IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0650

STATE OF MONTANA,

Plaintiff and Appellee,

v.

AARON EUGENE MCLAUGHLIN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twentieth Judicial District Court,
Sanders County, The Honorable John W. Larson, Presiding

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Whether this court should apply plain error review to consider the district court's handling of *voir dire*.

Whether the district court abused its discretion in rejecting McLaughlin's proposed "reasonable doubt" jury instruction.

Whether the district court imposed a legal sentence.

STATEMENT OF THE CASE

The State charged Aaron Eugene McLaughlin with felony murder under Mont. Code Ann. § 45-5-102(1)(b), for allegedly causing Raymond's death while committing the offense of aggravated assault. (Docs. 1, 29, 31, 349.) McLaughlin asserted a justifiable use of force (JUOF) claim. (Doc. 32.)

The district court denied McLaughlin's motion to suppress evidence collected from Raymond's trailer and rejected McLaughlin's proposed "reasonable doubt" jury instruction. (Doc. 349; 6/3/22 Tr.) The district court did not permit the parties to discuss self-defense during *voir dire* because McLaughlin had not yet established JUOF applied. (Doc. 32; Trial Tr. (hereinafter Tr.) at 59-62.)

The jury convicted McLaughlin of felony murder and the court sentenced him to Montana State Prison (MSP) for a term of 80 years. (Tr. at 564; 8/30/22 Tr.; Doc. 371.)

STATEMENT OF THE FACTS

In the fall of 2019, Raymond was leasing a house in Hot Springs from Roy McDaniels. (Tr. at 210-16.) Raymond was collecting full disability from a back injury he suffered in 1993, which had required multiple surgeries. (Tr. at 313-15.) Raymond's injury left him unable to stand for prolonged periods of time, so he had to lean on things, and he complained of numbness and tingling in his legs. (*Id.* .) McLaughlin began staying at Raymond's in August 2020. (*Id*. at 216-30, 452.)

On September 18, 2020, Raymond got into a bar fight and lost consciousness when he was struck in the head. (Tr. at 35-67, 342-44, 401-01, 414-18.) Raymond suffered a "very small" subdural hematoma that "was not creating any mass effect" as there was plenty of room in the skull to accommodate the hemorrhage. (*Id*. at 416.) Doctors released Raymond from the hospital after monitoring him for three days. (*Id*.)

On October 3, 2020, Raymond was found unresponsive in a motor vehicle and his blood alcohol level was .310. (Tr. at 401-03.) A CT scan showed no new

acute injuries to Raymond's brain and confirmed his prior subdural hematoma was healing so he was released from the hospital. (*Id*.)

On October 7, 2020, at around 10:10 a.m., McDaniels delivered the power bill to Raymond's trailer. (Tr. at 210-15.) When McLaughlin answered the door, he was acting skittish and aloof. (*Id*.) McLaughlin did not open the door all the way so McDaniels handed the bill to McLaughlin and did not see Raymond. (*Id*.)

About two and a half hours later, McLaughlin called 911:

911: 911, where is your emergency?

McLaughlin: My roommate broke through my door and I beat the shit out of him and he's not... his pulse is like real low but . . . yeah.

. . . .

McLaughlin: I don't know if he is still alive or . . .

911: Ok what is your name?

McLaughlin: My name is Aaron McLaughlin and he broke through my door and tried to assault me and I warned him, I was like, don't come through my door and he came through my door, and yeah.

. . . .

911: Ok so, does he have a pulse? Is he breathing?

McLaughlin: Uh, I can't tell. He's real cold. I, I, we, we need the ambulance like right now . . .

. . . .

McLaughlin: I beat the shit out of him.

. . . .

McLaughlin: My foot is probably like broken because I know karate . . . (giggle) so, yeah.

. . . .

(Tr. at 145-52; Exs. 109, 109A.)

Police Chief Eric Pfleger arrived before the ambulance. (Tr. at 153-90.) Chief Pfleger saw McLaughlin standing in the driveway fully clothed, but not wearing any shoes. (*Id*.) As Chief Pfleger secured McLaughlin in the patrol vehicle, he noted a strong smell of alcohol. (*Id*.)

Chief Pfleger discovered Raymond's body just inside the front door in the living room; his lower body had been covered with a blanket, and he had several visible bruises on his face and head. (Tr. at 157-90; Exs. 21-40.) Chief Pfleger immediately ascertained Raymond was deceased given his pale, gray colored skin, visible bruising, and that his body was cold to the touch. (*Id*.)

Chief Pfleger secured the residence and contacted the Department of Justice's Division of Criminal Investigation (DCI) for assistance. (Tr. at 162-90, 232-88, 427-30.) DCI Agent Edward Teniente applied for, and was granted, a search warrant to enter Raymond's residence and collect evidence. (Doc. 250.)

While in Chief Pfleger's vehicle, McLaughlin made several unsolicited statements that were recorded. (Tr. at 162-90; Exs. 110, 110A.) Significantly,

McLaughlin said, "Fuck yeah I had to kill him, he fucking broke through my door, bitch. I beat him all the way down the fucking hall." (*Id*. at 00:32 to 1:56.) McLaughlin also said, "I'm not on the lease. I'm out of here, bitch." (*Id*. at 7:40.)

When Detective Brian Josephson transported McLaughlin to jail, McLaughlin continued making unsolicited comments. (Tr. at 165-68, 193-209; Exs. 111, 111A.) During his ramblings, McLaughlin implied that earlier that fall he had helped Raymond and also claimed Raymond had been after McLaughlin as part of a conspiracy and that McLaughlin "snapped" and "had to kill" with his hands. (*Id*.) McLaughlin said he warned Raymond not to come into his room or he would "kill him" and that he "blacked out" and "kicked [Raymond] all the way down the hall like karate kicks. Like fucking Bruce Lee, like kia ki." (Ex. 111A at 3-4, 5-6, 13.) McLaughlin had no noticeable injuries on his body besides a few scratches on his hand and a bruise on his leg. (Exs. 77-85, 87-90.)

DCI Agent Kevin McCarvel photographed the area outside Raymond's residence and, once the search warrant was issued, photographed inside the trailer including the position of Raymond's body, the hallway, and all the rooms. (Tr. at 232-87; Exs. 1-7, 9-76.) Agent McCarvel did not notice anything indicating that McLaughlin's bedroom door had been forced open. (*Id*.)

During the investigation, agents spoke to two of Raymond's friends, who later testified at trial. Jonah Whitsett described Raymond as his "drinking buddy"

but he had not seen him for a couple days. (Tr. at 288-93.) Whitsett testified that in the weeks before Raymond's death, he had seen the damage to McLaughlin's bedroom door and said it had been caused by another man when he was fighting with McLaughlin. (*Id*.) Raymond's next-door neighbor, Robin Schrock, believed McLaughlin began staying at Raymond's in August 2020. (Tr. at 216-30.) Schrock had heard McLaughlin yelling at Raymond the night before and had to close her window because it was so loud. (*Id*.)

