DA 21-0585

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 136

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHARLES GEOFFREY SANTORO,

Defendant and Appellant.

APPEAL FROM: District Court of the Ninth Judicial District,
In and For the County of Toole, Cause No. DC-14-2
Honorable Jennifer B. Lint, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Alexander H. Pyle, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Merle Raph, Toole County Attorney, Michael J. Gee, Special Deputy County Attorney, Shelby, Montana

Submitted on Briefs: March 20, 2024

Decided: July 2, 2024

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Defendant and Appellant Charles Geoffrey Santoro (Santoro) appeals from the June 12, 2021 Opinion and Order Re: Cat Otway Testimony and the September 30, 2021 Amended Judgment issued by the Ninth Judicial District Court, Toole County. The District Court's Amended Judgment, which sentenced Santoro to twenty years in prison, with a twenty-year parole restriction, followed Santoro's conviction for negligent homicide upon retrial after this Court reversed his initial conviction on that charge due to ineffective assistance of counsel. *State v. Santoro*, 2019 MT 192, ¶ 21, 397 Mont. 19, 446 P.3d 1141 (*Santoro I*).

¶2 We address the following restated issues on appeal:

> *1. Whether the District Court abused its discretion by granting the State's motion in limine and precluding blind expert testimony regarding the effects of strangulation previously admitted at Santoro's first trial.*
>
> *2. Whether the State's sentencing recommendation after retrial was vindictive.*
>
> *3. Whether the District Court plainly erred by not providing Santoro the opportunity to make a statement at his sentencing hearing.*

¶3 We reverse and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 The background of the incident leading to Santoro's negligent homicide charge and details of his first trial were set forth in *Santoro I* and need not be repeated at great length here. *See Santoro I*, ¶¶ 4-10. On August 18, 2013, Santoro went to the VFW bar in Sunburst with Richard Potter. While there, Santoro encountered Levi Rowell, Levi's wife Tiffany, and Levi's friend Justin Gallup. Santoro and Levi knew each because Santoro

previously worked for Levi and they were neighbors. Santoro and Levi had a couple of drinks together and participated in the banter of those at the bar. Eventually, Santoro made crude comments which upset the other patrons and he was asked to leave. While he and Potter were leaving, Santoro ranted about how none of the bar patrons were even veterans, to which Levi responded, "Neither are you, Geoff." This greatly upset Santoro, who kicked the door open and smashed his beer bottle on the ground while walking to his truck. Once back at his truck, Santoro grabbed his shotgun and cleared the chamber before putting the shotgun back.

¶5 Levi heard the bottle smash and attempted to leave to follow Santoro, believing Santoro had done something to Tiffany's vehicle. Tiffany and Justin stopped Levi from leaving the bar by blocking the exit. After Tiffany thought sufficient time had passed, the three left the bar to check things out. Santoro and Potter had not left yet, and were sitting in Santoro's truck parked next to Tiffany's vehicle. Santoro was in the driver's seat, Potter was in the passenger seat, and the truck was running. Levi approached Santoro's truck, with Tiffany and Justin following behind him. Either Santoro's driver's door was open or Levi opened it, and Santoro and Levi began yelling at each other. Santoro testified that Levi grabbed him by the throat, choked him, and told him "Geoff, you're fucked now." Potter testified that Levi "had his hand on Geoff's neck." Santoro gassed his truck in reverse. Levi, Tiffany, and Justin were in the "V" created by Santoro's open door when Santoro reversed. All three were caught by the door, with Tiffany and Justin knocked

outward from the door and injured.[1] Levi was dragged and pulled under the truck where he was run over.

¶6 After he stopped reversing, Santoro drove forward and away from the bar. Sandra Owens, Tiffany, and J Scarbrough testified that Santoro ran over Levi driving forward. This eyewitness testimony was contradicted by the Montana Highway Patrol accident reconstruction report created by MHP Trooper Christopher Garza[2] after measuring and surveying the scene with MHP Sergeant Bob Bender. That reconstruction showed Levi was run over only once, while Santoro was going backwards, and then Santoro drove past, but not over, Levi's body when leaving the scene. Trooper Garza testified to his report and its conclusions at Santoro's 2021 retrial. Toole County Coroner Dan Whitted, who did not participate in MHP's reconstruction, also testified he believed Levi was only run over one time, though he believed it was not in reverse but when Santoro drove forward. Santoro was charged with negligent homicide for causing Levi's death.

