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STATE OF MONTANA
Case Number: DA 22-0483

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0483

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KEVIN CHARLES WALLA,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Sixth Judicial District Court,
Sweet Grass County, the Honorable Brenda R. Gilbert, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 5

STANDARDS OF REVIEW 15

SUMMARY OF THE ARGUMENT 16

ARGUMENT 18

I. The District Court abused its discretion by ruling Defense Counsel could not make a foundational proffer outside the presence of the jury concerning what Kevin Walla knew about the alleged victim and whether he relied on that knowledge when he shot Mr. Bowers in self-defense. 18

A. Additional facts. 18

B. Governing law. 26

C. The District Court's errors. 326

II. The District Court did not fully and fairly instruct the jury on the applicable law and abused its discretion by rejecting a supplemental verdict form that would have instructed the jury unanimously to find whether the State proved or failed to prove beyond a reasonable doubt that Mr. Walla's use of force was not justified. 39

CONCLUSION 45

CERTIFICATE OF COMPLIANCE 46

TABLE OF AUTHORITIES

Cases

City of Red Lodge v. Nelson,
1999 MT 246, 296 Mont. 190, 939 P.2d 21

DeSchon v. State,
2008 MT 380, 347 Mont. 30, 197 P.3d 476 ..... 21, 31

In re O.A.W.,
2007 MT 13, 335 Mont. 304, 153 P.3d 6 31

Miller v. State Farm Mut. Auto. Ins. Co.,
2007 MT 85, 337 Mont. 67, 155 P.3d 1278 ..... 33, 34, 35

Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.,
2010 MT 26, 355 Mont. 142, 226 P.3d 567 ..... 34, 35

State v. Brady,
2000 MT 282, 302 Mont. 174, 13 P.3d 941 37

State v. Brasda,
2021 MT 121, 404 Mont. 178, 486 P.3d 703 15

State v. Brodniak,
221 Mont. 212, 718 P.2d 322 (1986) (*en banc*) 42

State v. Cunningham,
2018 MT 56, 390 Mont. 408, 414 P.3d 289 ..... 15, 21, 27, 28

State v. Jones,
48 Mont. 505, 139 P. 441 (1914) 29

State v. King,
2013 MT 139, 370 Mont. 277, 304 P.3d 1 32

State v. Lackman,
2017 MT 127, 387 Mont. 459, 395 P.3d 477 16

State v. Logan,
156 Mont. 48, 473 P.2d 833 (1970) 29

State v. Maier,
1999 MT 51, 293 Mont. 403, 977 P.2d 298 37

State v. Miller,
231 Mont. 497, 757 P.2d 1275 (1988) 31

State v. Montgomery,
2005 MT 120, 327 Mont. 138, 112 P.3d 1014 21

State v. Partin,
287 Mont. 12, 951 P.2d 1002 (1997) 37

State v. Polak,
2018 MT 174, 392 Mont. 90, 422 P.3d 112 ..... 15, 27

State v. Sattler,
1998 MT 57, 288 Mont. 79, 956 P.2d 54 (*en banc*) 29, 31

State v. Savage,
2011 MT 23, 359 Mont. 207, 248 P.3d 308 ..... 32, 34

State v. Van Kirk,
2001 MT 184, 306 Mont. 215, 32 P.3d 735 (*en banc*) 42

State v. Weinberger,
204 Mont. 278, 665 P.2d 202 (1983) (*en banc*) 28, 38

United States v. Ramirez,
537 F.3d 1075 (9th Cir. 2008) 43, 44

United States v. Southwell,
432 F.3d 1050 (9th Cir.2005) 43, 44

Statutes

Mont. Code Ann. § 45-3-102 26
Mont. Code Ann. § 45-5-102(1)(a) 2
Mont. Code Ann. § 45-8-313(1)(b) 2
Mont. Code Ann. § 46-15-323 19
Mont. Code Ann. § 46-18-221 2

Rules

Mont. R. Evid. 103(a)(2) 31
Mont. R. Evid. 104(a), (c) 31
Mont. R. Evid. 404 ..... 3, 29
Mont. R. Evid. 404(a) 12
Mont. R. Evid. 404(a)(2) 29, 30
Mont. R. Evid. 404(b) 2, 12
Mont. R. Evid. 405 ..... 3, 30
Mont. R. Evid. 405(a) 30
Mont. R. Evid. 405(b) 2, 12, 30, 31

STATEMENT OF THE ISSUES

1. Kevin Walla shot and killed R.A. Bowers after Mr. Bowers learned Mr. Walla had won $1,300 earlier that day, refused to leave Mr. Walla's apartment, and threatened to hurt Mr. Walla and take from him whatever he wanted to take, including money. The parties agreed Defense Counsel could make a foundational proffer outside the presence of the jury concerning what Mr. Walla knew about the alleged victim's reputation for violence and prior violent acts and whether he acted on that knowledge when he fatally shot Mr. Bowers.

The District Court rejected the stipulated agreement, instead indicating that Mr. Walla must testify under oath in chambers, subject to cross-examination by the State, before the District Court would rule on the admissibility of the evidence and before Mr. Walla testified in front of the jury.

Did the District Court abuse its discretion by rejecting the parties' stipulated agreement?

2. Before trial, the District Court ruled the jury would be instructed their decision must be unanimous concerning whether Mr. Walla's use of force against Mr. Bowers was justified. Without

otherwise instructing the jury about that requirement, the District Court rejected a supplemental verdict form proposed by the Defense that specifically required the jury unanimously to state whether the State proved beyond a reasonable doubt that Mr. Walla's use of force was not justified.

Did the District Court abuse its discretion by rejecting the proposed supplemental verdict form without otherwise instructing the jury their verdict must be unanimous about whether Mr. Walla's use of force was justified?

STATEMENT OF THE CASE

The State charged Kevin Walla with one count of deliberate homicide, a felony, with a weapons enhancement in violation of Mont. Code Ann. §§ 45-5-102(1)(a), 46-18-221, and one count of unlawful possession of a firearm by a convicted person, a felony, in violation of Mont. Code Ann. § 45-8-313(1)(b). (Doc. 3.) The District Court severed count I from count II. (Docs. 69, 76.) Count I proceeded to trial first.

Mr. Walla provided notice of his intent to raise a justifiable use of force defense and introduce "reverse 404(b) evidence" and "evidence under Rule 405(b) . . . regarding Mr. Walla's knowledge and awareness

of Mr. Bowers's history of drug use, criminal history, assaultive behavior, money concerns, his being accustomed to asking for money and also being given money without asking for it, his expectation that people would give him money, erratic behavior, wide and sudden mood swings, aggression, etc." in support of that defense. (Docs. 25, 53 at 1 – 2, 97.) The State partially opposed Mr. Walla's intent to use 404 and 405 evidence and filed a motion in limine to exclude such evidence "until a proper foundation is laid by the Defendant and the Court explicitly grants permission to the Defendant allowing him to introduce" such testimony. (Doc. 55 at 1, 74, 132.)

