

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0477

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHN HILL,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Third Judicial District Court,
Anaconda-Deer Lodge County, The Honorable Ray J. Dayton, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

I. The offense 3

II. The investigation 10

 A. Weber interview 10

 B. Hill’s jail call admissions 11

 C. Shooting reconstruction, toolmarks and latent print analysis 12

III. Hill’s case 13

IV. Facts related to witness-legally-accountable jury instruction claim 16

SUMMARY OF THE ARGUMENT 18

STANDARD OF REVIEW 19

ARGUMENT 19

Hill’s claim that he was entitled to a witness-legally-accountable jury instruction fails 19

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

TABLE OF AUTHORITIES

Cases

<i>City of Helena v. Frankforter</i> , 2018 MT 193, 392 Mont. 277, 423 P.3d 581	20
<i>State v. Allen</i> , 2010 MT 214, 357 Mont. 495, 241 P.3d 1045	23
<i>State v. Charlo-Whitworth</i> , 2016 MT 157, 384 Mont. 50, 373 P.3d 845	19, 20, 21, 23
<i>State v. Flowers</i> , 2018 MT 96, 391 Mont. 237, 416 P.3d 180	21
<i>State v. Hall</i> , 2003 MT 253, 317 Mont. 356, 77 P.3d 239	20, 21, 22, 23
<i>State v. Johnson</i> , 257 Mont. 157, 848 P.2d 496 (1993)	20
<i>State v. Root</i> , 2015 MT 310, 381 Mont. 314, 359 P.3d 1088	20
<i>State v. Wells</i> , 2021 MT 103, 404 Mont. 105, 485 P.3d 1220	19
<i>State v. Williams</i> , 2015 MT 247, 380 Mont. 445, 358 P.3d 127	19

Other Authorities

<u>Montana Code Annotated</u>	
§ 26-1-303	20
§ 45-2-302(3)	20, 21, 23
§ 46-16-213	20

ISSUE PRESENTED

Did the district court abuse its discretion in declining to give a witness-legally-accountable jury instruction for attempted deliberate homicide pertaining to the passenger in Appellant’s vehicle—when Appellant’s defense at trial was that he did not do the crime but the passenger did the crime?

STATEMENT OF THE CASE

The State charged Appellant John Hill with three counts of attempted deliberate homicide (**Counts I-III**); three counts of assault on a peace officer (**Counts IV-VI**); one count of criminal possession of dangerous drugs (**Count VII**); one count of partner or family member assault (**Count VIII**); and one count of fleeing or eluding a peace officer (**Count IX**). (Doc. 57, 2nd. Am. Info.) The charges stemmed from an incident whereupon Hill led police on a meth-fueled highway chase and shot his AR-15 rifle through his windshield towards Sergeant Richard Pasha and two other officers—while the officers were employing stop sticks on the highway to disable Hill’s vehicle. (*See id.*)

In the omnibus hearing memorandum, Hill asserted he would rely on a general denial. (Doc. 22 at 3.) In Hill’s pretrial motion to dismiss, Hill introduced his theory that it was unclear whether Hill or his passenger, Elizabeth Weber, shot at police because the officers did not contemporaneously say on their bodycams

who they thought fired at them. (Doc. 32 at 2, 8.) The State listed Weber as a witness for the State in all Informations and witness lists. (Doc. 3 at 4; Doc. 44 at 4; Doc. 57 at 5; Doc. 77 at 1; Doc. 105 at 1.)

At trial, the State presented its theory that Hill attempted to kill the three officers by shooting his AR-15 at them while they were employing stop sticks on the highway. In support, the State presented: (1) Weber's testimony that she never touched the gun; (2) the State's reconstructionist who concluded that the shot was fired from the driver's seat; and (3) Hill's admissions at the scene, as well as Hill's jail calls whereupon he admitted he was attempting suicide by cop. (Trial Tr. at 277, 374, 468, 473, 475, 477, 780-81; State's Ex. 91, *offered, admitted, and published at* Trial Tr. at 783, 785.)