¶7 Prior to Santoro's first trial in 2016, the State filed a motion in limine seeking to prevent Santoro from presenting the expert testimony of Cat Otway at trial. Otway is a registered nurse and forensic nurse examiner whom Santoro wished to present blind expert testimony to inform the jury regarding strangulation and its effects on a person. After a

[1] Santoro was convicted of felony criminal endangerment at his first trial for injuring Tiffany and Justin and did not appeal those convictions. *See Santoro I*, ¶¶ 3, 21 n.3.

[2] By the time of trial, Trooper Garza was employed as a deputy at the Spokane County Sheriff's Office in Washington. For the sake of clarity, we refer to him as Trooper Garza throughout this opinion.

hearing, the District Court reserved ruling on the State's motion in limine because it believed it needed to "see what Ms. Otway knows about" and therefore a ruling would have to "wait until it comes up at trial." Otway thereafter testified as a blind expert at the first trial, where she was qualified "as an expert on the area of strangulation" without objection and the State vigorously cross-examined and recross-examined her testimony.

¶8 Santoro was convicted at trial in 2016. At sentencing, the State recommended Santoro receive a 20-year sentence for the negligent homicide charge, and was "not asking for a parole restriction[.]" The District Court sentenced Santoro to 20 years, with five years suspended, and did not impose a parole restriction. After Santoro appealed, this Court reversed his conviction and ordered a new trial due to ineffective assistance of counsel when his trial counsel did not serve a subpoena on or otherwise preserve Trooper Garza's testimony and report—that Levi was run over only once, while Santoro was reversing—for trial, and therefore the jury never heard that evidence during the first trial. *Santoro I*, ¶¶ 20-21, 27.

¶9 Upon remand, the District Court judge who presided over the first trial, James A. Haynes, had retired. The District Court judge initially assigned to the case upon remand, Robert G. Olson, recused himself and a new District Court judge, Jennifer B. Lint, assumed jurisdiction of the case. Santoro once again noticed his intention to call Otway as a blind expert witness to educate the jury on strangulation, noting "Ms. Otway testified in the first trial and the State stipulated to her expertise on the limited area of strangulation." The State then filed a new motion in limine, once again seeking to prevent Santoro from

presenting Otway's expert testimony regarding strangulation. The State's motion asserted Otway's testimony regarding strangulation would not be helpful to the jury under M. R. Evid. 702, would not be relevant under Rule 401, and would violate Rules 403 and 704. The State took specific issue with some of Otway's opinions regarding strangulation and its later effects on a person and also with her history of reviewing strangulation in a domestic violence context. Santoro filed a response noting Otway testified at the first trial and would testify similarly on retrial; that he had a constitutional right to present a complete defense; that he would not be asking Otway to make a legal conclusion regarding whether Levi's actions towards Santoro constituted a "forcible felony" or to comment on the credibility of Santoro and Potter; and, presciently, that "disallowing the Defense to call its properly noticed expert witness seems to set this case up for another appeal."

¶10 The District Court held a hearing on the motion on April 1, 2021, at which Santoro was not present. The court heard argument on the motion from the State and Santoro's counsel, and granted the State's motion pursuant to Rule 702, noting the court did not "feel that this is an area where expert testimony is necessary when we have Mr. Santoro available if he wants to describe what happened to him as part of a justifiable use of force claim." The court further noted it would provide the parties with a written order. Because Santoro did not attend the April 1 hearing, the District Court heard argument on the motion again during the April 16, 2021 pretrial conference. The court again granted the State's motion pursuant to Rule 702 "because what happened to Mr. Santoro is what happened to Mr. Santoro and his own description is the best" and therefore expert testimony from

Otway regarding strangulation would be "unnecessary, and . . . unduly confusing." The District Court's written order granting the State's motion followed on June 18, 2021. In its order, the District Court defined strangulation as "the restriction of airflow into and out of the lungs" and determined that "[s]pecialized scientific advice is not required for a jury to comprehend that strangulation can cause serious bodily injury or death."

¶11 Santoro's retrial occurred from June 21-25, 2021. Over the course of trial, the jury heard testimony from Sandra Owens, Tiffany, Justin, J Scarbrough, Shannon Howell, Toole County Deputy Sherriff Glenn Kurkowski, Melissa Gray, Sarah Braseth, Toole County Deputy Sherriff Michael Driemeyer, Toole County Sergeant Ryan Larson, Toole County Senior Deputy Jeff Robins, Trooper Garza, Toole County Coroner Dan Whitted, state medical examiner Dr. Walter Kemp, Santoro's father Charles Santoro, Richard Potter, Toole County Deputy Brandon Wootan, and Santoro. As her testimony was excluded following the District Court's order granting the State's motion in limine, Otway did not testify during Santoro's retrial.