Prior to the Defense's presentation of evidence during trial, the parties agreed the District Court should conduct a preliminary hearing outside the presence of the jury, during which Defense Counsel would make an offer of proof setting forth the foundation for specific sets of facts, and the Prosecutor could then challenge the admissibility of each set of facts. (Doc. 217, attached hereto as App. A.) The District Court rejected the proposal and instead indicated Mr. Walla would have to testify under oath and be subject to cross-examination during the

preliminary evidentiary hearing.[1] (03/30/2022 Tr. at 4 – 10, attached hereto as App. B.) Thereafter, Mr. Walla decided not to testify and the jury did not hear the proposed evidence. (03/30/2022 Tr. at 16 – 24.)

Prior to trial, the Defense moved the court "to instruct the Jury . . . [it] must be unanimously convinced that the defendant did not act in reasonable self-defense to support a conviction." (Doc. 210 at 3.) The District Court granted the motion. (Doc. 215 at 8, ¶ 17.) The parties stipulated to a proposed verdict form. (Doc. 211 (parties stipulated proposed instructions and verdict form); 03/30/2022 Tr. at 36.) The form asked the jury to find whether Mr. Walla was guilty or not guilty of deliberate homicide and, if he was guilty, whether he used a weapon in the offense. (Doc. 221, attached hereto as App. C.) The District Court rejected a Defense supplemental verdict form, to which the State had objected, that would have required the jury unanimously to find the State disproved justifiable use of force beyond a reasonable doubt. (Proposed Supplemental Verdict Form (supplemented to record on

[1] The court reporter prepared a separate transcript for each day of the three-day trial, i.e., 03/28/2022—03/30/2022. The date is used herein when citing individual transcripts.

appeal 07/08/2024, attached hereto as App. D; 03/30/2022 Tr. at 42 – 46, attached hereto as App. E.)

The jury found Mr. Walla guilty of deliberate homicide and used a firearm in the offense. (App. C; 03/30/2022 Tr. at 90 – 91.)

At sentencing, the District Court sentenced Mr. Walla to 100 years for the homicide and ten years for the weapons enhancement to run consecutively at the Montana State Prison ("MSP"). (06/26/2022 Tr. at 13, attached hereto as App. F.) The written judgment conforms to the oral pronouncement. (Doc. 236, attached hereto as App. G.) After sentencing, the District Court dismissed Count II upon the State's motion. (Doc. 242.)

Mr. Walla timely appealed.

STATEMENT OF THE FACTS

Evidence Presented at Trial

On the afternoon of New Year's Eve 2019, Kevin Walla and his 12-year-old daughter, J.W., returned to the apartment they shared in Big Timber to find their neighbor, Richard Allen Bowers, whom they knew as Allen, waiting for them at their doorway. Mr. Bowers would visit Mr. Walla once or twice a week to hang out and talk in the Wallas'

living room. Mr. Walla invited Mr. Bowers to come inside. (03/28/2022 Tr. at 131 – 32, 137 – 38.)

Mr. Bowers was six feet, one inch tall and weighed 202 pounds, while Mr. Walla was five feet, nine inches tall and weighed 161 pounds. (03/29/2022 Tr. at 96 – 97.) Mr. Bowers had numerous tattoos on his body, including a large tattoo across his belly that said "Hell Razor" and tattoos on his fingers that were consistent with prison tattoos. (Exh's. 39 – 59; 03/29/2022 Tr. at 102 – 03.)

According the J.W., Mr. Walla and Mr. Bowers "had odd arguments all the time." (03/28/2022 Tr. at 143.) On this date, the two men got into a disagreement when Mr. Bowers contended men have one less rib than women . J.W. overheard the argument and, knowing Mr. Bowers was incorrect, exited her room and told him so. Mr. Bowers told J.W. to "google it." (03/28/2022 Tr. at 138 – 39.) So, she did, but before she could read the article out loud, Mr. Bowers pointed his finger at her "in a victory kind of way and said that he was right." (03/28/2022 Tr. at 139 – 40.) According to J.W., Mr. Walla got mad at Mr. Bowers for pointing his finger at J.W. (03/28/2022 Tr. at 140.) But after J.W. showed Mr. Bowers the article on Google and Mr. Bowers "realized that

[he] was wrong and then he was done with the argument," and J.W. did not think much about it. She returned to her room. (03/28/2022 Tr. at 140.)

Around 5:20 p.m., J.W. let her friend, B.H., into the apartment. At that time, Mr. Bowers was sitting on the loveseat and Mr. Walla was either sitting on the couch or standing in the hallway near his bedroom. (03/28/2022 Tr. at 143 – 44, 172 – 73.) J.W. left the apartment with B.H. for a sleepover but returned shortly thereafter when J.W. realized she had forgotten her money. Mr. Bowers was still sitting on the loveseat, but Mr. Walla was not in the living room. (03/28/2022 Tr. at 144 – 45.) On her way out the second time, J.W. saw Mr. Walla exit his bedroom, holding what she originally stated was a silver gun with a wooden handle behind his back.[2] (03/28/2022 Tr. at 155.) Mr. Walla told J.W. "he was gonna make Allen leave." (03/28/2022 Tr. at 144.)

J.W. hurried B.H. out of the home, and they got in B.H.'s dad's pickup and drove away. None of the three of them saw or heard any

[2] On cross-examination, J.W. conceded the gun she saw her dad holding was not silver. (03/28/2022 Tr. at 155.)

commotion coming from inside the apartment when they left. (03/28/2022 Tr. at 145, 163 – 64, 173 – 75.)

Around 5:24 p.m., Mr. Walla called 911 and reported he had just shot someone who had tried to rob him in his apartment and requested "an ambulance and cops." (03/28/2022 Tr. at 183 – 86; Exh's. 1(a), 1(b) at 722 – 23.[3]) Mr. Walla gave the dispatcher his name and address and asked the dispatcher where he should put the gun. (Exh. 1(b) at 722 – 23.) Mr. Walla reported that he believed the man was dead, he was not breathing, and Mr. Walla could not feel a pulse. (Exh. 1(b) at 258 – 259.)

