deveraux*, 2022 MT 130, ¶ 19, 409 Mont. 177, 512 P.3d 1198. Because the trial court "has the ability to look into the eyes of the juror in question, and to consider her responses in the context of the courtroom," this Court affords the district court deference in making this determination. *State v. Robinson*, 2008 MT 34, ¶ 13, 341 Mont. 300, 177 P.3d 488

(citation omitted), *overruled in part on other grounds by State v. Gunderson*, 2010 MT 166, ¶ 50, 357 Mont. 142, 237 P.3d 74.

This Court reviews a district court's motion to dismiss a criminal charge for insufficient evidence de novo. *State v. Palafox*, 2023 MT 26, ¶ 16, 411 Mont. 233, 524 P.3d 461. The Court also reviews de novo whether sufficient evidence supports a conviction. *Id*. It reviews the sufficiency of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Id*.

Trial courts have broad discretion in determining whether evidence is relevant and admissible. This Court reviews such determinations for abuse of discretion. *State v. Quinlan*, 2021 MT 15, ¶ 16, 403 Mont. 91, 479 P.3d 982. A lower court abuses its discretion if it acts "arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *Id*., quoting *State v. Pelletier*, 2020 MT 249, ¶ 12, 401 Mont. 454, 473 P.3d 991. This Court affords the district court broad discretion to limit the scope of cross-examination to those issues it determines are relevant to trial. *State v. Wilson*, 2007 MT 327, ¶ 19, 340 Mont. 191, 172 P.3d 1264. This Court reviews any ruling based on an interpretation of an evidentiary rule de novo for correctness. *Quinlan*, ¶ 16.

This Court reviews a district court's denial of a motion for new trial for abuse of discretion. *State v. Gomez*, 2020 MT 73, ¶ 40, 399 Mont. 376, 460 P.3d 926.

II. The district court properly denied Rossbach's challenge of Simenson for cause.

Criminal defendants have a fundamental right to a fair and impartial jury. U.S. Const. amend. VI; Mont. Const. art. II, § 24; *State v. Calahan*, 2023 MT 219, ¶ 21, 414 Mont. 71, 538 P.3d 1129. A trial court must dismiss a juror if he has "a state of mind in reference to the case or to either of the parties that would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party." *Calahan*, ¶ 22, quoting Mont. Code Ann. § 46-16-115(2)(i). When deciding about a juror's state of mind, the trial court must consider the totality of the circumstances. *Calahan*, ¶ 22, citing *State v. Golie*, 2006 MT 91, ¶ 8, 332 Mont. 69, 134 P.3d 95.

A juror's state of mind "may be ascertained from statements expressing fixed opinions, or statements that raise serious questions as to potential bias." *Calahan*, quoting *State v. Johnson*, 2014 MT 11, ¶ 10, 373 Mont. 339, 317 P.3d 164. This Court recognizes that jurors bring their life experiences with them to trial. *State v. Rogers*, 2007 MT 227, ¶ 23, 339 Mont. 132, 168 P.3d 669. Jurors can remain impartial notwithstanding their personal views on or relevant experiences

with particular crimes. *Calahan*, ¶ 22, citing *State v. Russell*, 2018 MT 26, ¶ 13, 390 Mont. 253, 411 P.3d 1260.

Even when a juror expresses doubt about his ability to serve impartially, if that juror unequivocally affirms that he can remain impartial, then there is not a serious question about the juror's state of mind. *Calahan*, ¶ 24, citing *State v. Heath*, 2004 MT 58, ¶ 27, 320 Mont. 211, 89 P.3d 947.

Here, the record does not support Rossbach's claim that Simenson's responses about incentivized witnesses manifested a state of mind that would prevent him from serving impartially. Simenson indicated that he would want to listen to the witness's information, and he would assume that the prosecutor exercised diligence before offering any benefit to the witness. Defense counsel posed the hypothetical of agreeing to pay a defense witness a million dollars if he would testify in a particular manner. Regarding defense counsel's million-dollar hypothetical, Simonsen explained that he did not know whether defense counsel in the hypothetical example investigated the reliability of the witness receiving the million dollars for testifying. He presumed that the State would have checked a witness's claims before entering a deal with that person, but also acknowledged that he could not know that.

Simonsen explained that he would not assume a witness who received a benefit from the State automatically lacked credibility. Simonsen did not favor the

State and said he would also expect that defense counsel exercised due diligence before putting an incentivized witness on the stand. Simonsen assured the court that he did not prefer one side over the other and he would give both sides the same consideration. Another prospective juror interjected that the confusion had resulted from the hypothetical defense counsel posed about paying a million dollars for a witness to testify in a specific manner.

The totality of the circumstances establishes that, regardless of who called an incentivized witness, Simonsen would not assume that the witness was not credible unless the witness's lack of credibility was demonstrated during the trial. Every witness takes an oath promising to tell the truth, so Simonsen's statement does not express bias. Rather, it expresses a willingness to do exactly what the criminal justice system expects of jurors, to base his decision on the testimony and evidence presented at the trial. Simonsen explained he would consider that a witness was getting something for testifying, but that fact alone would not cause him to conclude the witness was either truthful or untruthful.

To the extent that this Court might consider any of Simonsen's initial answers about incentivized witnesses to be concerning, the problem arose from defense counsel's million-dollar hypothetical, not from Simonsen's state of mind or fixed opinion. Simonsen unequivocally expressed his ability and willingness to

serve impartially. The district court properly exercised its discretion in denying Rossbach's challenge of Simonsen for cause.

III. The State presented sufficient evidence to support the jury's felony murder guilty verdicts.

A. Applicable statutes, the charge, and the jury's verdict

Under Mont. Code Ann. § 45-5-102(1), a person commits deliberate homicide if:

> (b) the person attempts to commit, commits, or is legally accountable for the attempt or commission of robbery . . . . 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[.]