State Medical Examiner Dr. Sunil Prahsar ruled Raymond's death a homicide caused by "multiple blunt-force injuries." (Tr. at 395.) Raymond had rib fractures on both sides of his chest and over 50 bruises and abrasions, most of which were recently inflicted. (Tr. at 380-412; Exs. 91-106, 108.) A blow to Raymond's head caused his brain to herniate away from his spinal cord. (Tr. at 380-412, 432-41.) While the blood loss from his other bruises would have contributed, it was the massive bleeding in Raymond's brain that caused his death. (*Id*.) Dr. Prashar consulted with the Chief Medical Examiner and Director of Forensic Neuropathy in New Mexico to confirm the brain bleed that caused Raymond's death was recently inflicted and not the result of his prior injury in September. (*Id*.)[1]

[1]Additional facts relevant to the issues presented are set forth in applicable argument sections below.

McLaughlin was the only witness for the defense. (Tr. at 447-90.) McLaughlin testified that the night of October 6, 2020, Raymond wanted him to go buy alcohol, but he refused. (*Id*.) When asked when the physical altercation between the two started, McLaughlin stated Raymond opened his bedroom door and woke him up at 3 a.m. (*Id*. at 454.) But in his next response, McLaughlin stated he did not know when the altercation occurred and that he never looked at the time. (*Id*.) McLaughlin claimed that he got out of bed, closed and locked his door, and told Raymond to go away. (*Id*.)

According to McLauglin, Raymond said he was the Grim Reaper and that he was going to kill him and pushed the door open. (Tr. at 455-57.) McLaughlin stated the door struck him in the head, dazing him. (*Id*.) McLaughlin claimed he feared for his life, so he kicked Raymond five or six times. (*Id*.) According to McLaughlin, the physical altercation continued down the hall and into the living room where Raymond fell to the ground. (*Id*.) McLaughlin said he went back to his room because Raymond seemed fine. (*Id*.) However, McLaughlin also said he did not help Raymond with his injuries because he was too scared. (*Id*.) McLaughlin testified he went to sleep and woke up "in a lot of stress and anxiety" so he drank a half bottle of vodka to get the courage to leave his room. (*Id*.)

McLaughlin said he came out of his room when McDaniels knocked on the door. (Tr. at 457-90.) After getting the power bill, McLaughlin said he went to

wake up Raymond, but he was cold and not breathing so he called 911. (*Id*.) McLaughlin offered no explanation for the over two-hour delay between McDaniels coming to the house and McLaughlin discovering Raymond and calling 911. (*Id*.) McLaughlin blamed his intoxicated state and anxiety for his comments about killing Raymond. (*Id*.)

During cross-examination, McLaughlin denied ever hitting Raymond in the face and claimed Raymond's facial injuries occurred when he fell onto the toolbox in the hall. (Tr. at 465-90.) However, McLaughlin also testified that he did not remember if he caused injuries to Raymond's eyes. (*Id*.) McLaughlin admitted Raymond did not hit him and, although he claimed Raymond had shown him a gun and believed Raymond had access to weapons, McLaughlin agreed that Raymond had not threatened him with a weapon that night. (*Id*.)

After the defense rested, the court found, in the jury's presence, that sufficient evidence had been presented to assert the affirmative JUOF defense. (Tr. at 489.) The State presented rebuttal testimony from Agent McCarvel who explained they had looked for weapons when they searched the trailer and did not find a firearm. (*Id*. at 490-94.)

STANDARD OF REVIEW

This Court reviews an order denying motions to suppress to determine whether the court's factual findings are clearly erroneous, and the court's conclusions of law are correct. *State v. Hardy*, 2023 MT 110, ¶ 18, 412 Mont. 383, 530 P.3d 814. The sufficiency of a warrant is assessed on a case-by-case basis, under the "totality of the circumstances test," to determine whether any alleged defect in the warrant application is sufficient to affect the substantial rights of the accused. *State v. Kasparek*, 2016 MT 163, ¶ 8, 384 Mont. 56, 375 P.3d 372.

This Court's reviews the handling of *voir dire* and evidentiary rulings for abuse of discretion. *State v. Daniels*, 2011 MT 278, ¶ 11, 362 Mont. 426, 265 P.3d 623. A district court abuses its discretion if it "acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *Id.*

This Court reviews jury instructions for an abuse of discretion and will "determine whether, taken as a whole, the instructions fully and fairly instruct as to the applicable law." *Hardy*, ¶ 43; *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (proper inquiry regarding jury instructions is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on" reasonable doubt).

Criminal sentences eligible for statutory sentence review are reviewable on appeal only for legality. *State v. McGhee*, 2021 MT 193, ¶ 11, 405 Mont. 121, 492 P.3d 518.

SUMMARY OF THE ARGUMENT

The district court correctly applied the "totality of the circumstances" test when it issued the search warrant and later denied McLaughlin's motion to suppress. When assessing the sufficiency of a warrant application, the reviewing court does not consider the effect of alleged omitted facts. McLaughlin did not make a substantial showing that the information within the application was either misleading or untrue. Chief Pfleger's observation that Raymond had suffered multiple bruises and was cold to the touch in conjunction with McLaughlin's admission that he beat Raymond, supported a reasonable belief that an offense had been committed and there was a fair probability that evidence of the offense of homicide could be found in Raymond's trailer. Finally, even if this Court determines the warrant was defective, McLaughlin was not prejudiced because the allegedly improperly seized evidence was not admitted at trial.

McLaughlin's constitutional challenge to the court's handling of *voir dire* is not properly before this Court because he did not assert his right to an impartial jury was violated by the court during *voir dire*. Additionally, McLaughlin did not

advance any legal argument that plain error review was warranted, thus further precluding consideration of this issue.

Even if this Court reaches the issue, McLaughlin has failed to establish that plain error review is warranted to consider whether his Sixth Amendment right was violated by the court's handling of *voir dire*. Not every limitation on *voir dire* inquiries will lead to fundamentally unfair trial in violation of the constitution. Nothing in the record suggested that the community from which the jury was formed harbored such strong feelings about self-defense that required specific inquiry. The *voir dire* process ensured potential jurors would follow the law as given and that they understood McLaughlin was innocent until proven guilty and the State had the burden to prove every element beyond a reasonable doubt.