When responding officers arrived, Mr. Walla voluntarily walked out of his apartment to meet them in the hallway with his hands held up. He informed them he had a pistol in his rear pocket. Mr. Walla complied peacefully with the officers' commands, walking backwards toward them with his hands in the air. An officer removed a gun from Mr. Walla's pocket and cuffed him. (03/28/2022 Tr. at 192; Exh's. 25A

[3] Exhibit 1(a) is audio of the 911 call. Exhibit 1(b) is a written transcript of the audio. Exhibits 1(a), (b) were admitted and published to the jury at 03/28/2022 Tr. at 184 – 85. Cites herein to the 911 call are to the written transcript only.

at 00:40 – 01:26, 25B at 1277.[4]) Mr. Walla voluntarily told Brown he had a knife in his pocket, which was also seized. (03/29/2022 Tr. at 12 – 13; Exh. 26A at 00:55 – 01:30, B at 1231 – 32.[5])

Mr. Walla told the officers the man he shot was named "Allen" and was in the apartment. Mr. Walla did not know Allen's last name. Mr. Walla identified him as "a crazy tweaker from next door" and again asserted Allen tried to rob him. (03/29/2022 Tr. at 18; Exh's. 26A at 02:50 – 03:05, 26B at 1232.) He advised the officers Allen was not armed and there were no other weapons or people in the apartment. (03/28/2022 Tr. at 193; Exh's. 25A at 01:16 – 01:40, 25B at 1277 – 78.)

After being advised of his Miranda rights, Mr. Walla responded, "You guys are gonna find out a lot real quick. . . . I didn't do anything

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[4] Exhibit 25(A) is about 15 minutes of footage from Deputy Whaley's body camera beginning with his arrival at Mr. Walla's apartment building and ending when he left the building and drove away. Exhibit 25(B) is a written transcript of the audio from the body cam. Exhibits 25A, B were admitted and published to the jury at 03/28/2022 Tr. at 198 – 99.

[5] Exhibit 26(A) is about 11 minutes of footage from Deputy Brown's body camera beginning when Brown was in Mr. Walla's apartment with other officers, EMTs, and Mr. Bowers's body, and ending when Brown escorted Mr. Walla into the booking room at the Sheriff's office. Exhibit 26(B) is a written transcript of the audio from the body cam. Exhibits 26(A), (B) were admitted and published to the jury at 03/29/2022 Tr. at 19.

wrong." (Exh's. 26A at 04:00 – 04:37, 26B at 1233 – 34.) Mr. Walla explained this was the second time someone had tried to rob him at his apartment. He said the first time was a few months ago and he beat the guy up. Mr. Walla stated the guy was busted for meth in the stairwell of the building, asserting, "I've been dealing with these tweakers this whole time. . . . They tried to take my life. This is the second time they tried to take my life." (Exh's. 26A at 03:05 – 05:35, 26B at 1232 – 1234.)

Officers found Mr. Bowers on his knees, slumped over face-down on the seat cushion of a chair. Mr. Bowers was holding a lighter in his left hand and a corncob pipe in his right hand. (03/28/2022 Tr. at 197 – 98; Exh's 25A at 5:51 – 8:15, 25B at 1280 – 81.)

No signs of a struggle were observed in the apartment. Mr. Bowers's sneakers were sitting outside the front door to the apartment. (03/28/2022 Tr. at 193 – 97; 03/29/2022 Tr. at 11 – 12; Exh's. 25A at 3:00 – 5:50, 25B at 1279.) Toxicology reports showed Mr. Bowers had a blood alcohol content of .173 at the time of his death. (03/29/2022 Tr. at 100.) Multiple responding officers testified they believed Mr. Walla was intoxicated, as he was "making no sense," stumbling, having a difficult

time following directions, and smelled of alcohol. (03/28/2022 Tr. at 193; 03/29/2022 Tr. at 17 – 18.) J.W. testified she and her dad had been at the Big Timber Bar earlier that afternoon, where Mr. Walla drank Budweiser and Apple Crown shots while J.W. had Shirley Temples. (03/28/2022 Tr. at 135 – 36.)

Further investigation revealed Mr. Bowers died of a single fatal gunshot wound to the abdomen. The shot was fired two or more feet away from Mr. Bowers. (03/28/2022 Tr. at 204; 03/29/2022 Tr. at 63, 69 – 70; Exh's. 17, 32, 53, 57, 62.) The bullet trajectory went from the front to back of Mr. Bowers's body, slightly left to right, and downward. (03/29/2022 Tr. at 92; Exh. 57.) The bullet perforated the aorta and "would be rapidly fatal, . . . within minutes." (03/29/2022 Tr. at 109 – 110.) However, the wound "was not instantly incapacitating, it was not instantly fatal." (03/29/2022 Tr. at 110.) Thus, it could not be determined whether Mr. Bowers was standing or sitting or lunging at the person who shot him when the gun was fired, only that he was facing toward the shooter. (03/29/2022 Tr. at 110.)

According to a bartender from the VFW hall in Glendive, about five months after the shooting, Mr. Walla stated to her and other people

at the bar several times that he was having beers at his apartment "with a guy across the hall that was a preacher or wanting to be a preacher" on New Years Eve, and, after his daughter left the apartment with her friend, Mr. Walla "just got sick of him, went in and got a gun, and shot him." (03/29/2022 Tr. at 122 – 123.)

Defense Proffer Regarding Mr. Walla's Justifiable Use of Force Defense

Before trial, the Defense noticed an affirmative defense of justifiable use of force ("JUOF"). (Docs. 25, 97.) Additionally, the Defense noticed Mr. Walla's intent to introduce evidence about Mr. Bowers's prior bad acts, pursuant to Mont. R. Evid. 404(a), (b) and 405(b), to support his JUOF defense. (Doc. 53.) The Defense stated it:

> will present evidence regarding Mr. Walla's knowledge and awareness of R.A. Bowers history of drug use, criminal history, assaultive behavior, money concerns, his being accustomed to asking for money and also being given money without asking for it, his expectation that people would give him money, erratic behavior, wide and sudden mood swings, aggression, etc.

(Doc. 53 at 1 – 2.) Mr. Walla would offer the evidence to support his "awareness . . . of the situation he faced from R.A. Bowers and the reasonableness of the force used by Mr. Walla in self-defense." (Doc. 53 at 2.) Arguing that the evidence was not unfairly prejudicial under

Rule 403, the Defense leaned on Mr. Walla's right to present a complete defense. (Doc. 53 at 2, 8 – 9.) The Defense argued the evidence was both relevant and admissible. (Doc. 53 at 2 – 3.)

The notice stated,

> Bowers found out while at Walla's apartment that Mr. Walla had won $1300 earlier in the day at the American Legion playing keno. R.A. Bowers saw Mr. Walla give his daughter cash money. R.A. Bowers refused to leave Mr. Walla's apartment after repeatedly being told to leave. R.A. Bowers threatened to hurt Mr. Walla and take from him whatever he wanted to take, including money.

(Doc. 53 at 3.)

Initially, the parties disagreed about the proper procedure to determine the admissibility of such evidence. (03/29/2022 Tr. at 136 – 39.) The Defense's preferred option was for Mr. Walla simply to testify in court about his knowledge of Mr. Bowers's prior violent acts and whether he relied on that knowledge in the degree of force he used. (03/30/2022 Tr. at 137 – 38.) The State wanted Mr. Walla to testify first in chambers to provide a foundation for the evidence and obtain a ruling on its admissibility and then testify in open court about admissible evidence. (03/30/2022 Tr. at 139.) At the end of the second day of trial,

the judge expressed doubt about the legality of the State's preferred option, stating, "I'm not sure that the State is entitled to two cross-examinations and basically a discovery deposition under oath of the defendant." (03/30/2022 Tr. at 139.)