This Court has explained:

> [T]he purpose of the felony-murder rule is to ensure that people who engage in dangerous acts likely to result in death are held responsible for any resulting deaths, whether or not the acts were planned or premeditated. The felony-murder rule creates an alternate means of holding one responsible for reckless actions likely to result in death.

State v. Main, 2011 MT 123, ¶ 27, 360 Mont 470, 255 P.3d 1240, quoting *State v. Burkhart*, 2004 MT 372, ¶ 36, 325 Mont. 27, 103 P.3d 1037.

Montana Code Annotated § 45-4-103(1) provides: "A person commits the offense of attempt when, with the purpose to commit a specific offense, the person does any act toward the commission of the offense." It is not a defense that

"because of a misapprehension of the circumstances, it would have been impossible for the accused to commit the offense attempted." Mont. Code Ann. § 45-4-103(2).

> 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.

Mont. Code Ann. § 45-2-302. A person commits robbery if "in the course of committing a theft, the person: (a) inflicts bodily injury upon another[.]" Mont. Code Ann.§ 45-5-401(1)(a). "In the course of committing a theft" includes "acts that occur in an attempt to commit or in the commission of theft or in flight after the attempt or commission." Mont. Code Ann. § 45-5-401(3).

In the Amended Information, the State alleged that Rossbach "attempted to commit, committed, or is legally accountable for the attempt or commission of robbery, and in the course of the forcible felony or flight thereafter, the person or any person legally accountable for the crime caused the death of another human being[.]" (Doc. 68 at 2.)

The jury unanimously concluded that Rossbach was legally accountable for the offense of attempted robbery, and unanimously concluded that a person legally accountable for the offense of robbery or attempted robbery caused the deaths of Jason and Megan. (Doc. 329.)

B. The State presented sufficient evidence.

Relying on *State v. Weinberger*, 206 Mont. 110, 671 P.2d 567 (1983), Rossbach argues that the State failed to present any evidence of a theft or attempted theft, thereby failing to prove a robbery or attempted robbery, resulting in insufficient evidence to prove felony murder. This Court views evidence "in a light most favorable to the prosecution to determine if any trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Main*, ¶ 44, quoting *State v. LaMere*, 2003 MT 49, 314 Mont. 326, 67 P.3d 192. This approach requires that the Court "view the evidence and all inferences to be drawn therefrom in the strongest light possible which supports establishment of the State's case." *LaMere*, ¶ 20.

Circumstantial evidence is sufficient to support a conviction. *State v. Lantis*, 1998 MT 172, ¶ 46, 289 Mont. 480, 962 P.2d 1169. Proof to establish an element of an offense does not require direct evidence. The State can sufficiently prove an element with circumstantial evidence. *City of Helena v. Strobel*, 2017 MT 55, ¶ 16, 387 Mont. 17, 390 P.3d 921. Circumstantial evidence is evidence "which tends to establish a fact by proving another and which, though true, does not of itself conclusively establish that fact but affords an inference or presumption of its existence." Mont. Code Ann. § 26-1-102(1).

Rossbach argues that, because neither he nor Whitworth ever made a verbal demand for money or drugs prior to the shootings and stabbings, the State failed to prove accountability for attempted robbery. Accountability for the attempted robbery means that Rossbach played an active role in facilitating the commission of the attempted robbery. *State v. Turner*, 265 Mont. 337, 345, 877 P.2d 978, 983 (1994). Rossbach asks this Court to overlook the mountain of evidence the State presented that established exactly why Rossbach and Whitworth demanded Josiah and LaBenza take them to Raven's hotel room. There is no dispute that Rossbach and Whitworth showed up at LaBenza's house and insisted LaBenza come outside. LaBenza reluctantly complied. Josiah had already provided Whitworth with his requested amount of meth. LaBenza's presence had nothing to do with purchasing drugs.

LaBenza quickly assessed that Rossbach, Whitworth, and Ty were upset with her. She was aware that the group believed she had sold them bad meth four days prior, which had landed Rossbach's brother in the hospital. LaBenza surmised that the group expected her to make the situation right. Upon arriving at Raven's hotel, LaBenza wanted to go speak with Raven alone. Rossbach referenced LaBenza and Josiah and stated that one of them would stay in the truck with Ty and one of them would go with Rossbach and Whitworth. Rossbach viewed himself as in command.

The State presented undisputed evidence that LaBenza, Rossbach, and Whitworth then proceeded to Raven's room. On the way, Whitworth, who was armed with a gun, threatened that if anything funny happened the first bullet would be for LaBenza. Rossbach did nothing to retreat after hearing this threat.

Although the three briefly exited the room upon learning that Raven was not there, they re-entered the room moments later. LaBenza thought a robbery might occur. When the occupants of the room stated there were no drugs in the room besides a dab pen, the shootings and stabbings ensued. LaBenza had her eyes and ears covered. She left the room with Whitworth and without Rossbach. Justin and Kaleb both sustained multiple stab wounds. Rossbach fled the room after LaBenza and Whitworth. When the police arrived shortly after, Jason and Megan were dead and Kaleb was seriously injured. Kaleb had little memory of what had transpired.

Back at the truck, Rossbach displayed his Outlaws for Life tattoo, and Whitworth said, "You earned that shit, bro." (Tr. at 991.) Josiah was positive that Rossbach had a knife on his person. Rossbach held a knife to Josiah's and LaBenza's faces and said, "We didn't fucking see nothing." (*Id*.) Rossbach also stated leave "No witnesses." (Tr. at 865.) LaBenza believed Rossbach and Whitworth planned to kill her and Josiah, and was afraid of both. And Rossbach questioned Josiah, "Do you know what *we did* in that room?" (Tr. at 994 (emphasis added).)

Rossbach admitted to Kegan and Jesse that he and Whitworth intended to commit a robbery to compensate for a prior drug transaction. Rossbach admitted to stabbing Jason in the neck after Whitworth shot him and Jason was convulsing, and also admitted to stabbing Kaleb.