The district court's reliance upon Montana's Pattern Jury Instructions (MPJI) for the "reasonable doubt" instruction was not an arbitrary act or beyond the bounds of reason. The instruction proposed by McLaughlin has been replaced by MPJI-104, which is a correct statement of the law. McLaughlin has not established any basis for this Court to overrule its long-standing and reasoned jurisprudence approving this instruction. The jury was fully and fairly instructed on the law and McLaughlin cannot establish that the State's burden was lessened.

McLaughlin's claim that his sentence was "unreasonable" is inappropriate for direct review, as sentences of more than one year are reviewed for legality

only. The record confirms that the district court followed its sentencing mandates, properly weighed and considered applicable evidence, and imposed a legal sentence upon McLaughlin.

ARGUMENT

I. The district court correctly denied McLaughlin's motion to suppress.

A. Additional relevant facts

Agent Teniente's search warrant application included a detailed description of the real property to be searched and the possible evidence that law enforcement sought to seize. (Doc. 250, Ex. A (hereinafter SWA).) The application reiterated Chief Pfleger's report, which included the following summary of McLaughlin's 911 call:

> On 10/07/2020 at 1247HRs I Chief Eric Pfleger was advised by phone at HSPD by Sanders County Sheriff Office Dispatch (Shelly Wrightson) of a 911 call for an ambulance at 812 1ST Ave South Hot Springs, MT. Dispatcher advised that Aaron McLaughlin called 911 and stated that he 'beat the shit out of his Roommate' Raymond Wachlin and that he had a 'weak pulse' and that 'he was cold' and needed an ambulance. I was advised that Hot Springs Ambulance was being paged out. I proceeded to clear HSPD of all civilians (city court was in session) and responded. I am familiar with both subjects and the address.

(SWA at 3.) The application described Chief Pfleger's actions at the crime scene and his observations, namely that Raymond was dead, had been severely beaten, and was cold to the touch. (*Id.* .) The application also described information

Whitsett told Chief Pfleger, including that McLaughlin and Raymond had been doing drugs and engaged in arguments and physical altercations. (*Id.* .) The district court issued a search warrant. (Doc. 250, Ex. B (hereinafter SW).)

The agents executed the search warrant at 10:10 p.m., on October 7, 2020. (Doc. 271.) Through photographs, Agent McCarvel documented the officers' entry and preliminary search of the residence, as well as the seizure of Raymond's body for transport to the crime lab. (*Id.* .) The next day, the officers continued their search and collected several other pieces of evidence, none of which were used by the State at trial. (Docs. 250 at 4, 271 at 4.)

In his motion to suppress, McLaughlin argued the SWA sought to seize "broad categories of items that were not described with particularity and included improper 'open-ended' language and 'inaccurate and misleading information' by omitting 'known evidence of self-defense.'" (Doc. 250.) McLaughlin did not assert the photographs should be suppressed or any evidence gleaned from Raymond's body, but listed nine specific pieces of evidence that should be suppressed (none of which the State used at trial). (*Id*. at 18-19.)

At the evidentiary hearing, the court noted it would not need to resolve suppression of evidence that the State did not intend to introduce at trial and on June 2, 2022, the court denied McLaughlin's motion to suppress. (10/6/21 Tr. at 14, 18-20; Doc. 349.)

On appeal, McLaughlin asserts the court did not follow the applicable statutes, erred in finding probable cause to issue the search warrant, failed to sufficiently address his arguments that the warrant lacked particularity, and erred by not finding the SWA was misleading for omitting his self-serving statements related to JUOF. (Opening Brief (Br.) at 24-33.)

B. The district court did not err when it denied McLaughlin's motion to suppress.

1. Probable cause was unaffected by omitted alleged self-defense comments to 911 operator.

An application for a search warrant must contain sufficient facts "to show probable cause to believe an offense has been committed and that evidence of the crime may be found in the place to be searched." *State v. Burchill*, 2019 MT 285, ¶ 16, 398 Mont. 52, 454 P.3d 633; Mont. Code Ann. § 46-5-221. "Probable cause exists when there is a reasonable belief based on the information contained within the four corners of the search warrant application that an offense has been, or is being, committed and that the property sought exists at the place designated." *Id.* (citation omitted).

When determining if probable cause exists to issue a search warrant, the judicial officer must "make a practical, common sense determination, given all the evidence contained in the application for a search warrant, whether a fair

probability exists that contraband or evidence of a crime will be found in a particular place." *Burchill*, ¶ 17.

Since "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules," the totality of the circumstances test focuses on whether the application as a whole provides sufficient facts to support a determination of probable cause. *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

The court correctly found that the summary of the 911 call, that did not include McLaughlin's self-serving allegations about Raymond attacking him, did not invalidate the warrant. The court correctly applied *Kasparek, supra,* where this Court held it was inappropriate to review a court's probable cause determination using information outside the four corners of the application and warrant since doing so would undermine constitutional safeguards and invite speculation and conjecture.

McLaughlin relies upon this Court's subsequent statement in *Kasparek* that its holding did not preclude a defendant from challenging the *validity* of the information *within* the SWA. (Br. at 29-30 (citing *Kasparek*, ¶ 13).) However, as this Court further explained, it is the defendant's burden to make a *substantial* showing that establishes information within the four corners was "misleading or untrue." *Id.* (emphasis added). McLaughlin failed to meet this burden.

McLaughlin mistakenly conflates omission of information with proof that information in the SWA was untrue or misleading. Even assuming McLaughlin's allegations that Raymond "broke through" his door and "tried to assault him" were true, it would not mean there was no probable cause to believe a crime had occurred. It was undisputed that Raymond was dead by the hands of another. Whether McLaughlin's actions were justified was a determination for a jury; not officers investigating Raymond's death.

In addition, the officers had reason to not blindly accept McLaughlin's self-serving statements as a complete rendition of Raymond's death and end their investigation. For instance, it was undisputed that by the time McLaughlin called 911, Raymond had been deceased long enough to become cold to the touch. Thus, McLaughlin's failure to call for help as soon as he stopped Raymond's alleged attack was suspicious. It was also suspicious that McLaughlin claimed he had to defend himself, but did not contact law enforcement to report the attack.

The court correctly determined that the SWA established probable cause to issue a search warrant. "The judge's determination that probable cause exists is entitled to great deference and every reasonable inference possible must be drawn to support that determination of probable cause." *Kasparek*, ¶ 8 (citation omitted); *Hauge v. District Court*, 2001 MT 255, ¶ 21, 307 Mont. 195, 36 P.3d 947,

(reviewing court's function is "simply to ensure that the [issuing court] had a substantial basis for concluding that probable cause . . . existed").