In contrast, Hill's theory at trial was that Weber fired the AR-15 at the officers because: (1) Weber was lefthanded; (2) the officers did not specifically see who fired the shot; and (3) a defense reconstructionist concluded it was possible that the shot could have been fired from the passenger seat. Hill also repeatedly attacked Weber's credibility by calling probation officers to testify to highlight her drug addiction and prior probationary sentence. (Trial Tr. at 393, 534, 546-49, 815, 820, 847.) No testimony or evidence was presented that Weber aided or abetted Hill in committing attempted deliberate homicide.

During the settling of the instructions, Hill offered an accomplice liability instruction, contending the instruction was appropriate for all offenses. (Trial Tr. at 923.) The district court denied the requested instruction. (*Id.* at 925-27.)

The jury found Hill guilty of all counts, except for two attempted deliberate homicide counts, Counts II and III, pertaining to the officers who were standing next to Sergeant Pasha during the shooting. (Doc. 120; Trial Tr. at 1006-07.) The district court sentenced Hill to a life sentence, with no eligibility for parole for the first 30 years, for attempted deliberate homicide as to Sergeant Pasha in Count I, along with comparatively nominal sentences in Counts IV-IX, concurrent with Count I. (Doc. 133 at 3-4.)

Hill appeals, arguing that the district court abused its discretion by failing to give the accomplice liability instruction he offered for attempted deliberate homicide. (Appellant's Br. at 16.)

STATEMENT OF THE FACTS

I. The offense

On June 19, 2021, Officer Brian Berger attempted to initiate a traffic stop on a green Ford Ranger in Butte. (Trial Tr. at 211.) The Ranger did not stop, but instead ran several red lights and stop signs while exceeding the speed limit. (*Id.* at 211, 229.) The pursuit continued through several Butte streets, with the Ranger

eventually turning onto I-90 toward Anaconda. (*Id.* at 211.) Officer Berger ran the license plate and identified John Hill as the vehicle's owner. (*Id.* at 212.) After Officer Berger radioed dispatch to explain that Hill was not stopping, Officers Shawn Brown and Bryce Foley arrived as backup and fell into the pursuit line. (*Id.* at 212, 264-65.) Officer Berger radioed dispatch to inform Anaconda-Deer Lodge authorities and the Montana Highway Patrol about the pursuit. (*Id.* at 212.)

Hill was driving and Elizabeth Weber was in the passenger seat. (Trial Tr. at 371.) When Officer Berger started pursuing Hill's vehicle, Hill looked at Weber with a "crazy little look in his eye" and smiled and said, "[W]e're going to die today." He hit the gas. (*Id.*) Hill's AR-15 rifle was between them in the front seat. (*Id.* at 373.) Hill told Weber that he was "going to shoot at the cops, so they'd shoot back at us. It would be death by cops." (*Id.* at 417.) Hill further explained to Weber that "he was going to unload all 30 rounds" from the AR-15. (*Id.* at 669-70.) Weber was scared. (*Id.* at 371.)

Hill directed Weber to take the gun. Weber refused, repeatedly telling Hill there was "no way in hell am I going to touch that gun." (Trial Tr. at 374.) However, Hill requested beer, which Weber provided to him. Hill also requested meth, which Weber grabbed from Hill's pocket and gave him. Hill both smoked and ate the meth. (*Id.* at 374-75.) Hill directed Weber to call his mother for him,

which she did, whereupon Hill said his goodbyes. (*Id.* at 375.) Weber called her own children and said goodbye. (*Id.* at 376.)

Hill maintained his Ranger at highway speeds from 80 to 90 miles per hour. (Trial Tr. at 213.) Officer Berger saw Hill reach back and close his back sliding cab window, which was darkly tinted. (*Id.* at 226-27.)

Anaconda-Deer Lodge Officer Blake Linsted took over the pursuit. Butte Officers Berger and Foley fell back and were advised to terminate the pursuit, but they reengaged, following Officer Linsted's sole vehicle for a safety backup. (Trial Tr. at 266; State's Ex. 13 at 1:00-1:30, *offered, admitted, and published at* Trial Tr. at 215-16.)

