In the Supreme Court of the State of Montana

Supreme Court No. DA 23-0078

STATE OF MONTANA,

Plaintiff & Appellee,

-vs-

MICHEL SCOTT DULANEY,

Defendant & Appellant.

Appellant's Reply Brief

On Appeal from the Montana Twentieth Judicial District Court,
Sanders County, Hon. Robert L. Deschamps, III, Presiding.

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Table of Contents

Table of Contents . . . . . -i-

Table of Authorities . . . . . -ii-

Introduction . . . . . -1-

Argument . . . . . -1-

I. Mental State and Justifiable Use of Force . . . . . -1-

II. Expert Witness Error . . . . . -13-

Conclusion . . . . . -21-

Certificate of Compliance . . . . . -23-

Table of Authorities

Cases:

McClue v. Safeco Ins. Co. of Ill., 2015 MT 222, 380 Mont. 204, 354 P.3d 604 . . . . . 13, 17

People v. Dzambazovic, 377 N.E.2d 1077 (Ill. 1978) 4

People v. Guy, 227 N.E.3d 106 (Ill. App. 2023) 9-11

People v. Joyner, 50 Ill.2d 302, 278 N.E.2d 756 (Ill. 1972) 3-4, 12

People v. Purrazzo, 420 N.E.2d 461 (Ill. 1981) 4

People v. Trinkle, 369 N.E.2d 888 (1977). 10-12

State v. Crawford, 2003 MT 118, 315 Mont. 489, 68 P.3d 848 13

State v. Houle, 1998 MT 235, 291 Mont. 95, 208 P.3d 864 3

State v. Jay, 2013 MT 79, 369 Mont. 332, 298 P.3d 396. 15

State v. Lambert, 280 Mont. 231, 242, 929 P.2d 846 (1996) 12

State v. Nick, 2009 MT 174, 350 Mont. 533, 208 P.3d 864 3-4

State v. Price, 2007 MT 269, 339 Mont. 339, 171 P.3d 293. 13

State v. Reams, 2020 MT 326, 402 Mont. 366, 477 P.3d 1118 20-21

State v. Rosling, 2008 MT 62, 342 Mont. 1, 180 P.3d 1102. 5

State v. Santoro, 2024 MT 136, 417 Mont. 92, 551 P.3d 822 . . . . . 14, 17-18, 20

State v. Slavin, 2004 MT 76, 320 Mont. 425, 87 P.3d 495 20

State v. Stout, 2010 MT 137, 356 Mont. 468, 2347 P.3d 37 13

State v. Sunday, 187 Mont. 292, 609 P.2d 1188 (1980). 3

Thacker v. Commonwealth, 114 S.E. 504 (S. C. VA). 10-11

Statutes:

Mont. Code Ann. § 46-16-702 1

Mont. Code Ann. § 36-10-702, *Annotations,* Comm'n Comments 15

Rules and Other Authority:

Charles Wright & Victor Gold*, Federal Practice & Proc.*, § 6263, 197 (1997) 15

Criminal Law Commission, Comment, § 45-3-102 . . . . . 9 n.5

LaFave's Handbook on Criminal Law (1972) 11

MCJI 1-113 (2022) 21

Mont. R. Evid. 403 17-18

Mont. R. Evid. 702 . . . . . 13-14, 17

State v. Santoro, DA 21-0585 (Mont.), Appellee's Br. 16

State v. Santoro, DA 21-0585 (Mont.), Appellant's Reply Br. 16

Introduction

Dulaney has raised three issues on appeal. They are: (1) A defendant asserting justifiable use of force (JUOF) should not have to concede he acted "knowingly" our "purposely" as a condition precedent to asserting the defense; (2) the district court erred by denying Dulaney's expert witness, Gary Marbut; and (3) the district court erred in denying Dulaney's "Motion for Relief Under *Mont. Code Ann. § 46-16-702*."

The State has responded to Dulaney's arguments, and Dulaney now replies. Dulaney will first reply to the first two substantive arguments raised by the briefing. As to Dulaney's third argument relating to *Mont. Code Ann. § 46-16-702*, Dulaney relies on the arguments made in his Opening Brief.

Argument

I. Mental State and Justifiable Use of Force

The first paragraph of the State's Summary of the Argument highlights the dilemma Dulaney – and others who have asserted their rights to JUOF – face. The State's subjective belief that "Dulaney fully

presented his affirmative defense of JUOF," (State's Br. at 24), does not guarantee that the defendant's constitutional right to present a complete defense was, in fact, fulfilled. Certainly in every case in which it is successful, the State will always believe a defendant was able to fully present a defense. Whether the lower court's rulings bear out the State's belief are, fortunately, subject to review by this Court.