2. Particularity and breadth

"No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing." *State v. Neiss*, 2019 MT 125, ¶ 55, 396 Mont. 1, 443 P.3d 435. A warrant's specificity is defined by two distinct qualities: particularity and breadth; "[p]articularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *Neiss*, ¶ 57 (citation omitted).

McLaughlin is correct that the district court did not issue explicit findings concerning his allegations that the SWA lacked particularity to seize the specific items he asked to be suppressed. (Br. at 25.) However, such an omission does not create reversible error.

A search and seizure "may not be held to be illegal if . . . a right of the defendant has not been infringed by the search and seizure or any irregularity in the proceedings has no effect on the substantial rights of the accused." Mont. Code Ann. § 46-5-103(1)(b)(c). Moreover, this Court will affirm the district court when

it reaches the right result, even if it reaches the right result for the wrong reason. *State v. Funkhouser*, 2020 MT 175, ¶ 10, 400 Mont. 373, 467 P.3d 574.

There is no question the SWA included probable cause that a crime had been committed and particularly described the place to search (Raymond's trailer). The SWA also established a sufficient nexus between the two (trailer was where the deceased person had lived and had been assaulted/killed). The SWA specifically described items/materials to be seized that were directly related to the crime of homicide, including identification of suspects and possible motives.

Evidence of a suspected homicide included Raymond's body and any biological material from his person or clothing. These items were undisputedly connected to the investigation and preservation of evidence of homicide and the SWA and SW were neither overbroad nor lacking in particularity relative to this evidence. The same can be said of photographing Raymond and the trailer to memorialize the crime scene to preserve its original condition. Notably, McLaughlin offered no challenges to those parts of the SWA or SW. Instead, McLaughlin's challenge was limited to specific items, none of which were used at trial.

Even if the SWA did not include sufficient particularity or scope to seize the items enumerated by McLaughlin in his motion to suppress, the warrant was not

therefore invalid.[2] *See Hauge*, ¶¶ 18-19; *United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir.1984), *cert denied*, 466 U.S. 977 (1984). As this Court explained in *Hauge*, "when faced with a warrant that is lawfully issued and is otherwise sufficiently particularized," only the portions of the application and warrant that lack particularity or include overbroad categories "should be severed and only that evidence seized under [the problematic language] need be suppressed." *Hauge*, ¶ 19.

Notably, the only evidence obtained pursuant to the search warrant that the State used at trial was the autopsy results from examination of Raymond's body and the crime scene photographs. McLaughlin did not assert these pieces of evidence were illegally seized. Thus, even assuming the SWA and SW lacked particularity or were overbroad regarding the seizure of the items enumerated by McLaughlin, the district court's order denying McLaughlin's motion to suppress did not constitute reversible error because seizure of those items had no effect on McLaughlin's substantial rights. *See* Mont. Code Ann. § 46-5-103(1)(b)(c); *Kasparek*, ¶ 8.

[2]The State does not concede that the items McLaughlin enumerated were improperly seized based on lacking particularity or overbreadth. But given McLaughlin cannot show how seizure of those items prejudiced him, it is unnecessary to respond to that specific claim.

II. No reversible error occurred during voir dire.

A. Additional relevant facts

In response to McLaughlin's notice of JUOF, the State argued that unless and until defense counsel assured the court that proof of that defense pursuant to Mont. Code Ann. § 45-3-102 (defense of self/others) would be presented, the issue of JUOF should not be discussed at trial, including *voir dire* and opening statements. (Docs. 257, 270.) McLaughlin responded that he maintained his Fifth Amendment right not to testify until he chose to waive it, so he cannot be required to confirm whether he will testify at trial. (Doc. 280.) McLaughlin further asserted the 911 call was sufficient to meet his burden of offering evidence of JUOF relative to Mont. Code Ann. § 45-3-103 (defense of an occupied structure).[3] (*Id*.)

During pretrial hearings, the court repeatedly explained it would exercise its discretion in determining when JUOF could be discussed, noting that absent a sufficient offer of proof, it may not allow *voir dire* on that topic. (10/6/21 Tr.; 10/27/21 Tr.; 12/3/21 Tr.; 5/3/22 Tr.) (*Id*.) Relying upon *Daniels*, *supra*, the court explained that JUOF should not be covered during *voir dire* because the "affirmative defense has not been joined at that time." (10/6/21 Tr. at 2-6.) When

[3]At trial, McLaughlin asserted a "defense of person" JUOF theory, not defense of an "occupied structure." (*See* JI No. 5-H.)

Mclaughlin suggested the 911 recording would be sufficient to join JUOF, the court instructed the defense to brief the issue and make an offer of proof. (*Id*.) No point briefs were filed.

At the December status hearing, the court set the new trial date for early June 2022, and again discussed how JUOF would be addressed at *voir dire*, noting that it would be in the court's discretion and instructed the parties to advise the court what evidence will be introduced to establish JUOF. (12/3/21 Tr.)

On December 7, 2021, the court "preliminarily exclude[d] reference to [JUOF] in *voir dire*, opening statements, direct or cross-examination until admissible evidence supporting Defendant's claim of self-defense is presented through the course of trial or Defendant otherwise elects to testify at trial admitting some aspect of the charged conduct." (Doc. 300 at 5.)

On February 1, 2022, the State notified the court that it expected to play the 911 recording at trial wherein McLaughlin relayed that he "beat the shit" out of McLaughlin after he came into his room. (Doc. 301.) While the State asserted the 911 call raised JUOF, it explained further that it planned to introduce evidence that Raymond had not posed a risk of imminent death or serious injury to McLaughlin. (*Id*.) McLaughlin did not file any notice or point brief on this issue.

At the start of *voir dire*, the court thoroughly reviewed specific concepts of law with the jury pool including McLaughlin's right no to testify, that he remains

innocent until proven guilty, and that the State bears the burden of proof to establish all elements of the offense beyond a reasonable doubt. (Tr. at 28-43.) When the State began to discuss the issue of self-defense, the court interrupted and explained that they needed to "wait until we are all officially there on the record" before addressing the topic. (*Id*. at 59-60.)

At sidebar, McLaughlin stated the parties believed they should be able to ask prospective jurors about "their opinions on self-defense, if they think it's reasonable or not." (Tr. at 60-61.) The court declined to allow the inquiry. (*Id*.) The court explained that, regardless of the parties' agreement, the court determined if/when JUOF had been sufficiently presented, and noted that the defendant may change his mind about testifying, which could impact the court's determination. (*Id*.) McLaughlin offered no further argument or any claim that the court's ruling infringed on his constitutional right to an impartial jury.

During the defense's *voir dire*, counsel asked if any jurors had been assaulted or knew someone who had been assaulted. (Tr. at 79-102.) One juror explained his experiences and how he had to defend himself while another juror described his experience in chambers and was excused by the court. (*Id*.) Defense counsel did not ask any further questions about the jurors' experience with assaults. (*Id*.)