¶12 At the second trial, Santoro testified that Levi grabbed him by the throat, choked him, and told him "Geoff, you're fucked now" prior to Santoro gassing the truck in reverse. Potter testified that Levi "had his hand on Geoff's neck." Deputy Sheriffs Kurkowski and Driemeyer both testified to seeing red marks on the right side of Santoro's neck in the days after the incident, and pictures of Santoro's neck were entered into evidence. The State questioned Potter about whether Santoro's airway was blocked off and noted Santoro was able to speak during the time Santoro alleged Levi was choking him because Santoro said

"[f]uck this" before reversing the truck. In closing, the State argued that Santoro had "no real injuries to his neck" and that Santoro grossly deviated from the standard of conduct by driving forward through the crowd of people scattered on the ground after he knocked them down in reverse and that "negligent act led to the death of a human being." After deliberating for over eight hours over the course of two days, and receiving a dynamite instruction[3] from the District Court, the jury convicted Santoro of negligent homicide.

¶13 After Santoro was convicted at retrial, the District Court held a sentencing hearing on September 7, 2021. At that hearing, counsel for the State asserted the reversal of Santoro's initial conviction "amplified many fold" the "fears . . . stresses . . . anxiety and hurt" of the victims and it was "time to put this to rest[.]" The State further asserted Santoro had "[n]ever once [given] an I'm sorry. Not once." In its sentencing recommendation to the District Court, the State sought a twenty-year prison sentence, with a twenty-year parole restriction, asserting it was "the same thing we asked for the first time around" and it was "no trial tax." The State further informed the court that its recommendation was "what we have always believed was appropriate[.]" Santoro's counsel noted that Santoro had expressed remorse both at a previous parole hearing and at his sentencing following the first trial in 2016. Santoro's counsel expressed a belief the State's new sentencing request was vindictive, stating, "[t]he state doesn't seem to want justice here. It seems like they

[3] "The purpose of a dynamite or *Allen*/*Norquay* instruction is to 'encourage[] a deadlocked jury to continue deliberations' in furtherance of reaching a verdict." *State v. Hoover*, 2021 MT 276, ¶ 11 n.1, 406 Mont. 132, 497 P.3d 598 (quoting *State v. Santiago*, 2018 MT 13, ¶ 17, 390 Mont. 154, 415 P.3d 972).

want vengeance. Mr. Santoro should not be punished for pursuing an appeal." Counsel for the State informed the court he "[took] umbrage with the characterization of our sentencing recommendation" and he "believe[d] that the 20 years that we asked for back in 2017 as well as now is fully appropriate given what happened here." The District Court, without asking Santoro if he wished to make a statement, proceeded directly to imposing sentence. The court stated it was "not agreeing with the state because I'm agreeing with the state" and imposed a 20-year sentence, with no time suspended, and a full parole restriction. The District Court's written Amended Judgment followed on September 30, 2021.

¶14 Santoro appeals. Additional facts will be discussed as necessary below.

STANDARD OF REVIEW

¶15 A district court's ruling on a motion in limine is an evidentiary ruling which we review for an abuse of discretion. *State v. Thomas*, 2020 MT 281, ¶ 13, 402 Mont. 62, 476 P.3d 26 (citing *State v. Snell*, 2004 MT 334, ¶ 17, 324 Mont. 173, 103 P.3d 503). An abuse of discretion occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Thomas*, ¶ 13. "To the extent the court's ruling is based on a rule of evidence, a statute, or a constitutional right, our review is de novo." *State v. Given*, 2015 MT 273, ¶ 23, 381 Mont. 115, 359 P.3d 90 (citing *State v. Lotter*, 2013 MT 336, ¶ 13, 372 Mont. 445, 313 P.3d 148).

¶16 We review allegations of both prosecutorial error and due process violations de novo. *State v. Rardon*, 2005 MT 129, ¶ 14, 327 Mont. 228, 115 P.3d 182 (citations

omitted). "We review de novo whether a district court violated a defendant's constitutional rights at sentencing." *State v. Keefe*, 2021 MT 8, ¶ 11, 403 Mont. 1, 478 P.3d 830 (citing *State v. Haldane*, 2013 MT 32, ¶ 17, 368 Mont. 396, 300 P.3d 657).