That evening the parties reached a stipulated agreement whereby Defense Counsel could make an offer of proof outside of the presence of the jury about Mr. Walla's proposed testimony regarding Mr. Bowers's prior bad acts, after which the parties would present their respective arguments about the admissibility of those alleged acts. The parties requested the District Court to rule on the admissibility of the proffered testimony before Mr. Walla testified in open court. (App. A at 1, ¶ 2; App. B at 4 – 5.)

The parties presented the stipulation to the judge the following morning before the jury arrived. Without explanation, the District Court reversed course from the previous day, ruling that Mr. Walla had to be subject to cross-examination under oath during the preliminary hearing. (App. B at 9 – 10.) Thereafter, Mr. Walla indicated he would not testify. (03/30/2022 Tr. at 17 – 24.) Accordingly, the jury did not

hear Mr. Walla's explanation of what prompted him to shoot Mr. Bowers.

Additional facts pertinent to the Argument are provided below.

STANDARDS OF REVIEW

"We review evidentiary rulings for an abuse of discretion. . . . A district court abuses its discretion if it acts arbitrarily, without employing conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *State v. Cunningham*, 2018 MT 56, ¶ 8, 390 Mont. 408, 414 P.3d 289 (citations omitted). "Trial courts have broad discretion on evidentiary matters, and the determination of the adequacy of the foundation for the admission of evidence is within the discretion of the trial court, and will not be overturned absent a clear abuse of discretion." *State v. Brasda*, 2021 MT 121, ¶ 11, 404 Mont. 178, 486 P.3d 703 (citations, quotation marks omitted, formatting modified).

"A district court is bound by the Rules of Evidence and applicable statutes, . . . , and we review a district court's application of a statute or rule of evidence de novo." *State v. Polak*, 2018 MT 174, ¶ 12, 392 Mont. 90, 422 P.3d 112 (citations omitted).

"This court reviews for correctness the legal determinations a lower court makes when giving jury instructions, including whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law. . . . District courts are given broad discretion when instructing a jury; reversible error occurs only if the instructions prejudicially affect a defendant's substantial rights. . . . A district court's decision on jury instructions is presumed correct, and the appellant has the burden of showing error." *State v. Lackman*, 2017 MT 127, ¶ 8, 387 Mont. 459, 461, 395 P.3d 477 (citation omitted).

SUMMARY OF THE ARGUMENT

This Court should reverse Mr. Walla's conviction for deliberate homicide with a weapons enhancement for two independent reasons.

First, the District Court abused its discretion by ruling Mr. Walla must testify in chambers, subject to cross-examination, before testifying in open court concerning his knowledge about Mr. Bowers's prior violent acts and whether he acted on that knowledge when he shot Mr. Bowers in self-defense. The parties agreed that Defense Counsel could make a proffer of Mr. Walla's evidence and the Prosecutor could argue against admissibility of the proffered evidence outside the jury's presence, after

which the District Court would rule on admissibility before Mr. Walla testified in open court. None of the District Court's stated reasons for rejecting the parties' stipulated agreement was warranted. The District Court's indicated rulings implicated Mr. Walla's substantial rights to remain silent, to due process, and to present a complete defense. The State cannot prove the District Court's arbitrary decision was harmless.

Second, the District Court abused its discretion when it rejected the supplemental verdict form proposed by the Defense that would have required the jury to state whether they unanimously found the State proved beyond a reasonable doubt Mr. Walla's use of force against Mr. Bowers was not justified. Contrary to the District Court's pretrial order for the jury to be instructed its decision on JUOF must be unanimous, neither the JUOF instructions nor the verdict form itself required the jury to state its unanimous decision regarding Mr. Walla's JUOF claim. The District Court's error implicated Mr. Walla's rights to a unanimous jury verdict and to due process. The State cannot prove this error was harmless.

Mr. Walla's conviction should be reversed for either or both of these errors.

ARGUMENT

I. The District Court abused its discretion by ruling Defense Counsel could not make a foundational proffer outside the presence of the jury concerning what Kevin Walla knew about the alleged victim and whether he relied on that knowledge when he shot Mr. Bowers in self-defense.

A. Additional facts.

The Defense made several arguments why the prior acts evidence was admissible. First, the evidence and statements would be "offered to demonstrate Mr. Walla's state of mind and why he believed his response was appropriate in order to protect himself against R.A. Bowers." (Doc. 53 at 4.) Second, Mr. Walla's awareness of Mr. Bowers's prior bad acts would demonstrate his belief that Mr. Bowers was trying to get Mr. Walla to give him some of the money Mr. Walla had won and that Mr. Walla had reason to fear what Mr. Bowers would do when Mr. Walla did not give him money willingly. (Doc. 53 at 6.) Third, the evidence would prove the identity of the primary aggressor was Mr. Bowers and support Mr. Walla's position that his reaction was reasonable. (Doc. 53 at 6 – 7.)

The State opposed the introduction of evidence concerning Mr. Bowers's prior bad acts. The State moved in limine to prevent the

Defense from introducing "testimony of specific acts of alleged violence by the victim, the victim's alleged reputation for violence, or specific acts of violence committed by members of the community." (Docs. 55 at 1, 132 at 1, 198 at 1 – 6.) Separately, the State opposed Mr. Walla's notice of intent to introduce such testimony. (Doc. 74 at 1.) The State complained there was no evidence supporting the inclusion of prior-acts evidence and requested discovery regarding Mr. Walla's assertions, pursuant to Mont. Code Ann. § 46-15-323. (Doc. 74 at 2, 5 – 7.)

During a pretrial hearing, the parties maintained their respective arguments. (Combined Tr. at 20 – 21 (01/25/2022 Status Hearing).) Counsel agreed, however, that issues concerning evidence of Mr. Bowers's prior bad acts and the State's objections thereto should be resolved outside the jury's presence. (Combined Tr. at 21 – 22.) After the hearing, the District Court issued an order indicating the issue remained unresolved and stated, "Before this Court permits any reverse 404(b) evidence, this Court will hear relevant arguments about its foundation and admissibility outside the presence of the jury." (Doc. 186 at 2, ¶ 7.) In a subsequent pretrial order, the District Court again ruled, "The parties have not reached an agreement with regard to this

issue[, i.e., character evidence of the victim]; however the parties do agree that in the event the Defendant wishes to adduce evidence of specific acts of violence committed by the victim, Richard Allen Bowers, foundation must be established outside the presence of the jury." (Doc. 215 at 1, ¶ 2.)