Finally, Jason's purple watch was missing from his person when his body arrived at the State Crime Lab for an autopsy. His mother searched everywhere for this significant memento after she learned that law enforcement did not have it. Eva never found it. It was reasonable for the jury to infer that Rossbach—who was near Jason when he stabbed him, and of the three who entered the room Rossbach was the last to leave—took the purple watch.

The State presented overwhelming evidence that Rossbach's and Whitworth's purpose in going to the hotel room was to commit robbery. For the State to prove attempt, it does not matter that Rossbach and Whitworth were not successful. Mont. Code Ann. §§ 45-4-103(2), 45-5-501(3).

Rossbach next asserts that neither he nor Whitworth performed an overt act towards the commission of the robbery, but then goes on to describe all the acts Whitworth took to "master mind" the robbery, while portraying himself as an innocent bystander. (Appellant's Br. at 41.)

In determining the level of involvement an accused must have to be guilty of a crime by accountability, this Court has explained that, while mere presence at the

crime scene is insufficient to prove accountability, "the accused need not take an active part in any overt criminal acts to be adjudged criminally liable for the acts." *Lantis*, ¶ 39, quoting *State v. Miller*, 231 Mont. 497, 511, 757 P.2d 1275, 1284. Circumstantial evidence can overcome the argument that a defendant was merely present at the time of the crime. *State v. Maetche*, 2008 MT 184, ¶ 2, 343 Mont. 464, 185 P.3d 980.

This Court has explained that accountability "is a connection provided by our legislature that gives courts and juries a way to make people 'accountable' or responsible for a crime that has definitely been committed." *State v. Gollehon*, 262 Mont. 1, 26, 864 P.2d 249, 265-66 (1993). If a person has facilitated the commission of a criminal act by another, "he is no less guilty because he did not 'pull the trigger.'" *Gollehon*, 262 Mont. at 27, 864 P.2d at 266. Here, two homicides and a felony assault were "definitely committed," and Rossbach was not only an active participant in the crimes, he also intimidated witnesses to cover up his and Whitworth's involvement, and hid evidence connecting him and Whitworth to the crimes.

Rossbach theorizes that the State had to come forward with a witness to testify that he or she heard Rossbach and/or Whitworth demand money or drugs of the occupants of Raven's hotel room or the felony murder charges fail. Neither Rossbach nor Whitworth testified at Rossbach's trial. Two of the victims were

dead and the other victim sustained serious injuries and could only remember what occurred while Rossbach was stabbing him. While LaBenza did not testify to hearing such a demand, she provided other testimony about the purpose of going to Raven's hotel room, including her own thought that a robbery might occur.

Both Rossbach and Whitworth were unhappy about the drugs LaBenza had sold them four days earlier, claiming the drugs landed Rossbach's brother in the hospital. Rossbach armed himself with a knife and Whitworth armed himself with a gun. At the hotel, Rossbach decided to separate Josiah and LaBenza, with one remaining in the truck with Ty, and one going to Raven's room with Rossbach and Whitworth. Rossbach viewed himself as being in command, not as Whitworth's puppet. LaBenza also did not view Rossbach as acting under Whitworth's duress.

Rossbach entered the hotel room twice and then was the last to leave the room. Rossbach ran from the room holding something in his left hand—presumably, the knife he had just used to stab Jason and Kaleb. When Rossbach returned to the truck, he promptly displayed his Outlaws for Life tattoo and threatened Josiah and LaBenza with a knife, saying they better keep their mouths shut. Rossbach hid the clothes he was wearing at the hotel and hid the knife.

The circumstances here are easily distinguishable from those in the cases Rossbach relies upon. For example, in *State v. Fish*, 190 Mont. 461, 469-70, 621 P.2d 1072, 1077 (1980), this Court concluded there was insufficient evidence

to sustain Fish's conviction for attempted burglary when all Fish did was knock on the victim's trailer door and instruct the victim to come out or he would come in. Fish did not attempt to open the door or even grab the door knob. Fish retreated from the trailer's porch. Here, Rossbach armed himself with a knife, entered the hotel room twice, stabbed two of the hotel room's occupants, ran from the scene, threatened witnesses, and hid incriminating evidence.

Rossbach also relies upon this Court's holding in *State v. Boyd*, 2021 MT 323, 407 Mont. 1, 501 P.3d 409. After a verbal encounter with a bartender, the bar owner instructed Boyd to leave the bar. *Id*. ¶ 4. Boyd then began a verbal exchange with the bar owner, Jess Nelson. Before walking away from Nelson, Boyd asked if he would give him one shot, instructed the bar owner to wait there, and then stated, "You're going to give me one shot? I will be back." *Id* ¶ 5. Boyd lived in a second-floor apartment across the street. Boyd walked away and went to his apartment. *Id.*

An officer who witnessed the verbal altercation stopped and spoke with Nelson. Nelson explained he had kicked Boyd out of the bar. Nelson believed Boyd was going to return to the bar with a weapon. *Id*. ¶ 6. Nelson made eye contact with Boyd through his apartment window and motioned for him to come down. Boyd came down to speak with the officer, and Nelson returned to the front of the bar. Boyd reluctantly gave the officer his identification, but then began

swatting at the officer's hands. After a tussle, the officer handcuffed Boyd, who resumed yelling at Nelson. Another struggle ensued, after which the officer searched Boyd and discovered a ten-inch kitchen knife concealed in Boyd's pants. *Id*. ¶¶ 7-8. Nelson asked Boyd what he intended to do with the knife, and Boyd responded, "Stab you in the heart." *Id*. ¶ 37.

This Court held that there was insufficient evidence to sustain the jury's finding that Boyd committed attempted deliberate homicide because Boyd took no overt action towards attempting to kill Nelson. Although Boyd had a knife when Nelson beckoned him to come back down and speak with the officer, he took no steps to use it. *Id*. ¶ 21. Here, Rossbach armed himself with a knife before ever entering the hotel room and gave commands to Josiah and LaBenza. Once inside the hotel room, Rossbach stabbed Jason, who was likely dead or near death, and Kaleb, who had been sleeping. Back in the truck, Rossbach stated, "leave no witnesses," and threatened Josiah and LaBenza with the knife.