Officer Linsted radioed his fellow Anaconda-Deer Lodge officers—Sergeant Richard Pasha, Officer David Wolfe, and Officer Dan Beasley—to set up stop sticks at mile marker 201 to disable the Ranger tires. (Trial Tr. at 237-38.) Sergeant Pasha and Officer Beasley rushed to the 201 exit to do so. (*Id.* at 296, 299.) Officer Wolfe joined in another vehicle. (*Id.* at 299.) The two patrol vehicles parked next to each other at the 201 exit, near where the on-ramp converges with the slow lane of travel. (*Id.* at 333-34, 687.) The officers stood near each other, with Officer Beasley off Sergeant Pasha's right hip, and Officer Wolfe to Sergeant Pasha's left. (*Id.* at 337.) Sergeant Pasha heard Hill's vehicle engine revving, sounding like it was "basically pinned out." (*Id.* at 305.)

Meanwhile, from the passenger seat, Weber saw that Hill “was trying to shoot at the police officers” as they pulled out the stop sticks. (Trial Tr. at 394.) She could see “the barrel of the gun like right there” as she “was looking at the cops[.]” (*Id.* at 377.) Weber saw Hill pull the trigger right around the time the spike strips were deployed. (*Id.* at 378.) She heard a loud sound and a ringing in her ears. (*Id.*) But after Hill fired one shot, the clip on the AR-15 fell out of the gun. Hill commanded Weber to grab the clip for him. (*Id.* at 378-79.) Weber said, “[F]uck you I’m not touching that thing.” (*Id.* at 379.)

From the officers’ point of view, Hill’s Ranger was a “car length’ish” away, and before the Ranger hit the stop strips, all three officers heard a “loud pop” sound or “cracking sound.” (Trial Tr. at 306-07, 688, 713.) Sergeant Pasha ducked instinctively, and his ears were ringing. (*Id.* at 307, 309.) Officer Wolfe looked around, making sure his colleagues were unharmed, and said, “What the hell was that?” (*Id.* at 688.) Officer Beasley, based on his training and experience, immediately recognized it as a gunshot. (*Id.* at 713.) So did Sergeant Pasha. (*Id.* at 309-10.)

The stop sticks were successfully deployed, deflating the driver side front tire on the Ranger. (Trial Tr. at 239, 306-07; *see also* State’s Exs. 9 and 10, *offered and admitted at* Trial Tr. at 269, *published at* 272.) Hill’s vehicle continued traveling for around two miles until it was fully disabled. (Trial Tr. at

344.) Weber noticed that the Ranger was losing speed. (*Id.* at 379.) Hill said, “It looks like we’re going to jail today.” (*Id.*)

Officer Linsted arrived first, threw his truck into park, got out fast, put his rifle on Hill, who was already stepping out of the driver side of the Ranger. (Trial Tr. at 241.) He screamed at Hill to get on the ground. (*Id.* at 242.) Hill put his hands up, walked to the back of his vehicle, and laid down on his stomach. (*Id.*) Upon Officer Foley’s further direction, Hill backed up toward the officers and was secured. (State’s Ex. 13 at 5:25-6:00; State’s Ex. 15 at 1:40-2:25, *offered, admitted, and published at* Trial Tr. at 217-18; Trial Tr. at 277.) Sergeant Pasha said, “There was a shot at us . . . I’m 100 percent certain.” (State’s Ex. 15 at 2:28-2:33.)

Officer Foley pat searched Hill and then placed him into the patrol vehicle. (State’s Ex. 15 at 6:30-7:00.) Hill asked if Weber was okay, and further requested to give Weber a hotel room key. (Trial Tr. at 276; State’s Ex. 2 at 00:20-00:35, *offered, admitted, and published at* Trial Tr. at 275.) Hill said, “I’m the one in trouble . . . how much?” Officer Foley demurred. (State’s Ex. 2 at 00:40-00:45.) Hill said, “[Weber], I love you. Come see me, I’ll call you in a bit. Or something, maybe, who the fuck knows.” Hill gave a frustrated sigh and said, “I just wanted them to kill me.” (State’s Ex. 2 at 1:05-1:16; Trial Tr. at 276-77.)

Meanwhile, Officer Berger secured Weber in the back of his patrol car. (Trial Tr. at 215.) He observed that Weber “seemed frightened.” Weber mentioned that her “ears were ringing.” (*Id.* at 231.) Sergeant Pasha and Officer Foley transported Weber back to Anaconda. Neither officer saw any signs of impairment in Weber. (*Id.* at 227, 358.) For her part, Weber was happy to be alive. She told the officers: “Thank you for not shooting me” and “thank you for saving my life.” (*Id.* at 380.)