Defense counsel spoke to the jurors about how alcohol and drugs make people behave differently, their experiences when people jump to the wrong conclusions or make snap-decisions, and whether anyone had been falsely accused of something or done something dangerous out of despair. (Tr. at 79-102.) Defense counsel also inquired whether the jurors would hold it against McLaughlin if he chose not to testify. (*Id*.) When defense counsel asked what specific type of evidence the jurors would want to see in a homicide case, the court interjected, advising counsel it would not allow him to fish like that." (*Id*. at 101.) Counsel offered no opposition and withdrew the question. (*Id*.)

B. McLaughlin's claim on appeal

On appeal, McLaughlin argues the district court abused its discretion in handling *voir dire*, but fails to cite to any statutory or constitutional basis with which to evaluate this claim. (Br. at 40-45.) McLaughlin simply discusses the "importance of 'adequate questioning' of jurors" and provides broad legal premises from four cases: *State ex rel. Stephens v. District Court*, 170 Mont. 22, 550 P.2d 385 (1976); *Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861; *State v. Sattler*, 1998 MT 57, ¶ 47, 288 Mont. 79, 956 P.2d 54; and *Riggs v. State*, 2011 MT 239, 362 Mont. 140, 264 P.3d 693.

Three of the cases McLaughlin cites are inapplicable as they did not concern a direct appeal on either the court's handling of *voir dire* or the court's evidentiary

ruling on sufficient evidence to establish an affirmative defense. In *Stephens*, the issue concerned the appropriateness of awarding attorney's fees for time spent on *voir dire* and *Whitlow* and *Riggs* evaluated the defendants' Sixth Amendment right to effective counsel in postconviction proceedings. Only *Sattler* has any potential applicability here as it dealt with a direct appeal concerning limitation of *voir dire.*

Sattler addressed whether the defendant's "right to *voir dire* on [JUOF] was infringed." *Sattler*, ¶ 30. The cases this Court relied upon referred to a defendant's right to an impartial jury as guaranteed by the Sixth Amendment and Article II, Section 24, of Montana's constitution.[4] *Id.* (citing *State v. McKenzie*, 186 Mont. 481, 501, 608 P.2d 428, 441 (1980), and *State v. Olson*, 156 Mont. 339, 480 P.2d 822 (1971), *cert. denied*, 449 U.S. 1050, 66 L. Ed. 2d 507, 101 S. Ct. 626 (1980)).

Since *Sattler* did not concern whether the trial court abused its discretion in determining whether a defense had been joined at the point of *voir dire*, but did cite two cases that discussed a defendant's right to an impartial jury, the State presumes McLaughlin's *voir dire* claim on appeal is grounded in the Sixth Amendment right to an impartial jury.[5]

[4]For convenience and clarity, the State will refer to the Sixth Amendment when discussing the right to an impartial jury.

[5]Out of abundance of caution, the State also addresses the court's evidentiary ruling on whether JUOF was joined as of *voir dire*. *See* Footnote 6, Section II.D.

C. Constitutional claim

1. McLaughlin did not preserve a Sixth Amendment claim.

McLaughlin did not raise a Sixth Amendment claim to the district court in either his pretrial pleadings or during *voir dire*. Rather, McLaughlin raised a Fifth Amendment claim by arguing that the court's pretrial *voir dire* rulings infringed on his right to remain silent under both the federal and state constitutions. The district court considered this claim when it acknowledged that JUOF could be established by any admissible evidence. McLaughlin has not challenged this ruling on appeal and may not assert a Fifth Amendment claim in his reply brief. *See Sattler*, ¶ 47.

The context of the *voir dire* proceedings shows the court's limitation concerning JUOF was based solely on the sufficiency of evidence required to inject an affirmative defense into a trial.[6] McLaughlin simply argued that they should be able to ask jurors whether they think self-defense is "reasonable or not." The defense did not explain how such an inquiry was related to ensuring an impartial jury or refer to the Sixth Amendment. Additionally, the "reasonableness"

[6]McLaughlin does not advance any legal argument or authority challenging how this evidentiary ruling was an abuse of discretion. This Court will not consider unsupported issues or arguments, and that failure to comply with the rules of appellate procedure is fatal to an appeal. *Dodds v. Tierney*, 2024 MT 48, ¶ 14, 415 Mont. 384, 544 P.3d 857. To the extent this Court may consider this issue under plain error, *see* Section II.D below.

of a person's alleged self-defense claim is determined by the jury and is not appropriate for *voir dire*.

McLaughlin did not alter the court's perception or clarify he was raising a Sixth Amendment claim. Thus, the district court was not given the opportunity to consider whether its evidentiary ruling infringed on McLaughlin's constitutional right to an impartial jury. *See State v. Winzenburg*, 2022 MT 242, ¶¶ 17, 29, 411 Mont. 65, 521 P.3d 752 (fundamentally unfair to fault court for errors not raised). Issues not preserved by contemporaneous objection are generally waived and, thus, not subject to review on direct appeal. Mont. Code Ann. § 46-20-104(2); *State v. Thibeault*, 2021 MT 162, ¶ 9, 404 Mont. 476, 490 P.3d 105. Since McLaughlin did not preserve a Sixth Amendment challenge, the only way this Court may consider this issue is through the doctrine of plain error.

When a defendant's fundamental rights are at stake, this Court may choose to invoke the doctrine of plain error review of an unpreserved claim if failing to do so "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." *State v. Strizich*, 2021 MT 306, ¶ 19, 406 Mont. 391, 499 P.3d 575 (Court invokes plain error review "sparingly, on a case-by-case basis").

2. McLaughlin did not assert that plain error review warrants consideration of this claim.

McLaughlin has not advanced any law or reasoning that the doctrine of plain error should apply to the *voir dire* issue. (Br.) "It is not the job of this Court to conduct legal research on a party's behalf, to guess at his precise position, or to develop legal analysis that may lend support to that position." *Dodds*, ¶ 14. This Court requires an appellant to request plain error review on appeal with applicable legal argument and has "refused to invoke the common-law doctrine of plain-error review when a party raises such a request for the first time in a reply brief." *In re B.H.*, 2018 MT 282, ¶ 15, 393 Mont. 352, 430 P.3d 1006; *Strizich*, ¶ 30.

McLaughlin's failure to preserve a Sixth Amendment right and or advance any legal authority on why plain error review is warranted precludes this issue from being considered on direct appeal.