The record belies the State's argument that the lower court "did not, as Dulaney alleges, force him to admit that he intended to kill the victims or forego JUOF." (Id.). Take, for example, the following oral ruling from the court.

> But assuming the State is successful at putting on the evidence that supports all the elements, then – then, like I say, you got to make a choice: Either we're not going to testify at all or if we are going to testify and rely on justifiable use of force, your guy's gonna have to get up and say, Yeah, I – I shot him *and* I felt that there as a – I understand that when you shoot somebody, it's reasonably foreseeable that it might cause death or serious bodily injury.
>
> I think if you look at the definition of knowingly, a high likelihood a certain result's gonna occur. He says that, Yeah, there's a high likelihood if I shoot somebody, I might kill them.

(Trial Tr. at 56) (emphasis added).

The court's ruling not only required Dulaney to testify before he could assert JUOF, but also required him to concede the mental state. While the distinction may appear to be one without a difference to the State, this legal nuance is significant.

That significance is present in the case of *People v. Joyner*, 50 Ill.2d 302, 278 N.E.2d 756 (Ill. 1972), the case which formed the basis for this Court's own ruling that "[a] defendant who relies upon the defense of justifiable use of force concedes that he acted purposely and knowingly. *See State v. Nick*, 2009 MT 174, ¶ 13, 350 Mont. 533, 208 P.3d 864 (citing *State v. Houle*, 1998 MT 235, ¶ 15, 291 Mont. 95, 966 P.2d 147; *State v. Sunday*, 187 Mont. 292, 306, 609 P.2d 1188, 1197 (1980); *People v. Joyner*, 50 Ill.2d 302, 278 N.E.2d 756 (Ill. 1972)).

In *Joyner*, the court distinguished between the *actus reas* and the *mens rea* present in self-defense claims. "Self-defense relates to the use of force which a person reasonably believes necessary to protect himself. By its very nature it relates to knowingly and intentionally using force to deter another and not to an accidental shooting. Yet, Joyner testified that he did not pull the trigger of his gun. . . ." *Joyner*,

278 N.E.2d at 761. Notably, *Joyner* speaks to the use of force necessary to "deter another." It does not make the further leap that was made by the lower court in Dulaney's case, which requires a defendant asserting JUOF to also concede that he acted with a purpose or intent to kill or do serious bodily injury. Stripped of the legalese, *Joyner* merely holds that one cannot argue they purposely and intentionally acted to deter another and also argue that they did not purposely or intentionally act to deter another, i.e., the did not act by mistake, accident, or through an involuntary act. *See also People v. Purrazzo*, 420 N.E.2d 461, 893 (Ill. 1981); *People v. Dzambazovic*, 377 N.E.2d 1077 (Ill. 1978).

In *State v. Nick*, although the Court seemingly issued a blanket ruling that "[a] defendant who relies upon the defense of justifiable used of force concedes that he acted purposely and knowingly," *Nick*, ¶ 13, this Court also affirmed Nick's conviction based on the district court's recognition "that the crux of the case was determination of Nick's 'conscious object' to engage in that conduct."

If the offense of deliberate homicide – or event attempted deliberate homicide – merely required the State to prove a defendant

acted knowingly or purposely with respect to his conduct, then the district court's decision in Dulaney's case would have been a correct one and by asserting JUOF Dulaney would have to admit the mental state. However, as both *State v. Rosling*, 2008 MT 62, ¶ 37, 342 Mont. 1, 180 P.3d 1102, and the commentary to the pattern Montana Criminal Jury Instructions make clear, the offense of deliberate homicide requires the State to prove a defendant acts with a mental state to achieve a specific result.

It was not until right before Dulaney began testifying that nuance between act and result revealed itself. Again, in an *in camera* hearing the parties disputed evidentiary issues arising from the court's original pretrial ruling. The State argued, "the foundational requirement, before that [evidence] can be introduced at all, is that the defendant has to take the stand, he has to admit to the charges against him. Right? He has to admit that he attempted purposely or knowingly, to kill Edgar Torrey –" To this, the court interjected. "Well, I'm not sure I agree with that – that bare of statement. I think that it's sufficient if he purposely or knowingly used deadly force that he knew – and I may

not be artful in the way I phrase this, either – but that there was a high likelihood that what he was doing would cause serious injury or death. I think that's sufficient." (Trial Tr. 612-613).

In essence, both the State and the court agreed that not only would Dulaney have to admit he acted purposely or knowingly with respect to an awareness of his conduct[1] or that it was the conscious object to engage in that conduct[2], as opposed to firing accidently like in *Joyner*, but that Dulaney also had to admit that he aware of a high probability his conduct would cause a specific result[3] or that it was his conscious object to cause that result.[4]

The confusion in chambers escalated, however. The State continued: "And as I pointed out yesterday, Judge, defendant's actions can't be an accident. Right? This is an affirmative defense. He has to admit the elements." To which the court responded, "Yeah," and "I mean, he's – he's gonna have to say, I was shooting at them (Trial Tr.