DISCUSSION

¶17 *1. Whether the District Court abused its discretion by granting the State's motion in limine and precluding blind expert testimony regarding the effects of strangulation previously admitted at Santoro's first trial.*

¶18 In 2016, prior to the first trial in this matter, Santoro filed a notice that he would be calling Otway as an expert witness regarding strangulation and the State filed a motion in limine to preclude her testimony. The District Court denied the motion in limine, Otway testified regarding strangulation at trial, and the State vigorously cross-examined her. After Santoro's successful appeal of his conviction, he again noticed Otway as an expert witness regarding strangulation and the State again filed a motion in limine seeking to preclude her testimony. This time, however, the District Court granted the State's motion and precluded Otway from testifying at the retrial on the basis of M. R. Evid. 702. Santoro asserts the court's exclusion of Otway's testimony at retrial was an abuse of discretion mandating reversal because the excluded testimony "went straight to the trial's central issue—whether Geoff's conduct grossly deviated from the conduct of a reasonable person in the same situation." The State asserts the District Court did not abuse its discretion by excluding Otway's testimony because Otway's testimony as a blind expert would invite speculation by the jury and the jury did not need expert testimony to evaluate Santoro's actions. The State further contends that even if the exclusion of testimony was an abuse of discretion, it

was harmless error and there "is no reasonable possibility that the absence of Otway's comments contributed to the jury's verdict."

¶19 Generally, all relevant evidence is admissible, M. R. Evid. 402, though relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." M. R. Evid. 403. The admission of opinion and expert testimony is additionally governed by M. R. Evid. 701-705. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." M. R. Evid. 702. The Commission Comments to M. R. Evid. 702 explain that the "or otherwise" language of the rule "allows an expert to give testimony which need not be in the form of opinion, but which informs the jury so they may render the correct decision." Section 26-10-Rule 702, MCA, *Annotations*, Comm'n Comments (2023). "Commentators have opined that Rule 702 permits an expert to 'give test results, describe recognized principles of their specialized knowledge, provide general background, or simply to explain other evidence.'" *State v. Jay*, 2013 MT 79, ¶ 27, 369 Mont. 332, 298 P.3d 396 (quoting 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure*, § 6263, 197 (1997)).

¶20 "[W]e have repeatedly stated, 'the test for admissibility of expert testimony is whether the matter is sufficiently beyond common experience that the opinion of the expert

will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *State v. Ayers*, 2003 MT 114, ¶ 36, 315 Mont. 395, 68 P.3d 768 (quoting *State v. Southern*, 1999 MT 94, ¶ 49, 294 Mont. 225, 980 P.2d 3). "[A] trial court must first determine 'whether the subject matter of the testimony is one that requires expert testimony,' and 'whether the particular witness is qualified as an expert to give an opinion in the particular area on which he or she proposes to testify.'" *Ayers*, ¶ 36 (quoting *Southern*, ¶ 49). In order for expert testimony to be relevant there must be a connection between the expert's testimony and fact testimony. *Jay*, ¶ 29 (citations omitted).

¶21 Here, Santoro sought to introduce Otway's expert testimony regarding strangulation to counter the State's presentation to the jury that Santoro's claim Levi choked and/or strangled him prior to Santoro reversing did not, and could not have, happened. Whether or not Santoro was choked by Levi has been at issue since the very first document filed in the case, the State's February 11, 2014 Motion for Leave to File an Information and Affidavit in Support, which noted both Santoro and Potter claimed Santoro had been choked by Levi and questioned whether it would be possible for Santoro to say "fuck this" if he was being choked. A central issue at both trials was whether Santoro was justified in backing up his truck with Levi still in the doorway due to the alleged attack. At the second trial, Santoro testified that Levi grabbed him by the throat, choked him, and told him "Geoff, you're fucked now" prior to Santoro gassing the truck in reverse. Potter testified that Levi "had his hand on Geoff's neck" and that he saw Santoro being choked by Levi. Deputy Sheriffs Glenn Kurkowski and Michael Driemeyer both testified to seeing red

marks on the right side of Santoro's neck in the days after the incident. Pictures of Santoro's neck were entered into evidence at trial. At retrial, with Otway's testimony excluded, the State repeatedly argued Santoro's story of being choked could not have happened, arguing "there are no injuries to his neck, no real injuries to his neck" and that Levi's choking of Santoro "didn't happen. It didn't happen that way. It couldn't have happened that way." The State elicited testimony that Santoro spoke while allegedly being choked. Otway's testimony from the first trial, excluded at the retrial by the District Court, could have addressed many of the State's arguments. For example, Otway testified at the first trial that many strangulation victims do not have external marks after being strangled; that strangulation "is pressure on the vessels or the airway or both" and a person being strangled through pressure on blood vessels may be able to speak; and that it is difficult for a person "to think straight following an incident of strangulation." The jury at retrial heard none of this. Under the facts of this case, Santoro has met his burden to provide "*some* factual connection between the offered expert testimony and his driving in this case to make the testimony relevant." *Jay*, ¶ 31 (citing M. R. Evid. 402) (emphasis in original).