3. McLaughlin cannot establish the court's handling of voir dire constituted plain error.

Voir dire "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

To invoke the plain error doctrine, this Court must first find an error occurred. Trial courts have "great latitude in controlling *voir dire*." *State v. Grant*, 2011 MT 81, ¶ 8, 360 Mont. 127, 252 P.3d 193. "It is well established that '[a]bsent an abuse of discretion . . . the trial judge has great latitude in controlling *voir dire*.'" *State v. Michaud*, 2008 MT 88, ¶ 13, 342 Mont. 244, 180 P.3d 636; *Rosales-Lopez*, 451 U.S. at 189 (courts are afforded "ample discretion in determining how best to conduct" voir dire and may properly refuse to ask questions which are tied to prejudice only speculatively).

As long as a court conducts an adequate *voir dire*, a court's rejection of specific questions is not an error. *United States v. Scott*, 642 F.3d 791, 796 (9th Cir. 2011). The Ninth Circuit had held that it "will not disturb a district court's rejection of a defendant's specific questions unless the *voir dire* it conducts is 'so unreasonable or devoid of the constitutional purpose as to constitute an abuse of [ ] discretion.'" *Id*.

The United States Supreme Court has applied harmless error to a court's handling of *voir dire*, finding that "[f]airness requires a careful *voir dire* examination when there is a "significant likelihood" of juror prejudice. *Ristaino v. Ross*, 424 U.S. 589, 598 (1976). A significant likelihood of prejudice exists when a case involves "matters concerning which either the local community or the population at large is commonly known to harbor strong feelings," or the matters

are "inextricably bound up with the conduct of the trial." *Rosales-Lopez*, 451 U.S. at 189 (citing *United States v. Robinson*, 475 F.2d 376, 381 (D.C. Cir. 1973); *Ristaino*, 424 U.S. at 598).

Reyling on *Robinson*, the Ninth Circuit held that when the requested *voir dire* questions do not fall within these categories, the defendant has the burden of laying a foundation showing that his questions are "reasonably calculated to discover an actual and likely source of prejudice . . . ." *United States v. Jones*, 722 F.2d 528, 530 (9th Cir. 1983). Later, relying upon *Jones* and *Robinson*, the Ninth Circuit found that specific *voir dire* questioning is required for cases involving: (1) racial overtones; (2) matters on which the community is commonly known to harbor strong feelings; or (3) other forms of bias and distorting influence which have become evident through experience with juries). *United States v. Toomey*, 764 F.2d 678, 682 (9th Cir. 1985), *cert. denied*, 474 U.S. 1069 (1986).

Unlike the "insanity" defense at issue in *Olson*, or cases involving racial issues, or other clearly controversial issues, nothing in the record before the district court suggested that the jury pool harbored such strong feelings about self-defense to constitute an actual and likely source of prejudice that must be explored through *voir dire*.

Several courts have affirmed the trial courts' *voir dire* when it precluded discussion about affirmative defenses. For instance, in *Robinson*, *supra*, the court

found the defendant was not prejudiced in a felony murder case when the court did not allow *voir dire* questions relating to views on self-defense when the defense had not made a showing that the questions were reasonably calculated to discover actual or likely prejudice or presented material indicating likely prejudice in a community against self-defense claim. *See also, State v. Limary*, 235 A.3d 860 (ME 2020) (manslaughter trial was fundamentally fair when court declined to offer self-defense questions during *voir dire* when no clear evidence would support affirmative defense; no abuse of discretion to preclude queries about self-defense because specific inquiry required only in areas where there is more than speculation about potential bias); *State v. Graham,* 136 N.E.3d 959 (Ohio Ct. App. 2019) (no abuse of discretion to preclude *voir dire* questions on entrapment defense until defense proffered sufficient evidence to allow court to determine with "a reasonable degree of certainty that the entrapment defense will be a viable one"); *Connecticut v. Ebron*, 975 A.2d 17 (Conn. 2009) (no abuse of discretion to limit *voir dire* on willingness to follow instructions on self-defense); and *People v. Kendricks*, 459 N.E.2d 1137, 1142 (Ill. App. Ct. 1984) (court properly refused *voir dire* inquiry on self-defense because that defense is not controversial).[7]

[7]*See also Ebon*, 975 A.2d at 26, n.14, citing other jurisdictions that have concluded *voir dire* need not inquire into prospective jurors' views on self-defense.

Just as in *Robinson*, *Limary*, *Graham*, *Ebron*, and *Kendricks*, the district court's and counsels' *voir dire* confirmed that the prospective jurors would uphold McLaughlin's constitutional guarantees, including his right to remain silent, that he is presumed innocent until proven guilty and is not required to offer evidence to prove his innocence, and that the State bears the burden of establishing each element beyond a reasonable doubt. The prospective jurors also confirmed they would follow the law as instructed and the court provided clear and correct instructions relative to self-defense.

Additionally, McLaughlin inquired with the prospective jurors about any experience with assaults and openly discussed one juror's experience defending himself and following discussion in chambers a different juror was removed for cause based on his experience. And, as established above, when the court was conducting *voir dire*, it was not evident that the elements of JUOF would be met, so allowing inquiry on that issue (*e.g.*, the reasonableness of McLaughlin's act) would be improper.

McLaughlin has not established that JUOF was so controversial as to render *voir dire* limitations on the issue an abuse of discretion, let alone demonstrate that failing to invoke plain error would "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." *Strizich*, ¶ 19.

4. Structural error does not apply

McLaughlin asserts that the court's handling of *voir dire* was structural error and, thus, subject to automatic reversal. However, not all alleged errors during *voir dire* will constitute structural errors.

Significantly, the United States Supreme Court has held errors made during *voir dire* are subject to harmless error analysis and therefore do not always constitute structural errors. *See, e.g., Mu'Min v. Virginia*, 500 U.S. 415, 425-26, 431 (1991) (to constitute reversible error, a "trial court's failure to ask [specific] questions [on voir dire] must render the defendant's trial fundamentally unfair"); *Rosales-Lopez*, 451 U.S. at 191 (Failure to honor a defendant's request that jurors be surveyed for prejudice "will be reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury.").

Moreover, the cases relied on by McLaughlin concerning structural error, *Whitlow* and *Riggs*, are not compelling for two reasons. First, those cases did not apply plain error, but concerned the prejudice prong of IAC. Second, those cases relied upon *State v. Lamere*, 2005 MT 118, ¶ 15, 327 Mont. 115, 112 P.2d 1005 (if defendant shows attorney performed deficiently by not sufficiently questioning prospective jurors during voir dire, a "structural error" occurred, and prejudice is presumed without further inquiry). But *Lamere* was abrogated by the United States

Supreme Court in *Weaver v. Massachusetts*, 582 U.S. 286 (2017), which held that when an IAC claim is based on the jury selection process, prejudice is not presumed under structural error analysis.