At the end of the second day of trial, after the jury had been dismissed, counsel addressed with the judge the admissibility of Mr. Bowers's prior bad acts through Mr. Walla's testimony. The Prosecutor contended that before Mr. Walla could testify in court about his knowledge of specific acts of violence attributable to Mr. Bowers, he would first have to testify in chambers and be subject to cross-examination before the judge could rule whether his testimony was admissible. The Prosecutor was focused on what he considered:

> two prongs to the admissibility of these specific acts of violence. The first one is what we agree upon, that that Mr. Walla had had knowledge of these specific acts. However, there's a second prong and that is that the defendant relied upon those specific acts in the degree of force that that he used. So, it's, because it's the State's position that if we do this in front of the jury, then what that does is it just allows the defense to, the defendant to talk about all these acts and then, well they're already out, and then he doesn't have to say whether he relied on it or not. So, it really

> negates that second prong if this if this mechanism isn't or this procedure isn't taken care of outside the presence.[sic] So, that that's a nutshell of our, our disagreement.

(03/29/2022 Tr. at 137 – 38.)

Defense Counsel responded there was a third issue, which was that the State's position:

> forces Mr. Walla to be cross examined outside the presence of the jury by the State, once he lays that foundation. Which, I think is violative of his 5th Amended [sic] Right. To the extent it it [sic] opens up for two bites at the apple and then I can make all sorts of analogies even though the Court's probably tired of them at this point. So, but again though.

(03/29/2022 Tr. at 138.) The parties agreed the relevant cases were *Cunningham*, *supra*; *DeSchon v. State*, 2008 MT 380, 347 Mont. 30, 197 P.3d 476; *State v. Montgomery*, 2005 MT 120, 327 Mont. 138, 112 P.3d 1014; and *City of Red Lodge v. Nelson*, 1999 MT 246, 296 Mont. 190, 939 P.2d 300. (03/29/2022 Tr. at 139.)

The District Court advised:

> Well, what I would task Counsel to do on, on this issue . . . is just get me some point briefs with the law in them. And, and then we'll take it up in the morning, argue about it again. I understand both party's [sic] positions, I don't think that, just off the top of my head. I'd have to

> see the law. I'd just have to see the law, but I I'm not sure that the State is entitled to two cross examinations and basically a discovery deposition under oath of the defendant. And we may be able to take care of it if there's anything that comes up by objection and argument outside of the jury. At the same time that might release something out to the jury that shouldn't be. But, get me some point briefs in the morning, . . . and we'll go from there.

(03/29/2022 Tr. at 138.)

The next morning before the jury was present, the parties presented the judge with a stipulated proposed order that, in relevant part, set out a procedure for Defense Counsel to make an offer of proof outside of the presence of the jury about Mr. Walla's proposed testimony, after which the parties would present their respective arguments about the admissibility of those alleged acts. The parties requested the District Court to rule on the admissibility of the proffered testimony before Mr. Walla testified in open court. (App. A at 1, ¶ 2; App. B at 4 – 5.)

The District Court pressed the Prosecutor whether "the State is going to just accept" Defense Counsel's offer of proof regarding what Mr. Walla knew and acted upon. The Prosecutor explained he agreed to procedure, but indicated he would argue about admissibility and

"probably would object to [Defense Counsel's] lack of knowledge when [Defense Counsel] made the proffer." (App. B at 4 – 5.)

Defense Counsel explained the intent of the agreement was to prevent Mr. Walla from being cross-examined twice. Counsel described that he would make an offer of proof about a certain set of facts and how Mr. Walla came to know those facts, then the Prosecutor could challenge admissibility of those facts. Once the District Court made its rulings, Defense Counsel emphasized, "Mr. Walla still has to testify to all of it." (App. B at 6.)

Flip-flopping from its position the day before, the District Court was skeptical of the proposal:

> COURT: Okay, can I give you my impression? My impression is you're testing the Court's evidentiary rulings to decide whether in fact the defendant should testify or not. That's, that's what it appears to me by, you're, you're getting a Court's opinion on the strength of the evidence and the strength of the admissibility of the evidence. And then you're gonna make a decision whether he should testify or not.
>
> . . .
>
> COURT: Well, the issue as I see it in my mind, is that if we go through the proffer and then I'm, I'm not going to, let's say I don't allow that testimony, after you argue and I don't allow

> that testimony, then that testimony cannot go, none of that can go before the jury without, without Mr. Walla testifying.
>
> [DEFENSE COUNSEL]: We agree.
>
> COURT: But are you not then really, you may, you, you, I may not be expressing it you you're making this proffer with no cross-examination, and I have to determine whether that's sufficient evidence for the defense.
>
> [THE PROSECUTOR]: Right, it's and I, I understand.
>
> COURT: Is that not an advisory opinion from the Court as to what the evidence will be as it eventually comes before the jury?

(App. B at 6 – 8.)

Both parties attempted to persuade the judge to accept their stipulated procedure. (App. B at 8 – 9.) Defense Counsel pointed out he would be making the proffer as an officer of the court and would lay the foundation for Mr. Walla's testimony based on his conversations with Mr. Walla. Counsel argued that even if Mr. Walla did testify in-chambers and was cross-examined by the Prosecutor, the judge still would have to rule whether the testimony was admissible before the jury would hear it. Counsel contended, "The Court would have to make the same determination. So, to the extent that there would be

somewhat of an advisory opinion before he testifies [in open court], I don't see the difference." (App. B at 9.)

Without responding to Defense Counsel's point about the alleged advisory opinion, the District Court ruled:

> COURT: Well, the difference that I see it's an advisory opinion and I don't get to hear the cross. That, that's the difference I see. So, I'm getting, not Mr. Walla's direct testimony under oath, I'm getting his counsel saying this is what I believe Mr. Walla would testify to, I have no cross examination to even value the, value whether it's, you know meets the foundational requirements to admit it. So, I'm going on the good faith of what the proffer is and if I say, fine you can introduce it, and the, I guess I'm just really concerned that I'm only gonna get a quarter of the, maybe even a quarter of it, I'm getting counsel's statement as to what he believes his client will testify to. We don't know what his client's testifying to, and I don't get the benefit of cross examination to test, to test, to test those statements. I'll just have to take it at face, at face value, and try to determine you know, whether that's gonna be sufficient or not. And if I don't allow it, then the then the defendant can reevaluate his position and say I'm not going on the stand. That's, that's where my advisory opinion is at. But, so maybe we can ruminate on that a bit[.]

(App. B at 9 – 10.)

Following an off-the-record discussion between Defense Counsel and Mr. Walla, the Defense stated:

> Your Honor, . . . [w]e certainly wanted Mr. Walla to hear this proposed order [i.e., App. A, ¶ 2] and agreement and, and what the Court had to say, and I stepped out to talk to him, it doesn't change his opinion on things, so I do just state that it's an agreement that we all reached with respect to the second part of that. I believe it's academic at this point and I have a colloquy for Mr. Walla with respect to whether or not he wants to testify or not testify at trial that I'd like to discuss with him on the record outside the presence of the jury. I don't have an issue with the State being present and I think that the discussion most likely will make the answer to number two academic.