As to the officers, Sergeant Pasha felt lucky that the bullet didn’t hit him. He thought about his wife and kids and how close he was to being killed. (Trial Tr. at 332.) Officer Beasley noted that his body armor would not have stopped a .223 round from an AR-15, and he also thought about his family, specifically his kids growing up without a dad. (*Id.* at 717.)

After securing Weber and Hill, Officers Berger and Foley conducted a safety sweep on the Ranger. (Trial Tr. at 227, 268.) They discovered the AR-15 was laying crossway on the seat between the passenger and the driver seat. The barrel was pointed towards the passenger floorboard, while the butt of the rifle was at a 45-degree angle towards the driver seat. (Trial Tr. at 219, 221, 268; State’s Ex. 6, *offered and admitted at* Trial Tr. at 269, *published at* 271; State’s Ex. 31, *offered and admitted at* 633, *published at* 636.) The angle of the placement of the AR-15 indicated to Officer Foley that the rifle would have been set there by the driver.

(Trial Tr. at 272.) A bullet hole was located on the lower righthand side of the windshield. (*Id.* at 219-220, 268, 316; State’s Ex. 31.) Sergeant Pasha noted that the bullet hole was directionally toward where he and the other officers were standing while employing the stop sticks. (Trial Tr. at 317; State’s Exs. 33, 37, *offered and admitted at* Trial Tr. at 633, *published at* 637-38.) On the passenger floorboard was a case of beer, and a purse with a pack of cigarettes. (Trial Tr. at 271; State’s Ex. 6.)

Another pack of cigarettes was on the driver’s side. (State’s Ex. 11, *offered and admitted at* Trial Tr. at 269, *published at* 273.) Inside this pack was a small baggie of a crystalline substance, later determined to be meth. (Trial Tr. at 505; State’s Ex. 73, *offered and admitted at* Trial Tr. at 633, *published at* 646; Trial Tr. at 588.) A blood test would reveal the presence of meth in Hill too. (Trial Tr. at 619-21.)

Sixteen loose AR-15 bullets were also on the driver side floorboard. (Trial Tr. at 322; State’s Ex. 62, *offered and admitted at* Trial Tr. at 633, *published at* 643.) One fired shell casing was recovered from the vehicle. (Trial Tr. at 329.) The bullet was not recovered. (*Id.* at 342.)

A bumper sticker had been placed on the back window of Hill’s vehicle depicting an AR-15 and the phrase “FUCK AROUND & FIND OUT.” (State’s Ex. 12, *offered and admitted at* Trial Tr. at 269, *published at* 273.) Officer Foley

testified to his knowledge that the phrase was a message of hostility toward law enforcement or anyone attempting to control them. (Trial Tr. at 273.)

II. The investigation

A. Weber interview

Weber completed an interview with Detective Chris Snyder and Detective Josh Stearns. (Trial Tr. at 347, 667.) Detective Snyder noted that Weber was forthcoming but also emotional—scared and tearful. (*Id.* at 498-99.)

Detective Snyder did not sense that Weber was evasive in her answers. (*Id.* at 527-28.) Detective Stearns did not note any signs of impairment in Weber. (*Id.* at 671.) He noted that Weber’s account of when the shot was fired corroborated the officers’ accounts. (*Id.* at 667.)

Weber informed them that Hill had said “that he was going to unload all 30 rounds” but the magazine fell out after the first shot. (Trial Tr. at 669-70.) Upon his further investigation into the AR-15, Detective Stearns discovered that Hill had “pro mag magazines” which were essentially “knock off” magazines for the AR-15, which might have explained them falling out. (*Id.* at 670.)

Weber was not charged with any offense, nor was Weber given any deal for her trial testimony. (*Id.* at 626.)

B. Hill's jail call admissions

Detective Kristopher Vauthier monitored Hill's jail calls. (Trial Tr. at 780-81.) He discovered that Hill had made several admissions about the incident to an unknown female during the jail call. (State's Ex. 91.) The following conversation occurred:

FEMALE: I'm dying.

HILL: Fuck, join the crowd. I tried.

FEMALE: I have a few weeks left they said.

(Ex. 91 at 1:06-1:15.) She further explained that she had cancer. (*Id.* at 1:40-1:45.)