Rossbach cites two out-of-state cases that are equally unavailing. In *Rocker v. State*, 122 So.3d 898 (Ct. App. Fla. 2013), a jury convicted Rocker of felony murder based upon the predicate offense of robbery. By telephone, Rocker had arranged a drug deal with the victim. An eyewitness saw the victim's car drive up. Miterrio Banks approached the victim's car alone and bent down at the driver's side window. The eyewitness did not see Rocker nearby. Banks asked the victim,

"Where the money at?" *Id*. at 900. The eyewitness then heard a gunshot. The eyewitness ran back towards his house, but also saw Banks and Rocker running away from the victim's car, and heard Banks tell Rocker, "I think he's dead." *Id*.

A jury convicted Rocker of first-degree felony murder on the theory that he aided and abetted Banks during the robbery. *Id*. at 901. The appeals court concluded that the prosecution did not present sufficient evidence Rocker committed first-degree felony murder. Rocker was not carrying a weapon and made no demand for money. The eyewitness did not place Rocker anywhere near the victim's car during the attempted robbery and shooting. Although the prosecution presented evidence that Rocker made telephone calls to the victim prior to his death, Rocker claimed the calls were to set up a drug transaction and he had no knowledge that Banks intended to rob the victim. *Id*. at 902-03.

Here, LaBenza testified that both Rossbach and Whitworth were upset with her for selling them bad drugs. Both Rossbach and Whitworth made her feel uneasy. Upon arriving at the hotel, it was Rossbach who ordered that Josiah and LaBenza be separated. After the shootings, Rossbach remained in the room while LaBenza and Whitworth fled. Rossbach used that time to stab Jason and Kaleb. Rossbach stated, "leave no witnesses." According to Josiah, upon returning to the truck, Rossbach displayed his Outlaws for Life tattoo and threatened Josiah and LaBenza with the knife he had on his person. These facts are easily distinguishable

from those in *Rocker* and prove the State's theory that Rossbach was an active participant in the crimes rather than an unwitting bystander.

Rossbach also relies upon a quote from *Jones v. Commonwealth*, 826 S.E.2d 908, 920 (Va. Ct. App. 2019), to support his assertion that no attempted robbery occurred in his case because there was no demand to part with property. (Appellant's Br. at 42.) *Jones* is not only factually distinguishable, but Rossbach fails to include the court's complete analysis, including its explanation:

> Between these two points, if an act constituting any of those elements has commenced, the crime of attempted robbery has occurred even if the enterprise is abandoned or interrupted before completion.

Jones, 826 S.E.2d at 920.

Here, even assuming that Rossbach and Whitworth left the hotel room with nothing of monetary value, they abandoned the criminal enterprise because they had shot and stabbed the victims and then fled the hotel room to avoid detection. It was their escalated violence that prevented the completion of the robbery.

Rossbach next asserts that any attempted robbery concluded when he and Whitworth left the hotel room the first time after learning that Raven was not there. To the contrary, the first time Rossbach and Whitworth entered the room with LaBenza, LaBenza asked for Raven and if anyone had meth. Neither Rossbach nor Whitworth displayed their weapons, threatened violence, or used their weapons. And, although Rossbach and Whitworth briefly exited the room, they promptly

returned. Raven's presence in the room was not necessary to prove the elements of accountability for attempted robbery. The two cases upon which Rossbach relies, *State ex rel. Murphy v. McKinnon*, 171 Mont. 120, 556 P.2d 906 (1976), and *State v. Flatley*, 2000 MT 195, 302 Mont. 314, 14 P.3d 1195, are factually distinguishable and do not support Rossbach's assertion.

In *Murphy*, the State charged Murphy with felony murder, alleging that Murphy caused the death of the victim, Ray Hamann, or was accountable in Hamann's death. *Murphy*, 171 Mont. at 121, 556 P.2d at 907. In its charging documents, the State alleged that, prior to going to Hamann's bar, Murphy and Edwin Rasmussen discussed that Hamann would be testifying against them in an upcoming criminal trial. After this discussion, Murphy, Rasmussen, and Gary Smith proceeded to Hamann's bar. Upon entering the bar, Rasmussen immediately attacked Hamann. Murphy did nothing to restrain Rasmussen and said that Hamann had it coming. *Id.* at 124-25, 556 P.2d at 909.

In considering Murphy's petition for a writ of supervisory control, this Court concluded that the State's amended information did not establish probable cause to support the felony murder charge against Murphy. *Id*. at 125, 556 P.2d at 909. The Court explained the Murphy, along with Rasmussen and Smith, had entered Hamann's bar. Hamann was scheduled to testify at a pending trial in which the three men were defendants. Murphy and Smith seated themselves away from

Hamann, but Rasmussen physically attacked Hamann three times. During these attacks, Smith fled but Murphy remained. After Rasmussen's third attack, Murphy turned Hamann over so he would not choke on his own blood and instructed another employee to call an ambulance. Meanwhile, Rasmussen took money from the cash register. *Id*. at 121-22, 556 P.2d at 907.

This Court concluded that the amended affidavit in support of the amended information charging Murphy with felony murder did not support a causal connection between the robbery and/or witness intimidation and the homicide because:

> First, the mere allegation that the robbery occurred 'immediately' after the attacks is not sufficient by itself to establish probable cause to believe the attacks were in perpetration. Second, this is especially so in light of the inconsistent theory advanced by the state that the attacks were in fact retaliation for Hamann's planned appearance as a witness at a pending trial. Third, if we are to believe that the attacks may have had a two-fold purpose, the intimidation of Hamann and robbery, the amended affidavit still contains insufficient facts upon which to base probable cause.

Id. at 127, 556 P.2d 910.

The first obvious difference between this Court's holding in *Murphy* and Rossbach's claim of insufficient evidence is the different procedural posture of the two cases. In *Murphy*, the Court was evaluating the State's charging document for probable cause, whereas here, the Court is considering the sufficiency of the evidence the State presented at trial in the light most favorable to the State.