Additionally, the three cases *Lamere* was based on are distinguishable from the issue presented here. *See Lamere*, ¶ 50 (citing *State v. Lamere*, 2000 MT 45, ¶ 50, 298 Mont. 358, 2 P.3d 204 (material failure to substantially comply with statutes governing the procurement of the jury venire); *State v. Bird*, 2002 MT 2, ¶ 40, 308 Mont. 75, 43 P.3d, 266 (right to be present violated when defendant excluded from individual *voir dire* proceedings); *State v. Good*, 2002 MT 59, ¶ 62, 309 Mont. 113, 43 P.3d 948 (abuse of discretion when challenge for cause improperly denied and defendant used a peremptory challenge to remove the disputed juror and exhausted all other peremptory challenges)), *accord, State v. Deveraux*, 2022 MT 130, ¶ 25, 409 Mont. 177, 512 P.3d 1198 (clarifying *Good's* three-part test for structural error during *voir dire*).

Finally, *Lamere* did not address *State v. Nichols*, 225 Mont. 438, 448, 734 P.2d 170, 176 (1987), where this Court held that a *voir dire* error was harmless because the defendant's trial testimony required any juror to convict on the charges.

The court's handling of *voir dire* did not constitute structural error. Nor has McLaughlin established that plain error review is warranted to consider a Sixth Amendment claim or a challenge to the court's determination that JUOF had not been joined.

D. Evidentiary ruling

First, just like the Sixth Amendment claim, McLaughlin has not advanced any law or reasoning that the doctrine of plain error should apply to the court's evidentiary ruling about when JUOF was joined in this case. (Br.) Thus, this Court should decline to consider such an appeal argument. *See Strizich*, ¶ 30. Nonetheless, plain error review of the district court's ruling is unwarranted.

Determinations of whether a defendant has laid sufficient foundation is an evidentiary question that this Court reviews for abuse of discretion. *State v. Mont. Ninth Judicial Dist. Court*, 2014 MT 188, ¶ 19, 375 Mont. 488, 329 P.3d 603 (herein after, Lau). The district court did not act arbitrarily or outside the bounds of reason when it relied upon *Daniels* and its progeny in concluding McLaughlin's affirmative defense would not be joined until the evidentiary foundation for JUOF had been established on the record.

In *Daniels*, this Court reiterated that "the defendant has the initial burden to 'offer evidence of [JUOF],'" and must adhere to the applicable rules of evidence and establish any necessary foundation. *Daniels*, ¶¶ 15, 23 (citing Mont. Code

Ann. §§ 26-1-401, 46-16-201). *See also, Lau*, ¶ 12. Although Daniels admitted shooting the victim during his 911 call, this Court affirmed the district court's requirement that Daniels needed to testify to establish the foundational requirements to present character evidence about the victim. *Daniels*, ¶ 28. Similarly, in *State v. R.S.A.*, 2015 MT 202, 380 Mont. 118, 357 P.3d 899, this Court agreed that the quantum of proof gleaned from the defense cross-examining witnesses was insufficient to inject JUOF into the case.

The district court did not abuse its discretion by not finding McLaughlin's self-serving statements on the 911 recording were sufficient foundational evidence of JUOF. First, contrary to McLaughlin's argument on appeal (*see* Br. at 42), giving pretrial notice of his affirmative defense did not place it at issue in the trial. *See Daniels*, ¶ 15. Second, in his 911 call, McLaughlin had not admitted he killed Raymond or that Raymond was even deceased. *See Daniels*, ¶ 15 (JUOF is an affirmative defense, requiring the defendant to "admit[] the doing of the act charged," while "seek[ing] to justify, excuse or mitigate it").

Lastly, McLaughlin's statements to the dispatcher did not establish why McLaughlin believed deadly force was necessary (*e.g.*, his reasonable belief that Raymond was going to cause serious bodily injury or kill him). McLaughlin reported only that he warned Raymond not to enter his room, but Raymond entered and "tried to assault" him. Until McLaughin testified, and added details about

Raymond allegedly telling him he was the Grim Reaper and he intended to kill him, there was insufficient evidence to join his affirmative defense.

Just as in *Daniels*, *Lau*, and *R.S.A.*, the district court applied the proper evidentiary principles and did not abuse its discretion when it determined that as of *voir dire*, McLaughlin had not met his initial burden of establishing the elements of JUOF. During several pretrial hearings and its pretrial order, the district court made it clear that a proper foundation must be laid for JUOF to be joined at trial. The record demonstrates the court did not act arbitrarily or without reason during *voir dire* when it found JUOF had not been joined. McLaughlin has failed to establish that the court abused its discretion, let alone committed plain error, in making this determination.

III. The district court did not abuse its discretion when it rejected McLaughlin's proposed jury instructions.

Contrary to McLaughlin's claim, MPJI No. 1-104 (MPJI No. 1-104)[8] does not lower the State's burden of proof required under the Due Process Clause. (Br. at 34-39.) Moreover, McLaughlin's claim that his proposed instructions were not different than the pattern instruction, but simply sought to "clarify" the burden of proof, is belied by the lengthy and complex nature of his proposed instructions.

[8] *See* https://courts.mt.gov/Courts/boards/CriminalJuryInstructionsCommission.

The Due Process Clause of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

However, "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof," "so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt." *Victor*, 511 U.S. at 5. Instead, the instructions, taken as a whole, must correctly convey the concept of reasonable doubt to the jury. *Id*. Thus, the question here is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* [*i.e*., reasonable doubt] standard." *Id*. at 6.

The district court's Jury Instruction No. 3 (JI-3), which is the same as MPJI No. 1-104, provided in relevant part that:

> 3. The State of Montana has the burden of proving the guilt of the Defendant beyond a reasonable doubt.
>
> 4. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt.

(Doc. 359, JI-3).

This instruction was sanctioned by this Court in *State v. Lucero*, 214 Mont. 334, 693 P.2d 511 (1984), and subsequent cases addressing the issue. *See, e.g.*, S*tate v. Steffes*, 269 Mont. 214, 235, 887 P.2d 1196, 1209 (1994); *State v. Flesch*, 254 Mont. 529, 535, 839 P.2d 1270, 1274 (1992); *State v. Goodwin*, 249 Mont. 1, 14-15, 813 P.2d 953, 961 (1991), *overruled on other grounds by State v. Turner*, 262 Mont. 39, 50, 864 P.2d 235, 241 (1993); *State v. Milhoun*, 224 Mont. 505, 73 P.2d 1170 (1986).