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[1]knowingly as to conduct

[2]purposely as to conduct

[3]knowingly as to result

[4]purposely as to result

at 614-615).

The result of the court's ruling was the following exchange on Dulaney's direct examination:

Q: When you shot at Edgar Torrey, were you trying to kill him?

A: No.

Q: What were you trying to do?

A: I felt threatened, and I was trying to stop the threat.

Q: Okay. Did you shoot at Torrey and David Clifton?

A: No. Well, I – no, I shot at – at first, I shot at Edgar.

(Trial Tr. at 623).

In closing argument the State capitalized on the result of the district court's erroneous legal conclusion and the effect it had on Dulaney's testimony. "Ladies and Gentlemen, I'm going to start here: The defendant took the stand in this case and he testified that he purposely and knowingly attempted to shoot E.T. I put it to you that he committed the offense of attempted deliberate homicide. He took the stand and he acknowledged that he acted purposely and squeezed the trigger five times. He acted knowingly because he went and got the

gun. All right? For E.T., those facts have been proven." (Trial Tr. at 746).

The State now argues "Dulaney's assertions misstate the court's ruling and ignore the trial record." (State's Br. at 25). Dulaney respectfully disagrees. Although the court's ruling seemed to metamorphosize over time, the crux of the ruling did not: A *sine qua non* for Dulaney's JUOF defense was that he had to admit every element of the crime, including the mental state and his conscious object to cause a specific result.

The State argues that "[t]here is no support in the record for Dulaney's claim that the court forced him to concede to the jury that he intended to kill Edgar, David, or Troy, or surrender his affirmative defense." (State's Br. at 29). This is simply incorrect and the quotations in the preceding paragraphs make it plain. The court's ruling, in combination with the legally correct jury instructions, required Dulaney not just to admit he purposely or knowingly engaged in specific conduct by defending himself but that he also acted with a specific result, i.e., an attempt to kill E.T. and the Clifton Brothers.

Contrary to the State's suggestion that Dulaney is contesting the jury instructions, (State's Br. at 30), the instructions were legally correct. However, because they were legally correct, they highlight the error of the court's ruling that required Dulaney to admit every element including the mental state of the offense before he could rely on JUOF. There is simply a categorical difference between a requirement that one admit an awareness of conduct necessary to invoke an affirmative defense and an admission of an awareness of a result or consequence of the criminal offense.

Further complicating the matter and undermining the State's argument is that Dulaney was not charged with deliberate homicide but was charged with the inchoate offense of attempt. Since much of this Court's JUOF jurisprudence comes from Illinois, especially *Joyner*, it is appropriate to return to Illinois for this discussion.[5]

"The mental state required for the inchoate offense of attempted first degree murder is not the same as the mental state required for the completed offense of first degree murder." *People v. Guy*, 227 N.E.3d

[5]Montana's JUOF defense is sourced from Illinois's self-defense statute. Criminal Law Commission, Comment, § 45-3-102.

106, ¶ 36 (Ill. App. 2023). In *Guy*, the Appellate Court of Illinois, Third District, explained the distinction relying on a decision from the Supreme Court of Illinois, *People v. Trinkle*, 369 N.E.2d 888 (1977). While the cases deal with Illinois statutes, the similarities between statutes applicable to Dulaney make both *Guy* and *Trinkle* persuasive authority.

> The attempt statute requires that a defendant be guilty of an action with intent to commit a specific offense. Thus, to be guilty of attempted murder, the defendant must have intended to commit the crime of murder. It was not sufficient that the defendant shot a gun knowing such act created a strong probability of death or great bodily harm. If that were the test, then a defendant who committed a battery with knowledge that such conduct could cause great bodily harm would be guilty of attempted murder.

Guy, ¶ 40 (citing and quoting *Trinkle* (internal quotations and citations omitted)).

Trinkle drew authority from a 1922 case from Virginia, *Thacker v. Commonwealth*, 114 S.E. 504. There, the defendant and two friends were standing outside a tent which the defendant knew to be occupied. "Stating that he wanted to shoot out a lamp which was burning inside, defendant fired a gun into the tent, narrowly missing the occupant.

Defendant's conviction for attempted murder was reversed for lack of proof of specific intent to kill." *Trinkle*, 369 N.E.2d at 891. "'Thus . . . to commit murder, one need not intend to take a life, but to be guilty of an attempted murder, he must so intend.'" *Id.* (*quoting Thacker,* 134 Va. 767, 771 (quoting 1 Bishop, Criminal Law sec. 730 (8th ed.)).