(03/30/2022 Tr. at 17.)

During the colloquy, Mr. Walla indicated he would not testify.[6] (03/30/2022 Tr. at 17 – 24.) The colloquy did not address paragraph 2 in the proposed order. The judge signed the parties' proposed order but crossed out the second paragraph regarding the offer of proof concerning Mr. Bowers's prior bad acts because Mr. Walla would not be testifying. (03/30/2022 Tr. at 24; App. A at 1.)

B. Governing law.

Mont. Code Ann. § 45-3-102 provides in relevant part:

---

[6] Without objection, at Defense Counsel's request the District Court ordered the colloquy sealed. (03/30/2022 Tr. at 28.)

> 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 . . . against the other person's imminent use of unlawful force. However, the person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person . . . or to prevent the commission of a forcible felony.

In *Polak*, the Court explained:

> Justifiable use of force ("JUOF"), or self-defense, provides a complete affirmative defense to deliberate homicide. . . . The State retains the burden of proving the underlying offense beyond a reasonable doubt, but a defendant who raises JUOF as an affirmative defense assumes the burden of producing sufficient evidence on the issues to raise a reasonable doubt of his guilt. . . . To establish JUOF, a defendant must show that: (1) he was not the aggressor; (2) he reasonably believed he was in imminent danger of unlawful harm; and (3) he used reasonable force necessary to defend himself.

Polak, ¶ 26 (citations, quotation marks omitted, formatting modified.)

In *Cunningham*, this Court instructed:

> The primary issue in the affirmative defense of justifiable use of force is the reasonableness of the defendant's belief that the use of force is necessary. Therefore, only facts known to the defendant at the time of the incident are relevant. . . . The state of mind and

> intent of the defendant" is also relevant. . . . A defendant who asserts a justifiable-use-of-force defense may offer the victim's character evidence only in limited circumstances.

Cunningham, ¶ 14 (citations, quotation marks omitted, formatting modified).

"In a case where self-defense is raised, the state of mind and intent of the defendant is the primary issue. The jury is entitled to know, so far as evidence is available, all the facts and circumstances which tend to throw light upon the parties and their relations and feelings toward each other." *State v. Weinberger*, 204 Mont. 278, 292, 665 P.2d 202, 210 (1983) (*en banc*) (citation omitted). A jury is entitled to view a victim's death in the context of prior events. *Weinberger*, 204 Mont. at 292, 665 P.2d at 210 (citation omitted).

Concerning the admissibility by a defendant of evidence regarding the decedent's reputation for violence, this Court ruled long ago:

> [T]he weight of authority, we think, gives support to the rule that when, as in this case, the issue is self–defense, and there is doubt as to who was the aggressor, such evidence is admissible in order to enable the jury to resolve the doubt; for it is entirely in accord with everyday experience that a turbulent, violent man is more aggressive and will more readily bring on an encounter, than one who is of the contrary disposition. . . . Such

> evidence serves the same purpose as uncommunicated threats, which are always admissible when the question is in doubt, in order to enable the jury to determine who probably brought on the conflict.

State v. Jones, 48 Mont. 505, 139 P. 441, 446 – 47 (1914) (citations omitted). *See also State v. Sattler*, 1998 MT 57, ¶ 41, 288 Mont. 79, 956 P.2d 54 (*en banc*) (approving the rule announced in *Jones*—"when the issue is self defense and there is doubt as to who was the aggressor, evidence of the decedent's reputation for violence is admissible in order to enable the jury to resolve the doubt"). The Court also noted in *Sattler* that it "reiterated that rule of admissibility regarding reputation evidence in [*State v.*]*Logan*[, 156 Mont. 48, 473 P.2d 833 (1970)] many years later, clarifying that the reputation evidence was not admissible until a proper foundation had been laid via the defendant's testimony admitting the killing and raising the issue of the decedent being the aggressor." *Sattler*, ¶ 41, citing *Logan,* 473 P.2d at 841 – 42 (citations omitted).

Mont. R. Evid. 404 provides in relevant part:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action

> in conformity therewith on a particular occasion, except:
>
> . . .
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused . . . where the victim is incapable of testifying to rebut evidence that the victim was the first aggressor.

Mont. R. Evid. 404(a)(2).

In turn, Mont. R. Evid. 405 states:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct. In cases . . . where the character of the victim relates to the reasonableness of force used by the accused in self defense, proof may also be made of specific instances of that person's conduct.

At issue in Mr. Walla's case:

> Evidence of the violent nature of the alleged victim of an assault is limited to what the defendant knew at the time he used force against the victim, and it is also required that the defendant show this knowledge led him to use the level of force he did.

DeSchon, ¶ 24 (citations omitted). *Accord Sattler*, ¶ 46 (ruling a defendant seeking to introduce evidence of prior specific acts is admissible under Rule 405(b) to support a claim the force used was reasonable based on defendant's knowledge of the victim's history of violent acts).

Disputes regarding the admissibility of testimony must be resolved outside the jury's presence by the judge. Mont. R. Evid. 104(a), (c). In relevant part, this Court will not find error in a trial judge's ruling that "excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer[.]" Mont. R. Evid. 103(a)(2).

> The reason for M.R. Evid. 103(a)(2) "is to require that if evidence is excluded there must be an offer of proof so that neither the trial court nor this Court has to speculate concerning what the evidence would have been." *In re O.A.W.,* 2007 MT 13, ¶ 51, 335 Mont. 304, 153 P.3d 6. An offer of proof allows counsel the ability to get evidence on the record where the court determines that it should be excluded. *State v. Miller,* 231 Mont. 497, 508, 757 P.2d 1275, 1282 (1988). An offer of proof should be specific as to the facts to be proven. *Miller,* 231 Mont. at 508, 757 P.2d at 1282. A trial court cannot commit error without the arguing party informing the court that a specific course of action is legally improper. *Miller,* 231 Mont. at 508, 757 P.2d at 1282.

State v. King, 2013 MT 139, ¶ 37, 370 Mont. 277, 304 P.3d 1.

C. The District Court's errors.

The District Court expressed three concerns about the parties' agreed-upon proposal: (1) the parties were requesting an "advisory opinion;" (2) Mr. Walla could decline to testify after hearing the so-called advisory opinion; and (3) Defense Counsel's proffer may not be what Mr. Walla would say in testimony. These concerns are grounded upon the District Court's incorrect understanding of the law.