Also, Rossbach's attempt to compare himself to Murphy misses the mark. In *Murphy*, the charging documents did not establish Murphy's purpose in going to a bar open to the public. Here, the State established that Rossbach and Whitworth were displeased with the drugs LaBenza had previously obtained for them and demanded that she make things right, which included LaBenza taking them to Raven's private hotel room under circumstances in which LaBenza had no say in the matter. Rossbach was armed with a knife, which he used on occupants of Raven's hotel room. Rossbach displayed his Outlaws for Life tattoo after the homicides and threatened LaBenza and Josiah with a knife, saying they did not see anything and "leave no witnesses." Rossbach hid the clothes he was wearing and the knife he used. Rossbach was not merely present at a crime scene, he was an active participant in the criminal conduct before, during, and after the homicides.

Rossbach's reliance on *Flatley* is equally unavailing. In *Flatley*, the State charged Flatley with criminal sale of dangerous drugs by accountability. *Flatley*, ¶ 1. Flatley's acquaintance, Alan Real, worked with an agent of a local drug task force to purchase drugs from Flatley. Real went to Flatley's house and found Flatley and Lucas Janacaro working on a car. Real asked Flatley to hook him up, but Flatley replied, "No, the guy's gone fishing." ¶ 6. Janacaro offered to get drugs from another guy if Real and Flatley could give him a ride to Jefferson City. Flatley rode to Jefferson City with Janacaro, Reals, and the uncover agent. In

Jefferson City, Janacaro found his supplier, Jones, and got out of the car to speak with him. Janacaro returned to the car with Jones, Jones got in and the group drove to a local bar. Only Janacaro and Jones entered the bar with cash and returned with marijuana. *Id*. ¶¶ 6-9.

This Court concluded that the district court erred when it denied Flatley's motion to dismiss for insufficient evidence. *Id.* ¶ 17. After Flatley told Janacaro that his guy had gone fishing, Flatley did nothing to introduce Janacaro to Real and facilitate a drug transaction. All Flatley did was ride in the car to Jefferson City. It was Janacaro who facilitated the drug transaction between Jones and the undercover agent, without any participation from Flatley. *Id*. ¶¶ 16-17.

Rossbach attempts to liken himself to Flatley and urges that, once the group learned that Raven was not in the hotel room, any culpability Rossbach had ended because it was not possible to successfully complete the robbery without Raven. Unlike Flatley though, Rossbach had armed himself with a knife when he went to Raven's hotel room. And when Rossbach and Whitworth learned Raven was not in the room, they only momentarily left before returning to the room. Once they reentered the room, Whitworth began shooting either of his own accord or because Rossbach instructed him to do so. While Whitworth and LaBenza then made a frantic exit, Rossbach remained and stabbed Jason and Kaleb.

Back in the truck, Rossbach held a knife to LaBenza's and Josiah's necks and threatened them. Rossbach hid the clothing he was wearing during the crimes and the knife he used to attack Jason and Kaleb and to intimidate LaBenza and Josiah. Unlike Flatley, Rossbach did not simply go along for the ride. Rather, he actively participated in the criminal conduct.

Viewing "the evidence and all inferences to be drawn therefrom in the strongest light possible" the State provided sufficient evidence of accountability for attempted robbery.

C. Rossbach's assertion that the district court should have treated Kegan and Jesse as accomplices is not properly before this Court and is meritless.

For the first time on appeal, Rossbach asserts that the district court should have treated Kegan and Jesse as the equivalent of accomplices and should have required the State to corroborate Kegan's and Jesse's testimony. (Appellant's Br. at 53-56.) Rossbach does not acknowledge that he raises this issue for the first time on appeal, nor does he ask this Court to invoke plain error review.

Generally, this Court does not review issues raised for the first time on appeal. *State v. Strizich*, 2021 MT 306, ¶ 19, 406 Mont. 391, 499 P.3d 575. If a defendant's fundamental rights are at issue, the Court may choose to invoke plain error review when failing to review the claimed error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of

the proceedings, or compromise the integrity of the judicial process. *Id*. "[A] mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine." *State v. Gunderson*, 2010 MT 166, ¶ 100, 357 Mont. 142, 237 P.3d 74. This Court invokes plain error review sparingly. *Strizich*, ¶ 19. To invoke plain error review, this Court requires the appellant to assert plain error and argue it on appeal. *Id*. ¶ 33. Rossbach has done neither. This Court has also refused to invoke plain error review when a party raises the request for the first time in a reply brief. *Id*.

An appellant who requests plain error review of an unpreserved claim has the burden of proving that this Court should review the unpreserved claim. *Gunderson*, ¶ 100. Even if Rossbach had raised and argued the merits of plain error review, he could not meet his burden for two important reasons. First, the district court gave him wide latitude to cross-examine Kegan and Jesse about the motives they had to testify against Rossbach about admissions he had made to them while they were incarcerated. The jury was fully aware of Kegan's and Jesse's criminal records and any benefits either might gain by testifying against Rossbach.

Second, the State did corroborate the details that Kegan and Jesse provided. Kegan and Jesse accurately reported the details the State has already recounted in detail, including the reason for the robbery attempt, the general location, the

vehicle Rossbach was in and the other occupants of the vehicle, the occupants of the hotel room, the use of a gun and a knife, Rossbach threatening LaBenza with a knife, and Rossbach hiding his clothes and the knife he used.