FEMALE: You know, I'm sorry.

HILL: Oh don't be sorry. Fuck, I tried to beat you but they don't shoot back for some reason.

FEMALE: I'll be there waiting at the gate for you.

HILL: I know you will . . . I was trying to beat you there but. . .
[laughing]

(*Id.* at 1:56-2:12.)

HILL: Fuck, I thought I won but . . . they got scared!

(*Id.* at 2:45-2:50.)

FEMALE: You do it, you do it right, don't ya.

HILL: Well, we're not gonna fuck around are we?

FEMALE: Nah, I guess there's no room for that. No time.

HILL: Well, there's plenty of it I guess. Well, fuck. I didn't expect to live through it. I wasn't trying.

FEMALE: [unintelligible] guns at ya?

HILL: Oh no they had guns at me. [unintelligible] a lot of em. A fucking lot of em.

FEMALE: Was it Sunday night, is that when that happened?

HILL: Aw, fuck this was like two weeks ago.

FEMALE: I know but Monday or . . .

HILL: I don't know when that was. Saturday, it was on the 19th I think. It was a Saturday I think. Yeah.

(Id. at 3:05-4:00.)

C. Shooting reconstruction, toolmarks and latent print analysis

Montana Department of Justice Division of Criminal Investigation Agent Anthony Poppler conducted the State's shooting reconstruction. Accounting for the variables, Agent Poppler used a trajectory rod to simulate the direction of the shot from the bullet hole in the windshield. (Trial Tr. at 460.) He concluded that the angle showed that the bullet was fired from the driver side of the vehicle, with a margin of error of between 1 and 5 degrees. (*Id.* at 468, 473, 475, 477.)

State Crime Lab Firearm and Toolmark Examiner Lynette Lancon compared the fired shell casing to Hill's AR-15 and opined that the AR-15 was the firing gun. (Trial Tr. at 561.)

State Crime Lab Latent Print Specialist Shephanie Shappee analyzed prints found on the stock of the AR-15 and determined that the prints could be excluded as belonging to either Hill or Weber—which did not exclude either from firing the gun, but rather indicated that someone else had left the impressions. (*Id.* at 57-78.)

III. Hill’s case

In opening statements, defense counsel told the jury that “lefthanded Beth Weber could also have fired the shot[.]” (Trial Tr. at 206-07.) Hill explained that Weber’s “word is not to be trusted” because she was on probation and used drugs. (*Id.* at 207.)

Hill cross-examined Weber about her history with methamphetamine and her struggles with addiction, and her prior probationary sentence. (Trial Tr. at 383-388.) Hill questioned Weber’s overall honesty. (*Id.* at 387-393.) Weber confirmed she was lefthanded. (*Id.* at 393.) Hill asked if Weber struggled for the barrel or touched the gun, and Weber denied touching the gun. (*Id.* at 394.) Hill accused Weber of having a motivation to lie to prevent revocation of her sentence. Weber responded, “I had no involvement in this besides being put in the passenger seat and having my life at risk was my involvement in this.” (*Id.* at 419.)

Hill cross-examined the police officers extensively about Weber, including asking about whether they adequately pat searched Weber and whether Weber

was a suspect upon the conclusion of the incident. (Trial Tr. at 225-26.) Hill cross-examined investigators about the adequacy of the investigation into Weber, and their failure to report possible probation violations or investigate her reputation for honesty. (*Id.* at 523, 529.) Hill highlighted that Weber carried her cell phone with her to the patrol car. (*Id.* at 254-55.) Hill cross-examined Officer Foley about moving the passenger seat during his safety sweep of the Ranger. (*Id.* at 277.)

Hill obtained the officers' admissions that, from their respective vantages, or because of the 95-mph speed of the vehicle, or because of the dark tint of the vehicle, they did not see a gun raised toward them nor did they see who fired the shot. (Trial Tr. at 251, 341, 728, 743.) Hill brought up a possible scenario related to a "struggle" for the gun, asking Officer Linsted:

DEFENSE COUNSEL: And you don't know if Mr. Weber, or excuse me, was Ms. Weber and Mr. Hill might've struggled for the gun, correct?

OFFICER LINSTED: Yeah, I don't know.