¶22 In addition to being relevant, Otway's excluded testimony was admissible to "assist the trier of fact to understand the evidence or to determine a fact in issue[.]" M. R. Evid. 702. Otway's testimony could have assisted the jury with determining whether Santoro's actions were a "gross deviation" from that of a reasonable person in Santoro's situation (as applicable to the negligent homicide charge itself) or whether his belief he needed to use

force to get away from Levi was reasonable (as applicable to Santoro's justifiable use of force defense).

¶23 "[A] trial court, presented with scientific evidence, novel or not, is encouraged to liberally construe the rules of evidence so as to admit all relevant expert testimony[.]" *Hulse v. Mont. Dep't of Just., Motor Vehicle Div.*, 1998 MT 108, ¶ 63, 289 Mont. 1, 961 P.2d 75. "Our standard recognizes that admissible expert evidence should come in, even if that evidence may be characterized as shaky. The expert's testimony then is open for attack through the traditional and appropriate methods: vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 23, 380 Mont. 204, 354 P.3d 604 (internal quotation marks and citation omitted). "Questions concerning expert testimony's reliability are threefold under [M. R. Evid. 702]: (1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts." *State v. Clifford*, 2005 MT 219, ¶ 28, 328 Mont. 300, 121 P.3d 489. The first two questions are for the trial court to resolve, the third—whether the qualified expert reliably applied the reliable field to the facts—is left to the jury and "is not a question for the trial court to resolve." *Clifford*, ¶ 28. "Under M. R. Evid. 702, the District Court needed simply to determine whether the expert field is reliable and whether the expert is qualified, leaving to the jury whether the qualified expert reliably applied the reliable field to the facts." *McClue*, ¶ 22 (internal quotation marks and citation omitted).

¶24 Here, the District Court ventured beyond its role and usurped the province of the jury by excluding Otway's testimony. Rather than following our standard of admitting relevant and admissible expert testimony and then allowing the State to attack Otway's testimony through the traditional methods, the court put its thumb on the scale in favor of the State by excluding the testimony of Santoro's chosen expert entirely. The exclusion of Otway's relevant and admissible testimony in this case was an abuse of discretion.

¶25 The State contends that, even if the exclusion of Otway's testimony was an abuse of discretion, it was harmless. The burden of persuasion in such a harmless error analysis is on the State—"because the claimed error was a court ruling which excluded testimony, the State must demonstrate there was no reasonable possibility that the exclusion contributed to the conviction." *State v. Slavin*, 2004 MT 76, ¶ 22, 320 Mont. 425, 87 P.3d 495. We cannot find the State meets its burden in this regard.

¶26 The exclusion of Santoro's expert testimony prevented him from presenting evidence going to the core of his defense—that strangulation doesn't always leave a mark, that it would be possible to speak while being strangled, that strangulation can occur with even low pressure on the neck, etc. A defendant has a constitutional right to present a complete defense. *State v. Reams*, 2020 MT 326, ¶ 18, 402 Mont. 366, 477 P.3d 1118. Excluding Otway's testimony hindered Santoro's right to present a complete defense. The State capably cross-examined Otway's testimony once before and could certainly do it again on retrial. It was not entitled to the free pass the District Court gave it in this case. In addition, the jury clearly struggled in this case, deliberating for over eight hours over

the course of two days and requiring a dynamite instruction before returning a conviction. Finally, the State's assertion that the error was harmless because "after he was well away from any threat, Santoro put his truck in drive and drove forward over Levi a second time" is particularly unconvincing given the reconstruction evidence presented by Trooper Garza demonstrating Levi was run over only once—when Santoro drove in reverse. We cannot find there was no reasonable possibility that the exclusion of Otway's testimony contributed to the conviction in this case. *Slavin*, ¶ 22. Its exclusion was therefore not harmless and a new trial is required.

¶27 While this issue is dispositive as to the need to remand for a new trial of the negligent homicide charge, we nevertheless determine it prudent to address the two other issues raised by Santoro in this appeal as, if he were to be convicted at retrial, both issues could arise again in the sentencing context and guidance to the parties and the District Court is necessary. While this Court does not issue advisory opinions, *State v. Savage*, 2011 MT 23, ¶ 17, 359 Mont. 207, 248 P.3d 308, it is proper in this case to issue an opinion providing guidance to the parties and District Court on remand "[i]n the interests of judicial efficiency[.]" *State v. Knowles*, 2010 MT 186, ¶ 37, 357 Mont. 272, 239 P.3d 129.