In *State v. Miller*, 231 Mont. 497, 757 P.2d 1275 (1988), Miller appealed his convictions for two counts of felony murder, arguing in part that there was insufficient evidence to support the jury's verdicts. *Id.* at 500, 757 P.2d at 1277. At Miller's trial, his co-defendant Wentz testified against Miller, implicating him in the two murders. *Id*. at 502, 757 P.2d at 1278. Miller argued on appeal that the State did not corroborate Wentz's testimony connecting Miller to the deliberate homicides. *Id*. at 509, 757 P.2d at 1282. This Court explained that corroborating evidence must "show more than the fact that a crime was committed," and must "raise more than a suspicion concerning [a] defendant's involvement." *Id*. at 510, 757 P.2d at 1283. The Court further explained, though, that the corroborating evidence, "need not be sufficient, on its face, to support a prima facie case against [the] defendant." *Id*. The Court then detailed all the circumstantial evidence that corroborated Wentz's testimony. *Id.* at 510-11, 757 P.2d at 1283-84.

The Court rejected Miller's argument that he was merely present at the crime scene:

> Although mere presence at the scene of a crime is not enough to establish accountability, the *accused need not take an active part in any overt criminal acts to be adjudged criminally liable for those acts.*

Id. at 511, 757 P.2d at 1284, quoting *State v. Bradford*, 210 Mont. 130, 683 P.2d 924, (1984) (emphasis added). The Court explained that, based on the evidence presented, the jury could infer that Miller was involved in the crimes and that his participation was not based on Wentz's use of force or intimidation.

Here, the State presented compelling evidence proving that Rossbach and Whitworth acted together after believing they had been duped in a prior drug transaction. The evidence established that Rossbach was not an innocent bystander, unaware of the potential of criminal activity. Rather, he was an active participant before, during, and after the criminal conduct. In *Miller*, this Court was unwilling to disturb the jury's verdicts because the jury is "the fact finding body in our system of jurisprudence, and its decision is controlling." *Miller* at 512, 757 P.2d at 1284. As the Court explained, it was up to the jury to pick and choose which of the witnesses to believe. *Id*. The same holds true here.

IV. The district court properly denied Rossbach's motion to dismiss the felony murder charges as a matter of law.

Rossbach next argues that the district court erred in denying his motion to dismiss the felony murder charges based upon his claim that it was legally impossible for him to be guilty of felony murder when Whitworth was personally responsible for any robbery and for Jason's and Megan's deaths. Rossbach's theory undercuts Montana's felony murder and accountability statutes. Rossbach

ignores that the law allows Rossbach and Whitworth to be legally accountable for each other's conduct in the robbery attempt. Here, the jury was not determining Whitworth's culpability, but it did determine that Rossbach was accountable for attempted robbery and, during that attempted robbery, Jason and Megan were murdered.

As the district court observed in its order denying Rossbach's motion for new trial on the same theory, "Application of accountability in a felony murder case is well-established." (Appellant's App. B at 7.) As the district court explained:

> The State presented evidence to the jury to suggest that the offenders aided each other in the attempted commission of a robbery against the victims. The State presented evidence that when Rossbach and Whitworth went to the motel room that morning, they wanted to 'even a score' and rob its occupants of money or drugs, and at least one was armed. While Whitworth may have been suggested as the shooter, the State also produced evidence that a motivation for the robbery may have been that Rossbach's brother was hospitalized because of some bad drugs that were sold to them by LaBenza Charlo; that Rossbach instructed Whitworth to shoot the victims; that after the robbery failed, the killings served to initiate Rossbach into a gang called Outlaws for Life. Looking at the evidence in its entirety and in the light most favorable to the prosecution, there was sufficient evidence for the jury to conclude that at least one of the offenders attempted to rob the victims, and in the course of the attempted robbery, Megan McLaughlin and Jason Flink were killed.

(*Id*. at 9.)

The circumstances of this case allow for a straightforward application of the felony murder statute. If felony murder cannot apply to these circumstances, then the purpose behind the felony murder statute will be severely limited in a way that

neither the Legislature nor this Court has intended. Rossbach seemingly argues that because during the attempted robbery Whitworth fired the gun that killed Jason and Megan, Rossbach has no culpability in their deaths. But, as the district court pointed out, this ignores Rossbach's statement to Jesse that it was Rossbach who directed Whitworth to fire the shots. And after Whitworth did so, Rossbach began stabbing Jason and Kaleb with the knife he had brought to the hotel room. It also ignores Rossbach's conduct after the murders and the well-developed precedent in Montana that if a person actively participated in a crime with another, he cannot avoid responsibility just because he did not pull the trigger. *Gollehon*, 262 Mont. at 27, 864 P.2d at 266.

Rossbach primarily and mistakenly relies upon this Court's holding in *State v. Kline*, 2016 MT 177, 384 Mont. 157, 376 P.3d 132, to support his claim that he cannot be guilty of felony murder as a matter of law. *Kline*'s holding is unique to the nature of the offense and the facts before the Court. Kline's incest victim was 17 years old. She admitted that she willingly and repeatedly had sexual intercourse with her father when she was under the influence of methamphetamine, which he provided to her. *Id*. ¶¶ 4-5. On appeal of his incest conviction, Kline argued that the district court erred by not finding that the victim was legally accountable for the incest. Thus, the State was required to present evidence corroborating the victim's testimony, and Kline was entitled to a jury instruction

that the jury should view the victim's testimony with distrust. *Id*. ¶ 7. This Court rejected Kline's accountability theory because the victim also committed incest and, had the State chosen to charge the victim, it could not have relied on a theory of accountability. *Id*. ¶ 18. The State's decision not to prosecute Kline's 17-year-old daughter did not implicate accountability theories of culpability. *Id*. ¶ 19.

In discussing the theory of accountability, this Court explained that the theory prevents a secondary party from escaping liability when he is equally blameworthy for committing the crime as the perpetrator himself. *Id*. ¶ 13. That is precisely the circumstance here. Even assuming Rossbach did not fire the gun that violently killed Jason and Megan, he is still culpable for their deaths because the jury found him legally accountable for an attempted robbery that resulted in Jason's and Megan's homicides. The jury's verdicts are supported by overwhelming evidence.

The district court correctly denied Rossbach's motion to dismiss the felony murder charges based on his theory that, as a matter of law, the State could never convict him of felony murder because Whitworth was the only culpable party.