(*Id.* at 252.) Hill asked Officer Foley:

DEFENSE COUNSEL: Okay. Did you know that Beth Weber [is] left-handed?

OFFICER FOLEY: Uh, I did recently find out, yes.

DEFENSE COUNSEL: Okay. Um, couldn't a left-handed person put that rifle uh in that position?

OFFICER FOLEY: I mean yeah, I mean anything is possible.

(Id. at 278.)

Hill called Weber's 2017 probation officer and inquired as to Weber's conduct on supervision and her reputation for truthfulness. (Trial Tr. at 534, 546-49.) Hill called two more probation officers for the same purposes. *(Id. at 815, 820.)*

Finally, Hill called William Schneck, a crime scene reconstructionist. Hill had asked Schneck to determine whether a passenger could fire a shot based on the bullet hole in the window. (Trial Tr. at 847.) Schneck initially thought that the "bullet traveled more from the driver side toward the left side out of the windshield." *(Id. at 836.)* He explained that the State reconstructionist "did a pretty good job" but he thought that the findings should have been more general without an angular measurement. *(Id. at 837.)* Schneck conducted his own reconstruction with a different 1997 Ford Ranger in Arizona. *(Id. at 838.)* He asked a friend with similar height to Weber to sit in the passenger seat. *(Id. at 839.)* He concluded that "it's certainly possible for the driver or the passenger to

have taken that shot out the windshield.” (*Id.* at 847.) Schneck also thought that the shot would be easier if the passenger was lefthanded.¹ (*Id.* at 848.)

IV. Facts related to witness-legally-accountable jury instruction claim

First, at the close of the State’s case, Hill moved for a directed verdict, alleging that Weber was legally accountable for “all of the crimes” charged. (Trial Tr. at 791.) The district court asked:

COURT: How is she accountable for the crime of Attempted Deliberate Homicide, for example?

DEFENSE COUNSEL: If she was struggling for the gun with Mr. Hill and, and we don’t have any reliable testimony about any of this, but she would be legally . . .

COURT: What witness testified that she was struggling with the gun?

(*Id.* at 791-92.) Defense counsel responded that this was a “possible scenario[.]”

(*Id.*) Defense counsel argued that Weber had motivations to avoid detention by law enforcement. (*Id.* at 794.) The district court denied the motion, holding that

¹ The State disputed the lefthanded theory through Detective Stearns, who observed that the fix sight on Hill’s AR-15 was adjusted for a righthanded shooter. (Trial Tr. at 675.) If a lefthanded shooter shot the gun, the injection port would hit the shooter in the face. (*Id.* at 676.) Detective Stearns also noted the passenger would have to essentially execute a difficult sideways shot. (*Id.*)

there was “no evidence” presented that Weber was legally accountable for attempted deliberate homicide. (*Id.* at 811-12.)

Next, during the settling of instructions, the defense circled back to the issue, proposing the witness-legally-accountable instruction for all offenses. Defense counsel explained it was the “pattern” instruction and based on a theory that Weber had the “purpose to promote, or facilitate the commission by solicit, aid, abet, agrees or attempts to aid in the planning or the commission of the offense.”² (Trial Tr. at 923-24.) The following discussion occurred:

COURT: So, uh we’re on Defense Proposed Number 3, when a witness is legally accountable. It asks me to say though testimony has been presented that the witness Elizabeth Weber may be legally accountable. What testimony is that again?

DEFENSE COUNSEL 1: Uh, the very last witness, the Defense expert said that uh, Ms. Weber could have taken the shot.

COURT: Well, that’s not accountability then. That would be a complete defense.

DEFENSE COUNSEL 2: Uh, one is accountable if, if they participate, aid, abet, all the A words.

STATE 1: But that wouldn’t be accountability necessarily. That would be . . .

STATE 2: That she did it.

STATE 1: that she did it.

² The State was unable to find Hill’s proposed instruction in this record. However, the pattern instruction is available at [cji-1.docx \(live.com\)](#).

COURT: Yeah, you got the wrong guy charged.

(*Id.* at 923.) The court continued, “We’re discussing whether or not there’s any evidence that she solicited [Hill] to do it. Aided him to do it. Abetted him, agreed with him, or attempted to aid the person in the planning of the commission of the offense. I don’t, I don’t—other than the meth I don’t see any of that.” (*Id.* at 925-96.) The court concluded that it was “not going to give this instruction” but held that the instruction could be proper only for the drug possession charge if Hill wanted it, which Hill declined. (*Id.* at 926-27.)