First, the District Court inaccurately determined the parties were requesting an advisory opinion. In characterizing what constitutes an advisory opinion, this Court has explained:

> [T]he existence of a justiciable controversy is a threshold requirement to a court's adjudication of a dispute. . . . A justiciable controversy is one upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion. . . . A matter is moot where judgment will not operate to grant relief, and, absent relief, a decision on the merits of the issue raised would be merely advisory. . . . We will not submit advisory opinions.

State v. Savage, 2011 MT 23, ¶ 17, 359 Mont. 207, 248 P.3d 308 (citations, quotation marks omitted).

Additionally, the Court has instructed:

> The test to determine whether a justiciable controversy exists contains three elements:
>
> First, a justiciable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. Third, [it] must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Miller v. State Farm Mut. Auto. Ins. Co., 2007 MT 85, ¶ 8, 337 Mont. 67, 155 P.3d 1278 (citation omitted, brackets original).

> [T]he cases and controversies that are within the judicial power to determine do not include abstract differences of opinion. Citing cases from the United States Supreme Court, we observed that a controversy, in the constitutional sense, is one that is definite and concrete, touching legal relations of parties having adverse legal interests; it is a real and substantial controversy, admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.

Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567 (citation, quotation marks omitted).

Here, the issue presented to the District Court was whether Mr. Walla could testify in open court concerning Mr. Bowers's prior violent acts and how those acts influenced his response to Mr. Bowers's threat to use violence to take whatever he wanted, including the money Mr. Walla had just won that day. This was, in fact, a justiciable controversy affecting Mr. Walla's substantial right to present a complete defense at his deliberate homicide trial while maintaining his right to remain silent until he chose to testify in open court.

The parties were not presenting "a purely political, administrative, philosophical or academic" dispute. *Savage*, ¶ 17. The dispute was not theoretical, but rather was "one upon which the judgment of the court may effectively operate." *Miller*, ¶ 8. The admissibility of Mr. Bowers's prior violent acts was "definite and concrete, touching legal relations of parties having adverse legal interests;" it was a "real and substantial controversy" in which a request was presented for "specific relief through decree of conclusive

character," not a "hypothetical state of facts" or an "abstract proposition." *Plan Helena*, ¶ 9. *Accord Miller*, ¶ 8.

The parties agreed upon a procedure in which, outside the presence of the jury, Defense Counsel would make a proffer regarding Mr. Walla's knowledge of a certain set of facts and the Prosecutor could object to admissibility. The District Court, then, would determine whether the proffered facts were admissible. If they were admissible, Mr. Walla could testify to them. If they were inadmissible, a record would be made for appeal without the jury hearing the ruled-upon inadmissible facts. In no manner could the stipulated procedure be deemed a request for an advisory opinion. The District Court's decision to the contrary was wrong as a matter of law.

Moreover, the District Court's concern that Mr. Walla could decide not to testify after hearing the judge's rulings on the admissibility of Mr. Bowers's prior violent acts was misplaced. Why? Because there would have been nothing wrong with Mr. Walla deciding not to testify after hearing the judge's rulings – just like there is nothing wrong with a criminal defendant sitting through the State's entire presentation of

its case and resting before a defendant decides to testify in their own defense.

The District Court's belief that Mr. Walla would be engaging in improper gamesmanship by listening to the judge's rulings before deciding whether to testify was unwarranted. Waiting to decide whether to testify until the State rests its case and observing the judge's rulings are encompassed within a defendant's substantial rights to remain silent and to due process in a criminal trial.

Lastly, the District Court's fear that Mr. Walla might go rogue on the witness stand and testify to facts outside of those the judge determined were admissible constitutes no basis for rejecting the parties' stipulated proffer procedure. To analogize, under the District Court's logic a judge could refuse to hear argument or rule on a motion in limine because witness testimony in court might exceed the bounds of the judge's ruling. That is not the way a trial works.

A trial court has broad discretion to fashion an appropriate remedy when a witness violates an order in limine or otherwise testifies regarding inadmissible facts or opinion. For example, a judge may order the testimony struck from the record, tell the jury to disregard it,

give a curative instruction, admonish or even sanction the witness or counsel, or when necessary declare a mistrial. *See, e.g.*, *State v. Partin* (1997), 287 Mont. 12, 22, 951 P.2d 1002, 1008 (defendant's motion for mistrial should have been granted due to an officer's undisputed violation of a motion in limine during testimony); *State v. Maier*, 1999 MT 51, ¶ 64, 293 Mont. 403, 977 P.2d 298 (in light of the powerful evidence against defendant and the District Court's prompt admonition to the jury, the prejudice to defendant from improper testimony was cured; *State v. Brady*, 2000 MT 282, ¶ 14, 302 Mont. 174, 13 P.3d 941 (mistrial not required where State witness did not "directly violate" a stipulation in limine and the district court admonished the jury to disregard the testimony).

Here, Defense Counsel offered a written account of the testimony Mr. Walla wanted to tell the jury regarding his knowledge of Mr. Bowers's prior violent acts and how that knowledge influenced his decision to shoot Mr. Bowers, which the State opposed. (Docs. 53, 55, 74, 198.) The parties maintained their respective positions throughout pretrial proceedings, agreeing that the admissibility of the proffered facts would be determined during trial outside the presence of the jury.

(Docs. 186, 217.) The parties ultimately agreed upon a negotiated procedure for the judge to determine the admissibility of Mr. Walla's expected testimony through proffers from counsel outside the jury's presence, followed by argument from the Prosecutor concerning the admissibility of Defense Counsel's proffer. As explained above, the District Court rejected the procedure for unwarranted reasons.

The District Court clearly abused its discretion by rejecting the parties' stipulated procedure. The State cannot prove the error was harmless. The District Court's decision requiring Mr. Walla to testify under oath in chambers subject to cross-examination by the Prosecutor before he testified in open court implicated Mr. Walla's substantial rights to remain silent until he testified before the jury and to present a complete defense. In light of the District Court's indicated ruling, Mr. Walla declined to testify. Therefore, the jury did not know "all the facts and circumstances" that would have "throw[n] light upon the parties and their relations and feelings toward each other" and was unable to view Mr. Bowers's death in the context of prior events. *Weinberger*, 204 Mont. at 292, 665 P.2d at 210.

This Court should reverse Mr. Walla's conviction on account of the District Court's error and remand for a new trial at which the Defense may make a foundational proffer outside the presence of the jury before Mr. Walla testifies in court to obtain admissibility rulings concerning what Mr. Walla knew about Mr. Bowers's prior violent acts and whether he acted on that knowledge in using force against Mr. Bowers.

II. The District Court did not fully and fairly instruct the jury on the applicable law and abused its discretion by rejecting a supplemental verdict form that would have instructed the jury unanimously to find whether the State proved or failed to prove beyond a reasonable doubt that Mr. Walla's use of force was not justified.