V. The district court properly exercised its discretion when it imposed limits on Rossbach's cross-examination of Kegan and Jesse.

Rossbach next argues that the district court violated his constitutional right to confront the witnesses against him because the district court improperly limited his cross-examination of Kegan and Jesse about their motives to testify falsely.

A criminal defendant's right to demonstrate the bias or motive of a State's witness is grounded in the Confrontation Clause of the Sixth Amendment to the Unites States Constitution and Article II, § 24, of the Montana Constitution. *State v. James*, 2022 MT 177, ¶ 17, 410 Mont. 55, 517 P.3d 170, citing *State v. Gommenginger*, 242 Mont. 265, 272, 790 P.2d 455, 460 (1990). A trial court has broad discretion to limit the scope of cross-examination to those issues it determines are relevant to a trial. Limiting the scope of cross-examination does not necessarily violate a defendant's right to confront an adverse witness. *James*, ¶ 18, citing *State v. Nelson*, 2002 MT 122, ¶ 15, 310 Mont. 71, 48 P.3d 739. The trial court's discretion in exercising control and excluding evidence of a witness's bias or motive to falsely testify only becomes operative after the constitutionally required threshold level of inquiry has been afforded to the defendant. *James*, ¶ 18, citing *Gommenginger*, 242 Mont. at 274, 790 P.2d at 461.

Rossbach generally claims that he "was not permitted to ask about the nature of prior convictions, to demonstrate the seriousness of the criminal histories" of

Kegan and Jesse and the scope of "escalated punishment" they faced. (Appellant's Br. at 75.) The record does not support Rossbach's general claims. Rossbach does not specifically identify what the district court should have allowed him to ask Kegan and/or Jesse during their cross-examinations, but the record establishes the district court imposed reasonable limitations.

The district court painstakingly considered Rossbach's request to question Kegan and Jesse about their past crimes without limitations. (Tr. at 1807-30, 1906-55.) The State offered that Rossbach could question both witnesses about prior convictions that were relevant to truthfulness and could generally ask the witnesses about the length of time they had spent or could spend in prison and any leniency the witnesses could receive from the State in exchange for their truthful testimony. Rossbach's strategy, though, was to unearth every criminal charge Kegan and Jesse had ever faced, including juvenile infractions, regardless of disposition, so he could argue to the jury that they were very bad people whose testimony could never be worthy of the jury's consideration.

For example, Rossbach really wanted to question Jesse about a prior robbery because it was a violent crime—in other words, he wanted to introduce character evidence to prejudice the jury against Jesse so it would discard his testimony because of his bad character. And, even though the district court had advised

Rossbach not to question Kegan about his prior gang affiliation, Rossbach asked questions about this topic on cross-examination.

The district court properly exercised its discretion by allowing Rossbach to question the witnesses about any prior convictions that were relevant to credibility, whether the witnesses had provided false information to law enforcement officers, whether the witnesses used methamphetamine, the prison time the witnesses had already served, and the prison time the witnesses faced if they were convicted of charges pending against them. The State introduced into evidence any cooperation agreements it had with the two witnesses, regardless of whether the agreement was still in effect. Those agreements were fair game during cross-examination.

The district court did exactly what this Court suggested the trial court should have done in *State v. Flowers*, 2018 MT 96, ¶ 22, 391 Mont. 237, 416 P.3d 180. A jury convicted Flowers of criminal possession of methamphetamine and marijuana. Law enforcement had found drugs in Flowers' vehicle during a traffic stop. Leslie Hill was the lone passenger in the vehicle. *Id*. ¶ 1. At the time of the Flowers' traffic stop, Hill was facing serious drug charges from an incident that had occurred in 2014, and risked being sentenced as a persistent felony offender (PFO). Hill faced 147 years of incarceration. *Id*. ¶ 7.

The State reached a plea agreement with Hill to resolve all her pending charges, including amending the drug charges to less serious offenses, dismissing

the PFO notice, and agreeing to recommend a five-year prison sentenced followed by two years of probation in a separate case. The agreement did not require Hill to testify against Flowers. At Flowers' trial, Hill testified that the drugs belonged to Flowers. Flowers wanted to cross-examine Hill about the entirety of the plea agreement she had entered with the State, but the trial court allowed only very limited cross-examination of Hill. *Id*. ¶ 8.

Flowers argued at trial that the drugs belonged to Hill. He sought to introduce evidence of all her pending charges and the plea agreement to show that Hill was motivated to testify falsely, in part because she had received a favorable deal from the State. *Id*. ¶ 18. On appeal, this Court concluded that the entirety of Hill's plea agreement with the State was relevant to both impeach Hill's testimony that she had not received a favorable deal and to show her motive to testify against Flowers. Because the trial court had disallowed Flowers from questioning Hill about the entirety of the plea agreement she reached with the State, Flowers was unable to impeach Hill with a possible motive to testify falsely that the drugs in question belonged to him. *Id*. ¶ 21.

Importantly though, this Court recognized that the trial court in *Flowers* could have limited the evidence "to ensure its permissible use and to minimize the potential for an improper propensity inference." *Id*. ¶ 22. The Court elaborated:

> The court could, for example, have precluded reference to the specific crimes with which Hill was charged in the August 2014 incident. But

> to prohibit any questioning to show that Hill had faced a potential 147-year sentence and got an agreement from the State for seven years with two suspended deprived Flowers of valuable impeachment evidence.

Id.

Here, the district court allowed Rossbach to question Kegan and Jesse about convictions that bore on either witness's credibility. The court also allowed Rossbach to question the witnesses about their methamphetamine use and to establish that they had spent time in prison in the past and were each facing more time in prison, including the exact number of years in prison each witness faced. And, even though the district court prohibited Rossbach from questioning Kegan about his prior gang affiliation, Rossbach still managed to get this information before the jury during Kegan's cross-examination. As this Court has repeatedly held, the Confrontation Clause "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *State v. Garding*, 2013 MT 355, ¶ 21, 373 Mont. 16, 315 P.3d 912, quoting *Nelson*, ¶ 19.