SUMMARY OF THE ARGUMENT

Hill’s appellate argument that he was entitled to a witness-legally-accountable jury instruction fails. Hill’s trial theory was that he did not fire the AR-15 at the officers, but rather that Weber fired the gun at them. No theory at trial was presented that Weber aided or abetted Hill in shooting at the officers. No evidence or testimony exists suggesting that Weber was an accomplice for attempted deliberate homicide. Nor was Weber ever charged with any offense pertaining to the incident. Since Hill could not have had an accomplice to a crime that he claimed he did not commit, he was not entitled to the accomplice jury instruction.

STANDARD OF REVIEW

This Court reviews jury instructions to assess whether they fairly and fully instruct the jury on the applicable law. *State v. Charlo-Whitworth*, 2016 MT 157, ¶ 7, 384 Mont. 50, 373 P.3d 845 (citations omitted). This Court reviews decisions regarding jury instructions for an abuse of discretion. *State v. Wells*, 2021 MT 103, ¶ 13, 404 Mont. 105, 485 P.3d 1220 (citing *State v. Williams*, 2015 MT 247, ¶ 10, 380 Mont. 445, 358 P.3d 127). The district court’s discretion in formulating jury instructions is broad and will only be reversed when a mistake prejudicially affects a defendant’s substantial rights. *Wells*, ¶ 13 (citing *Williams*, ¶ 10).

ARGUMENT

Hill’s claim that he was entitled to a witness-legally-accountable jury instruction fails.

Hill argues that the witness-legally-accountable instruction was appropriate here. Hill repeats his trial theory that Weber could have taken the shot, based on the defense reconstructionist’s conclusion and because Weber was a “left-handed passenger” in the vehicle. Hill argues that the instruction was further appropriate because Weber was on probation, thus had a motive to lie. (Appellant’s Br. at 14-16.)

Montana law provides that “[a] person may not be found guilty of an offense on the testimony of one responsible or legally accountable for the same offense . . . unless the testimony is corroborated by other evidence that in itself and without the

aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense.”

Mont. Code Ann. § 46-16-213. A person is an accomplice and legally accountable for the acts 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(3).

Pursuant to Mont. Code Ann. § 26-1-303, a district court should give a witness legally accountable instruction “on all proper occasions” that “testimony of a person legally accountable for the acts of the accused ought to be viewed with distrust[.]” In *State v. Johnson*, 257 Mont. 157, 163, 848 P.2d 496, 499 (1993), *overruled on other grounds in City of Helena v. Frankforter*, 2018 MT 193, ¶ 18, 392 Mont. 277, 423 P.3d 581, this Court held that it is within the district court’s discretion whether the case before it is a “proper occasion” to give the “witness legally accountable” instruction. *Johnson*, 257 Mont. at 163, 848 P.2d at 499.

However, “[i]t is not proper to give an accountability/accomplice instruction where it is unsupported by the evidence and is inconsistent with the defendant’s claim of innocence.” *State v. Root*, 2015 MT 310, ¶ 15, 381 Mont. 314, 359 P.3d 1088 (citing *State v. Hall*, 2003 MT 253, ¶ 30, 317 Mont. 356, 77 P.3d 239). For example, in *Charlo-Whitworth*, this Court explained:

. . . [T]he propriety of that instruction presupposes the existence of an accomplice. Section 45-2-302(3), MCA. Accordingly, if the defendant claims at trial that he did not commit the acts for which he is being tried, he cannot then ask the court to instruct the jury that a testifying witness aided the defendant in the commission of those acts. In other words, a person cannot be an accomplice to a person who did not commit the crime. Further, if there is no evidence to suggest that a testifying witness is legally accountable, then it is not proper to give the accomplice liability instruction. *State v. Hall*, 2003 MT 253, ¶ 30, 317 Mont. 356, 77 P.3d 239.

Charlo-Whitworth, ¶ 12; see also *State v. Flowers*, 2018 MT 96, ¶ 29, 391 Mont. 237, 416 P.3d 180 (concluding that an accomplice liability instruction is “inconsistent” with the defense of “complete innocence.”)