¶28 *2. Whether the State's sentencing recommendation after retrial was vindictive.*

¶29 When Santoro was initially convicted of negligent homicide after trial in 2016, the State requested the imposition of a twenty-year sentence, with no time suspended, and no parole restriction. The District Court sentenced Santoro to 20 years, with five years suspended, and did not impose a parole restriction. Santoro then appealed his conviction

to this Court, where we reversed his negligent homicide conviction due to ineffective assistance of trial counsel. *Santoro I*, ¶ 21. After Santoro was convicted at retrial in 2021, the State changed its sentencing recommendation, now seeking a twenty-year sentence, with no time suspended, and a full twenty-year parole restriction. The State, represented by the same counsel who made the first recommendation following the 2016 trial, asserted to the District Court that it was "the same thing we asked for the first time around" and that the recommendation was "no trial tax." Santoro's counsel asserted that Santoro should not be punished for pursuing a successful appeal following the first trial. The District Court confusingly stated it was "not agreeing with the state because I'm agreeing with the state" and imposed a 20-year sentence, with no time suspended, and a full parole restriction.

¶30 "[T]he rights of the defendant must be protected and due process must be observed in sentencing hearings." *State v. Webb*, 2005 MT 5, ¶ 18, 325 Mont. 317, 106 P.3d 521 (citations omitted). "[P]unishing a person for exercising a constitutional right is a basic due process violation." *State v. Brown*, 2003 MT 166, ¶ 29, 316 Mont. 310, 71 P.3d 1215 (citing *State v. Baldwin*, 192 Mont. 521, 525, 629 P.2d 222, 225 (1981)). "The principle of prosecutorial vindictiveness originates from the idea that it is unconstitutional for the State or its agent to penalize a person for exercising his or her legal rights." *State v. Roundstone*, 2011 MT 227, ¶ 37, 362 Mont. 74, 261 P.3d 1009.

¶31 Santoro asserts his increased sentence following his conviction at retrial violated his right to due process. Santoro contends the prosecutor's remarks regarding the increased strain on Levi's family due to Santoro's appeal and his false statement that the State

previously requested a twenty-year sentence, with no time suspended and a full twenty-year parole restriction, demonstrates either actual or presumptive vindictiveness. The State asserts the prosecutor's false statement that he was requesting the same sentence he did following the first trial was simply an honest mistake and cannot constitute either actual or presumptive vindictiveness.

¶32 "To establish that a prosecution was vindictive, a defendant must establish either (1) actual vindictiveness, or (2) a rebuttable presumption of vindictiveness in those cases in which a reasonable likelihood of vindictiveness exists." *Roundstone*, ¶ 38 (citations omitted). "[I]t is the *appearance of vindictiveness*, rather than *vindictiveness in fact*, which controls." *United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978) (emphasis in original); *see also Knowles*, ¶ 35.

¶33 We are not presented with a traditional vindictive prosecution claim in this case. The State did not increase the actual charges faced by Santoro following his successful appeal—he stood trial for negligent homicide each time. The State did, however, markedly increase its recommended sentence following retrial, and did so while falsely informing the District Court its recommendation was the same. This enhanced recommendation also came after the prosecutor recounted the amount of time Levi's family had experienced increased stress and anxiety due to the amount of time the appeal and remand had taken and, specifically, the trauma Levi's family had experienced due to Santoro receiving a

parole hearing in 2020.[4] The prosecutor also incorrectly informed the court that Santoro had "[n]ever once [given] an I'm sorry," though Santoro had apologized during his allocution at the first sentencing hearing.[5] The prosecutor further recalled being "arm-check[ed]" by Santoro during the first trial prior to giving his sentencing recommendation.

¶34 Due process of law "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S. Ct. 2072, 2080 (1969). While "actual proof of prosecutorial vindictive intent is difficult to produce, . . . if the facts indicate a likelihood of vindictiveness, then it can be presumed." *State v. Ridge*, 2014 MT 288, ¶ 14, 376 Mont. 534, 337 P.3d 80 (citing *Knowles*, ¶ 31). "A presumption of vindictiveness is not appropriate in all cases, and is not appropriate when the prosecutor has no personal stake in the defendant's decision." *Ridge*, ¶ 14 (internal citation omitted).

¶35 In this case, we are presented with both an appearance of vindictiveness and facts indicating a likelihood of vindictiveness. The prosecutor here did have a personal stake in the matter as he was the same prosecutor who won the initial conviction that was later overturned by this Court and evinced a further personal stake at the second sentencing

[4] The prosecutor noted Tiffany did not include this concern in her statement to the District Court at the second sentencing hearing, but alleged that Tiffany had told him about the traumatization stemming from the parole hearing "in the past[.]"