Before trial, the Defense filed a motion in limine asking the District Court, in relevant part, "to instruct the Jury . . . [it] must be unanimously convinced that the defendant did not act in reasonable self-defense to support a conviction." (Doc. 210 at 3, ¶ 5.) The District Court granted the motion, ordering, "The Jury **shall be instructed** that once Mr. Walla raises the defense of justifiable use of force, the jury **must be unanimously convinced by the State** that Mr. Walla did not act in reasonable self-defense." (Doc. 215 at 8, ¶ 17 (emphasis added).)

The third paragraph of the parties' mid-trial, proposed, stipulated order provided that if Mr. Walla did not testify, the parties agreed "the defense of self-defense is joined" and the stipulated jury instructions regarding defense of self, but not defense of property or occupied structures, should be given to the jury.[7] (App. A at 1 – 2, ¶¶ 3, 5; 03/30/2022 Tr. at .) As grounds for the stipulation, counsel observed that Mr. Walla's statements during the 911 call and on the officers' body camera videos that Mr. Bowers tried to rob him provided a foundation for a justifiable use of force as a defense. (03/30/2022 Tr. at 11 – 12.) The District Court accepted these paragraphs of the stipulation and gave the jury the parties' requested JUOF instructions. (App. A; Doc. 220 at Instructions 24, 25, 26, 27, 28.) None of those instructions directed the jury to unanimously find the State proved beyond a reasonable doubt that Mr. Walla's actions were not justified.

The parties stipulated to the State's proposed verdict form asking the jury whether Mr. Walla was guilty or not guilty of deliberate homicide and whether the State proved beyond a reasonable doubt that

[7] The record does not indicate why Defense Counsel agreed to omit defense of property or an occupied structure from the jury instructions.

Mr. Walla used a firearm in the offense. (Doc. 211.) The District Court used the State's verdict form. (Doc. 221.) The stipulated verdict form did not ask the jury to find whether the State proved beyond a reasonable doubt that Mr. Walla's use of deadly force was unjustified.

Contravening its pretrial order, neither the JUOF instructions nor the verdict form instructed the jury they must *unanimously* decide whether the State proved or did not prove beyond a reasonable doubt that Mr. Walla's use of force was justifiable. Consequently, Defense Counsel proposed a supplemental verdict form asking that question. (App. D at 42.) The State objected to the proposed form, complaining it was unnecessary and would confuse the jury. The Prosecutor noted that instruction 28 advised the jury the State had to prove beyond a reasonable doubt that Mr. Walla's force was unjustified while instruction 29 charged the jury about the issues in self-defense. Thus, the State averred the instructions alone were sufficient for the jury to understand they could not find Mr. Walla guilty of deliberate homicide unless the State shouldered its burden to disprove Mr. Walla's JUOF defense beyond a reasonable doubt. (App. D at 42 – 43.) Notably

missing from the Prosecutor's argument was any reference to unanimity.

The Defense countered the jury must first reject Mr. Walla's JUOF defense unanimously "before they can get to the verdict form with deliberate homicide." (App. D at 44.) Counsel referred the judge to *State v. Brodniak*, 221 Mont. 212, 718 P.2d 322 (1986) (*en banc*), *overruled in part on other grounds State v. Van Kirk,* 2001 MT 184, 143, 306 Mont. 215, 32 P.3d 735 (*en banc*), for the proposition that "all theories charged should be submitted to the jury for a special verdict. In the instant case all the theories charged were reflected in the verdict form given the jury." *Brodniak*, 221 Mont. at 228, 718 P.2d at 332.

In contrast to *Brodniak*, the Defense pointed out the verdict form in Mr. Walla's case did not include his JUOF theory. Therefore, a special verdict form, or a special interrogatory, should be given. (App. D at 44.) Defense Counsel emphasized the District Court "has the discretion to give it [i.e., a special verdict form or special interrogatory], if it's appropriate[,]" and argued it was appropriate here. (App. D at 45.)

Counsel also cited *United States v. Ramirez*, 537 F.3d 1075 (9th Cir. 2008), which explains "when a self-defense issue is raised at trial, the jury must be unanimously convinced that the Defendant did not act in reasonable self-defense to support a conviction." (App. D at 43 – 44.) In *Ramirez*, the Ninth Circuit observed, "As a rule, special verdicts in criminal trials are not favored[,]" but also remarked, "Whether or not it is appropriate to use a special verdict should be determined according to the particular circumstances of each case. . . . Verdict forms are, in essence, instructions to the jury." *Ramirez*, 537 F.3d at 1083 (citations, quotation marks, brackets omitted).

The Ninth Circuit rejected defendant's argument the district court erred by not using a special verdict form regarding his JUOF defense because "[t]he district court included a specific unanimity instruction within the self-defense instruction, stating that '[t]he government must prove beyond a reasonable doubt, with all of you agreeing, that the defendant did not act in reasonable self-defense.' . . . The unanimity requirement was unambiguous." *Ramirez*, 537 F.3d at 1083 (citations omitted). *Accord United States v. Southwell,* 432 F.3d 1050, 1053 (9th

Cir.2005) (noting, "[t]he failure to properly instruct the jury on the unanimity requirement was constitutional error").

Here, the District Court instructed the jury if the Defendant has introduced evidence of JUOF – and here the parties agreed Mr. Walla had done so – "the State has the burden of proving beyond a reasonable doubt that the Defendant's actions were not justified." (Doc. 220 at Instruction 26.) Unlike *Ramirez*, however, neither this instruction nor any other JUOF instruction included a specific unanimity instruction within it. (Doc. 220 at Instructions 24, 25, 26.) Failure to instruct the jury on the unanimity requirement either in the instructions or in a supplemental verdict form was constitutional error. *Southwell*, 432 F.3d at 1053. The State will not be able to demonstrate this error was harmless because there is no way to ascertain whether the jury unanimously determined the State proved beyond a reasonable doubt that Mr. Walla's use of force against Mr. Bowers was not justified.

The District Court clearly abused its discretion by failing to require the jury to indicate their unanimous decision regarding whether the State proved beyond a reasonable doubt Mr. Walla's use of force was not justified. This error adversely implicated Mr. Walla's substantial

rights to a unanimous jury verdict and to due process at trial. This Court should reverse Mr. Walla's conviction on account of the District Court's error and remand for a new trial.

CONCLUSION

For the above two independent reasons, Kevin Walla requests the Court to reverse his conviction for deliberate homicide and the accompanying weapons enhancement and remand for a new trial.

Respectfully submitted this 17th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,532, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
Deborah S. Smith

APPENDIX

Stipulated Procedural Order.....App. A

Argument and Ruling on Stipulated Procedural Order.....App. B

Verdict Form.....App. C

Proposed Supplemental Verdict Form.....App. D

Argument and Ruling on Supplemental Verdict Form.....App. E

Oral Pronouncement of Sentence.....App. F

Judgment and Sentence.....App. G

CERTIFICATE OF SERVICE

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-17-2024:

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