For example, in *Hall*, a defendant was convicted of misdemeanor and felony theft for stealing approximately \$40,000 worth of camera equipment. *Hall*, ¶¶ 10, 16. Following the execution of a search warrant, authorities found the equipment in the home the defendant shared with another man. *Id.* ¶ 13. At trial, Hall’s defense rested on his claim that his roommate was the sole perpetrator of the theft. *Id.* ¶ 26. Hall requested that the jury receive a legally-accountable-witness instruction. *Id.* ¶ 27. The district court denied Hall’s request, and this Court affirmed. *Id.* ¶ 30. This Court noted that where a defendant claims innocence and the evidence does not support witness accountability, it is improper to give the instruction. *Id.*

In *Charlo-Whitworth*, the defendant was convicted of various offenses for beating his girlfriend’s two-year-old child. *Charlo-Whitworth*, ¶¶ 1, 3. Whitworth

had admitted to the conduct to police, occurring around 10 p.m. at his girlfriend's house, while the girlfriend was at work and he was alone with the child. *Id.* ¶ 3. However, Whitworth had dropped off the child at midnight at the child's relatives' house. The relatives noticed that the child had been physically abused and informed the girlfriend to take the child to the hospital. *Id.* ¶ 4. Whitworth's theory at trial was that the girlfriend committed criminal endangerment and the relatives were accomplices. *Id.* ¶ 14. This Court rejected that theory, explaining first that the instruction was only appropriate if the person was an accomplice to the "*accused*," and, in any event, there was no testimony that the relatives were "involved in the physical abuse of [the child]." *Id.* ¶ 16. This Court explained that the instruction would have been inconsistent with Whitworth's theory of the defense and was unsupported by any evidence in the record. *Id.* ¶ 18.

Here, the State charged Hill with attempted deliberate homicide, and had to prove that Hill took "any act toward" purposely or knowingly causing the death of another human being. (Given Instr. # 12-13.) Like in *Hall* when the defendant blamed the other person sharing space with the defendant for the offense, Hill defended against the attempted deliberate homicide and assault charges by denying that he fired the weapon at the officers, and attempting to show that Weber was the shooter. No evidence was presented that Weber aided or abetted Hill in the planning

or commission of the offense of attempted deliberate homicide. Mont. Code Ann. § 45-2-302(3). On appeal, Hill’s reiteration of his trial arguments that Weber could have fired the gun misses the point. Like in *Hall* and *Charlo-Whitworth*, Hill’s defense that he did not commit the crime makes accomplice liability inapplicable to this case, and such an instruction would not have been proper. *Charlo-Whitworth*, ¶ 12; *Hall*, ¶ 18.

Hill nonetheless argues that this case was like *State v. Allen*, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045 because, in *Allen*, “the witness informant who [drove] . . . to the location where the crime occurred was an accomplice as defined in § 45-2-302(3), MCA.” (Appellant’s Br. at 14.) While *Allen* effectively demonstrates the circumstances when such an instruction would be appropriate, it does not advance Hill’s cause.

In *Allen*, the defendant was charged with assault with a weapon and criminal endangerment for beating Louis Escobedo. *Allen*, ¶ 1. Kristen Golie drove Allen to a residence where Escobedo was staying and upon arrival, “beckoned Escobedo to approach the car.” *Id.* ¶¶ 7, 15. Allen then demanded money from Escobedo and then pointed a pistol at Escobedo, proceeding to beat him in the head with the pistol. *Id.* ¶ 7. Golie then drove Allen back to a bar. *Id.* At trial, Escobedo testified that Golie threatened to kill him during the incident. *Id.* ¶ 15. Another witness, Jodi Pickens, testified that Golie had been previously urging Allen at the

bar to “go take care of business” with Escobedo. *Id.* Allen admitted to assaulting Escobedo but denied using a weapon. *Id.* ¶ 71. This Court ruled that there was “no question” Golie was an accomplice who aided and abetted Allen in committing the offenses. Here, there was no evidence or testimony presented at all that Weber aided or abetted Hill in committing attempted deliberate homicide.

CONCLUSION

The State respectfully requests that this Court affirm Hill’s convictions.

Respectfully submitted this 3rd day of May, 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 5,474 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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