Thus, in order for this Court to find that the trial court abused its discretion by giving JI No. 3, it must ignore the time-honored doctrine of *stare decisis*. *City of Missoula v. Sadiku*, 2021 MT 295, ¶ 13, 406 Mont. 271, 498 P.3d 765. As this Court has explained, *stare decisis* is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *State v. Kirkbride*, 2008 MT 178, ¶ 13, 343 Mont. 409, 185 P.3d 340 (citation omitted). "Though *stare decisis* is not a rigid doctrine preventing reexamination of past cases, 'weighty considerations underlie the principle that courts should not lightly overrule past decisions.'" *Guethlein v. Family Inn*, 2014 MT 121, ¶¶ 16-17, 375 Mont. 100, 324 P.3d 1194 (when prior cases not challenged, doctrine of stare decisis "requires" Court to follow prior holdings).

McLaughlin's theory on appeal is insufficient to overcome the "weighty considerations" this Court has already employed in sanctioning the language of JI No. 3. McLaughlin admits that his alternative instruction "did not attempt to change the burden of proof, only clarify it" and claims it "offered a great deal more explanation and clarification" that the jurors must "reach their verdict based on 'moral certainty,'" and would have "provided the jury with a more definite reason to consider all the evidence all the more carefully. (Br. at 35-36.)

However, McLaughlin's proposed instruction was not a modicum of clarity and would have created more confusion with the jury. *See Flesch*, 254 Mont. at 535, 839 P.2d at 1274 ("more complicated instructions on reasonable doubt did not help clarify the State's burden of proof, but rather had a tendency to confuse the jury") (quoting *Lucero*, 214 Mont. at 343, 693 P.2d at 516); *Victor*, 511 U.S. at 10-12; *Stoltie v. Tilton*, 538 F.3d 1252, 1258-59 (9th Cir. 2008) ("moral certainty" instruction emanated from language and patterns of speaking that are not prevalent in our current world).

McLaughlin's argument also ignores that "moral certainty" is the equivalent to "beyond a reasonable doubt," *see Victor*, 511 U.S. at 12. Although the United States Supreme Court did not find the instructions in *Victor* that use the "moral certainty" phrase were unconstitutional, the Court explicitly stated it "[did] not condone the use of the phrase" and advised that it should be avoided as

an unhelpful means of defining reasonable doubt. *Id.* at 16, 22. Given the complexity of Mclaughlin's proposed instruction and use of terms no longer relatable to modern jurors, the district court correctly found that his proposed instruction created confusion and lessened clarity. Just as this Court held in *Flesh.*

McLaughlin's argument also ignores that Montana courts used the "moral certainty" instruction from *Commonwealth v. Webster,* 5 Cush. 295 (Mass. 1850), in several cases, but abandoned that instruction in favor of MPJI No. 1-104. *Lucero*, 214 Mont. at 343, 693 P.2d at 516 (listing cases). This Court approved MPJI No. 1-104 after concluding that the *Webster* instruction and those like it "do not help clarify the State's burden of proof [and] have a tendency to confuse the jury." *Id*.

In addition to proposing confusing and unnecessary language to define "reasonable doubt," McLaughlin presents flawed circular reasoning by asserting that JI No. 3 was unconstitutional because the proposed language in his reasonable doubt instruction "would have given the jurors a fuller understanding" of the State's burden of proof. Simply asserting that his proposed instruction would have been "better," is not a compelling reason for this Court to find its opinions affirming the use of MPJI-1-104 were manifestly wrong. Nor has McLauglin established why MPJI No. 1-104 lowers the State's burden. He simply asserts his proposed instruction would "clarify" the State's burden of proof.

McLaughlin's claim that his proposed instruction was "better" twists the issue before this Court. When the appropriateness of jury instructions is challenged, this Court determines if the trial court abused its discretion in instructing the jury, by examining if the instructions, taken as a whole, fully and fairly instruct as to the applicable law and "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on" reasonable doubt. *Hardy*, ¶ 19; *Victor*, 511 U.S. at 5.

The instructions here fully and fairly instructed the jury. The court not only gave the jury instruction for "reasonable doubt," that this Court has consistently sanctioned, but also repeatedly instructed the jury that the State bore the burden of proof and that McLaughlin was presumed innocent. When the instructions are considered as a whole, JI-3 did not lower the State's burden or raise the degree of doubt required for acquittal. There is certainly a "reasonable likelihood that the jury understood the instructions" and based its verdict on the proper burden of proof. McLaughlin has not met his burden to establish that the district court abused its discretion in instructing the jury. *Hardy*, ¶ 43.

IV. The district court imposed a legal sentence.

McLaughlin was convicted of felony murder which is punishable by death, life in prison, or a term of imprisonment of not less than 10 years or more than

100 years. *See* Mont. Code Ann. § 45-5-102(2). McLaughlin's 80-year sentence was a legal sentence, well-within the statutory parameters. Yet, McLaughlin asserts the district court failed to follow statutory mandates and further claims the court abused its discretion by imposing an unreasonable sentence. (Br. at 45-51.) McLaughlin's claims are not properly before this Court.

First, McLaughlin is precluded from challenging the court's alleged failure to follow sentencing statutes since he did not assert this challenge at sentencing. *See Thibeault*, ¶ 10 n.4 ("unpreserved challenges to sentences or conditions on the basis of non-compliance with affirmative statutory prerequisites or mandates for that type of sentence or condition are not reviewable under the narrow *Lenihan*[9] exception).

Second, McLaughlin's complaint that the court's sentence was not reasonable is an equitable challenge concerning the proportionality of the offense to the sentence and is not properly raised on direct appeal. *McGhee*, ¶ 34 (Court does not review the length of a sentence or its proportionality to the crime).

Even if this Court considers this issue, the record fully supports that the court imposed a legal sentence. McLaughlin's argument that the district court failed to consider mitigating factors (*see* Br. at 47) is contradicted by the court's comments at sentencing and in the judgment. The district court did not imply

[9]*State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979).

McLaughlin intended to kill Raymond and it acknowledged his substance abuse history. The court articulated several reasons for its sentence, including McLaughlin's extensive criminal history, substance abuse issues, and that he is a violent offender. (8/30/22 Tr. at 17-19; Doc. 371.) The court categorized McLaughlin's crime as "horrendous" and found there was "absolutely no excuse for the excess that was endured by [Raymond]." (*Id*. at 17.)

The court did not rely on any incorrect information or fail to consider other sentences imposed for similar crimes. The court also explicitly referenced McLaughlin's presentence investigation report, to which McLaughlin offered no objections or amendments. McLaughlin's challenge to his sentence fails as the district court followed the applicable sentencing statutes and imposed a sentence within the legal parameters for felony murder.

/ / /

CONCLUSION

This Court should affirm McLaughlin's homicide conviction and the district court's judgment and sentence.

Respectfully submitted this 30th day of April, 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 9,781 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

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