[5] As we address in Issue Three below, the District Court did not provide Santoro with an opportunity to make a statement at the second sentencing hearing.

hearing by recalling being "arm-check[ed]" by the defendant in court during the initial trial. Accordingly, Santoro has established the rebuttable presumption of vindictiveness and we presume the prosecutor acted vindictively by falsely informing the District Court the State's sentencing recommendation of a twenty-year sentence, with no time suspended and a full twenty-year parole restriction, was "the same thing we asked for the first time around" and "what we have always believed was appropriate[.]" *See Ridge*, ¶ 14.

¶36 Because the presumption of vindictiveness applies, "the prosecutor must rebut the presumption" that his actions were vindictive. *Roundstone*, ¶ 38 (citation omitted). The State has failed to meet its burden in this regard. Its only defense to the vindictiveness claim raised here is to assert in briefing that the prosecutor "truly believed, albeit incorrectly, that he had made the same recommendation at Santoro's first sentencing" and that the prosecutor's "inadvertent comment did not prejudice Santoro" because the District Court "made it clear its sentencing decision was not based on the State's recommendation[.]" What the State claims to be "clear" evidence of the District Court not basing its decision on the State's recommendation is the court stating it was "not agreeing with the state because I'm agreeing with the state." The District Court stating it was not agreeing with the State's sentencing recommendation *because* it was agreeing with the State's sentencing recommendation is anything but clear. And the State has pointed to nothing in the record, beyond the statement of its appellate counsel, that the prosecutor's sentencing recommendation was simply an honest mistake. Throughout the proceedings on remand after Santoro's successful appeal, the prosecutor was able to recall numerous

other things which happened prior to, during, and after the first trial with clarity. The State's characterization of the enhanced sentencing recommendation as just a careless slip of the tongue which only coincidentally happened to have the effect of recommending to (and receiving from) the District Court a markedly harsher prison sentence which removed the possibility of parole is unavailing.[6] The State's sentencing recommendation following retrial was vindictive. While prosecutorial vindictiveness in increasing charges properly results in dismissal of the enhanced charges, *Ridge*, ¶ 13, here Santoro would only have a claim for a new sentencing hearing, not dismissal of the negligent homicide charge, for the prosecutor's vindictive sentencing recommendation. As Santoro's conviction is being reversed, there is no need to remand for a new sentencing hearing. We also need not address whether the actual sentence imposed by the District Court was actually or presumptively vindictive because that sentence no longer exists.[7] We address this issue for the guidance of the parties on remand. *See Knowles*, ¶ 37. Should Santoro again be convicted of negligent homicide at retrial, the State may not falsely suggest to the District Court that its original sentencing recommendation following the initial trial in this matter

[6] This recommendation also came directly after the prosecutor recounted the trauma Santoro's 2020 parole hearing inflicted on Levi's family, which he noted was "above and beyond what the remand had done to them."

[7] In addition, Santoro would not be entitled to a presumption of vindictiveness on the part of the sentencing judge because it was a different judge who imposed the sentence following retrial and therefore a presumption of vindictiveness is inapplicable. *Texas v. McCullough*, 475 U.S. 134, 140, 106 S. Ct. 976, 979 (1986); *State v. Forsyth*, 233 Mont. 389, 422, 761 P.2d 363, 384 (1988); *see also Ferguson v. State*, 2013 WY 117, ¶ 15, 309 P.3d 831. In such a case, a "defendant may still obtain relief if he can show actual vindictiveness upon resentencing." *McCullough*, 475 U.S. at 138, 106 S. Ct. at 979; *see also Forsyth*, 233 Mont. at 422, 761 P.2d at 384.

was for a twenty-year sentence, with no time suspended and a full twenty-year parole restriction.

¶37 *3. Whether the District Court plainly erred by not providing Santoro the opportunity to make a statement at his sentencing hearing.*

¶38 The final issue Santoro raises on appeal concerns the District Court not affording him an opportunity to make a statement at the sentencing hearing after retrial. The State concedes the District Court did not provide Santoro such an opportunity. Due process must be observed in sentencing hearings. *Webb*, ¶ 18. "Under the due process guarantee, a defendant must be given an opportunity to explain, argue, and rebut 'any information that may lead to a deprivation of life, liberty, or property.'" *State v. Webber*, 2019 MT 216, ¶ 10, 397 Mont. 239, 448 P.3d 1091 (quoting *Webb*, ¶ 19).