To the extent that Rossbach argues Kegan's and Jesse's testimonies were incredibly unreliable because they each testified that Rossbach made statements that did not align with the evidence the State presented at trial, such as Megan being pregnant and LaBenza planning the robbery, Rossbach had the ability to make these arguments to the jury. A jury, though, decides all credibility issues, and

it is free to believe all, part, or none of the testimony of any witness. *State v. Quiroz*, 2022 MT 18, ¶ 33, 407 Mont. 263, 502 P.3d 166. The jury understood Kegan and Jesse were criminals who had served time in prison in the past, were facing prison time in the future, and were either seeking or hoping for leniency from the State, so they had a motive to testify falsely against Rossbach. Rossbach fully explored and exploited Kegan's and Jesse's criminal histories and motives to testify falsely against Rossbach.

The district court carefully and properly exercised its discretion when it reasonably limited Rossbach's cross-examination of Kegan and Jesse without violating Rossbach's right to confront the witnesses against him.

VI. The district court properly denied Rossbach's motion for a new trial based on an alleged *Brady* violation.

Rossbach, finally, argues the district court erred in denying his motion for a new trial based on his claim that the State did not timely disclose a letter Jesse wrote to the Missoula County Attorney's Office about an unrelated burglary and theft case. The letter, included as an exhibit in support of Rossbach's request for a new trial, is undated. (Doc. 333, Ex. 5, attached as App. A.) In the letter, Jesse denied stealing items from a residence where he and his husband worked, and denied ever breaking into the residence. Jesse admitted, however, to attempting to pawn a stolen item at a local pawn shop. Jesse indicated he would accept

responsibility for attempting to pawn an item he knew was stolen but would not plead guilty to charges his husband had solely committed. Jesse expressed his willingness to help recover property he claimed his husband stole. (*Id*.) Rossbach claims that the State's failure to disclose Jesse's letter sooner, which he asserts was exculpatory, violated his constitutional right to due process under *Brady*.

In denying Rossbach's motion for a new trial, the district court explained:

> Regarding [Jesse] Faircloth/Hopkins, Rossbach wanted to introduce information from a pending investigation, which relates to the letter he maintains was withheld in discovery and argues was a *Brady* violation, to demonstrate that Faircloth/Hopkins was untruthful. The Court permitted examination of the investigator, but the investigator was unwilling or unable to determine whether Faircloth/Hopkins' statements were truthful. The investigator indicated that while Faircloth/Hopkins tended to implicate another, rather than himself, he lacked sufficient information to conclude that Faircloth/Hopkins was untruthful. Upon careful consideration, admission of the letter written by Faircloth/Hopkins and/or his statements to the investigator would have only served to confuse jurors.
>
> . . . .
>
> To the extent that Rossbach intends to substantially rely on his thin *Brady* violation theory, the Court has considered it and denies it, as the subject letter does very little to cast doubt on Faircloth/Hopkins' credibility. Further, the connection of the dots between the subject letter and Faircloth/Hopkins' credibility as a live witness is so convoluted that the Court finds no probability that the outcome of the proceedings would have been different.

(Appellant's App. B. at 22-23.)

The district court properly denied Rossbach's motion for a new trial based on an alleged *Brady* violation for two important reasons. First, Detective Kedie referenced Jesse's letter to the Missoula County Attorney's Office during his offer of proof testimony, and defense counsel did not question him further about the letter, although he clearly could have done so, and defense counsel had not yet completed his cross-examination of Jesse.

Even assuming, though, that upon reading the letter, defense counsel concluded that he needed to explore the matter further, he made no effort to do so. The record establishes that the district court carefully considered all Rossbach's requests regarding cross-examination of Jesse; it did not leave a stone unturned. Rossbach could have asked the court to recall Jesse and/or Detective Kedie, but he chose not to do so. The district court indicated its willingness to entertain a request to recall Jesse. (Tr. at 1384.)

Second, Rossbach cannot prove a *Brady* violation. To establish a *Brady* violation, Rossbach must prove that: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the prosecution suppressed the favorable evidence; and (3) had the evidence been disclosed, a reasonable probability exists the outcome of the proceeding would have been different. *State v. Ilk*, 2018 MT 186, ¶ 29, 392 Mont. 201, 422 P.3d 1219. Rossbach's alleged *Brady* violation fails because, even assuming without conceding that the State

should have disclosed the letter sooner, the letter was not favorable to Rossbach, and disclosure of the letter sooner would not have resulted in a reasonable probability of a different outcome in Rossbach's trial.

Rossbach asserts that Jesse's letter to the Missoula County Attorney's Office was impeachment evidence. Rossbach has failed to prove there was anything in Jesse's letter that was inconsistent with what Jesse told Detective Kedie during his interview with Detective Kedie. Detective Kedie testified that Jesse denied personal involvement in the burglary, which is consistent with Jesse's letter. (*Compare* Tr. at 2100 *with* App. A.)

Rossbach has also failed to establish that had the State disclosed the letter sooner, there would have been a reasonable probability of a different outcome. The contents of the letter would not have impacted the district court's ruling prohibiting Rossbach from questioning Jesse about the specifics of the crimes that were pending against him concerning the Shelby family. The letter simply does not do what Rossbach claims it does—establish that Jesse lied to Detective Kedie about his involvement in the criminal offenses related to the Shelby family.

Rossbach has failed to demonstrate that the district court abused its discretion in denying his motion for a new trial based on an alleged *Brady* violation.

CONCLUSION

For the reasons argued above, the State respectfully requests that this Court affirm Rossbach's convictions.

Respectfully submitted this 8th day of January, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 17,148 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0604

STATE OF MONTANA,

Plaintiff and Appellee,

v.

PRESTON CSOO ROSSBACH,

Defendant and Appellant.

APPENDIX

Jesse Faircloth/Hopkins' letter to Missoula County Attorney's Office
(Doc. 333, Ex. 5)..... Appendix A

CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-08-2024:

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