¶39 "Before imposing sentence or making any other disposition upon acceptance of a plea or upon a verdict or finding of guilty, the court shall conduct a sentencing hearing" wherein the court "shall address the defendant personally to ascertain whether the defendant wishes to make a statement and to present any information in mitigation of punishment or reason why the defendant should not be sentenced. If the defendant wishes to make a statement, the court shall afford the defendant a reasonable opportunity to do so." Section 46-18-115(3), MCA. "We have held that 'shall' means 'must' and that use of the term 'shall' connotes a mandatory obligation." *Swearingen v. State*, 2001 MT 10, ¶ 6, 304 Mont. 97, 18 P.3d 998 (collecting cases); *see also State v. Kortan*, 2022 MT 204, ¶ 21, 410 Mont. 336, 518 P.3d 1283.

¶40 At sentencing, the court is required to "ascertain whether the defendant wishes to make a statement" and, if so, "afford the defendant a reasonable opportunity to do so." Section 46-18-115(3), MCA. At no point during Santoro's sentencing hearing after retrial did the District Court ascertain whether Santoro wished to make a statement or provide him the opportunity to do so. This is clear error. Should Santoro be convicted again on retrial, the District Court must ascertain whether Santoro wishes to make a statement at the sentencing hearing and, if so, provide him with the opportunity to do so. Section 46-18-115(3), MCA.

CONCLUSION

¶41 The District Court abused its discretion by granting the State's motion in limine and precluding Santoro from presenting expert testimony regarding strangulation which was admitted at his first trial. The court's preclusion of this admissible testimony was not harmless and necessitates remanding to the District Court for a new trial. In addition, the prosecutor's enhanced sentencing recommendation after retrial was vindictive and the District Court clearly erred by failing to allow Santoro the opportunity to speak prior to the court pronouncing sentence.

¶42 Reversed and remanded for a new trial.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR

Justice Jim Rice, dissenting.

¶43 Under former statutes, the affirmative defense of acting intentionally in self-defense was considered to be inconsistent with a charge of causing the death of another by acting negligently. *See State v. DeMers*, 234 Mont. 273, 280, 762 P.2d 860, 865 (1988) ("Lack of intent supports his negligent homicide theory but conflicts with a theory of self defense."). While it appears possible under current statutes to plead justifiable use of force in defense to a negligent homicide charge, the match is not perfect and trial courts are well advised to proceed carefully on a case-by-case basis in merging these standards into jury instructions, depending upon the evidence produced at trial and, as here, the evidence proffered from a proposed expert witness. I believe the District Court analyzed the issue prudently, would conclude it did not abuse its discretion, and affirm.

¶44 Under § 45-3-102, MCA, a person is justified in the use of force against another "when and to the extent that the person reasonably believes that the conduct is necessary for self-defense . . . ." Specifically, as to the use of deadly force, the person must "reasonably believe[] that the force is necessary to prevent imminent death or serious bodily harm." Section 45-3-102, MCA. Thus, the focus is situational, that is, on what a defendant was experiencing and what he believed about it—a subjective rather than objective standard. Clearly, Santoro's claim that Levi choked him is relevant; though factually contested, this is his version of what happened in the fight, and it can appropriately lay the foundation for his claimed defense that his actions were justified, and therefore not a "gross deviation from the standard of conduct that a reasonable person

would observe in the actor's situation" necessary for conviction of negligent homicide. Section 45-2-101(43, MCA.

¶45 However, Santoro sought leave from the District Court for admission of Otway's expert testimony so that he would "be allowed to explore the issues of what a reasonable person would believe or how a reasonable person would act in that circumstance." He argued that "[r]easonableness . . . lends itself to individual interpretation." This incorrectly frames the issue as one decided under an objective standard, is misleading and potentially confusing.

¶46 I believe Santoro's argument to the District Court was correct in this sense—reasonableness is indeed subject to individual interpretation, and for that reason the decision about whether Santoro's actions were reasonable should be left to the jury. Santoro's proposed purpose for Otway's testimony—to "explore the issues of what a reasonable person would believe or how a reasonable person would act in that circumstance"—could well, and likely would, cross into what a jury must decide in this case: whether it was reasonable for *Santoro* to do what he did in this circumstance. Even if it is possible to frame Otway's testimony as merely informational, I believe the District Court astutely recognized the potential problems with this testimony, especially on the particular grounds Santoro offered for its admission, and that the District Court was within its discretion to conclude that the proposed testimony was inadmissible. Even if relevant, it was outweighed by the danger of confusion of the issues and misleading to the jury. I would thus affirm the conviction.

¶47 I agree with Santoro's arguments that the errors during sentencing require a new sentencing proceeding, and would reverse and remand for that purpose.

/S/ JIM RICE