The Court in *Trinkle* also relies on a passage from Wayne R. LaFave and Austin Scott's "Handbook on Criminal Law*,* § 59, at 428-29 (1972)).

> Some crimes, such as murder, are defined in terms of acts causing a particular result plus some mental state which need not be intended to bring about the result. Thus, if *A*, *B*, and *C* have each taken the life of another, *A* acting with the intent to kill, *B* with an intent to do serious bodily injury, and *C* with a reckless disregard for human life, all three are guilty of murder because the crime of murder is defined as such as way [under a the criminal scheme used in LaFave] that any one of these mental states will suffice. However, if the victims do not die from their injuries, then only *A* is guilty of attempted murder; on a charge of attempted murder it is not sufficient to show that the defendant intended to do serious bodily harm or that he acted in reckless disregard for human life. Again, this is because intent is needed for the crime of attempt, so that attempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another).

Guy, ¶ 40 (quoting *Trinkle*, 369 N.E.2d at 891-892)

The example from LaFave and Scott, and cited in both *Guy* and *Trinkle,* reads remarkably like Justice Leaphart's concurring opinion in *State v. Lambert*, 280 Mont. 231, 242, 929 P.2d 846 (1996). Simply because Dulaney chose to invoke the defense of JUOF should not necessarily require him to admit to mental state elements that encompass both the underlying offense (deliberate homicide) as well as the mental state for attempt, i.e., the specific intent to commit deliberate homicide.

In Dulaney's case, the district court gave one definition for "purposely" (Inst. No. 12) and one definition for "knowingly" (Inst. No. 13). As both were "result" based definitions, both were legally correct despite not distinguishing between "attempt" and "deliberate homicide." However, the district court's ruling, consistent with a superficial and unnecessarily broad reading of this Court's holding in *Nick*, etc., required Dulaney to admit to the enhanced mental state for "attempt," because Dulaney invoked the defense of JUOF. Such a holding is as erroneous as it is unnecessary. Both the spirit of *Joyner* and this Court's holdings require a defendant to conceded he was aware

of his conduct, e.g., the gun did not go off by accident, but they do not require him to admit to a mental state of an intent to kill.

The district court's ruling was erroneous and violated Dulaney's right under the Due Process clauses. (Appellant's Opening Br. at 24). Reversal and remand for a new trial is necessary.

II. Expert Witness Error

The State is correct that "[a] district court has great latitude in ruling on the admissibility of expert testimony." (State's Br. at 31) (citing *State v. Stout*, 2010 MT 137, ¶ 59, 356 Mont. 468, 237 P.3d 37; *Mont. R. Evid. 702*, and *State v. Crawford*, 2003 MT 118, ¶ 30, 315 Mont. 489, 68 P.3d 848). What is also clear is that trial courts should "construe liberally the rules of evidence so as to admit all relevant expert testimony." *McClue v. Safeco Ins. Co. of Ill.*, 2015 MT 222, ¶23, 380 Mont. 204, 354 P.3d 604 (citation omitted). Relevant expert testimony should "be attacked by cross-examination and refutation," no exclusion. *State v. Price*, 2007 MT 269, ¶ 26, 339 Mont. 339, 171 P.3d 293.

The district court erred in categorically excluding Dulaney's

expert and the State's briefing fails to demonstrate the absence of an abuse of discretion. First, Dulaney takes issue with the State's argument that no abuse occurred because "[i]t was appropriate for the State to rely on an undisputed fact in presenting and arguing its case to the jury." (State's Br. at 32). The propriety of the State's reliance on any fact – disputed or otherwise – is of little consequence to the Defendant's constitutional right to defend himself, especially given how the evidence was presented at trial.

Since Dulaney's Opening Brief was filed, this Court decided *State v. Santoro*, 2024 MT 136, 417 Mont. 92, 551 P.3d 822, in which this Court reversed and remanded Santoro's case for a new trial based on 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 in Santoro's first trial. *Santoro*, ¶ 2.

In *Santoro*, this Court quoted from the Commission Comments to *Mont. R. Evid. 702,* which note:

> 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 render the correct decision'. . . . '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.'

Santoro, ¶ 19 (citing Section 26-10-Rule 702, MCA, *Annotations*, Comm'n Comments (2023); *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)). The proffered testimony by the defense expert in Dulaney's case fit a number of categories of allowable testimony.

The arguments in *Santoro* were similar to those raised in the pretrial proceedings in Dulaney's case. For example, in the briefing on appeal in *Santoro*, the State argued any error by the district court in excluding Santoro's expert was harmless. As it did in Dulaney's case, the State argued the JUOF statute presents a subjective standard, which "asks what was in the defendant's mind at the time he used force against the victim. . . . As the district court properly observed, when considering whether Santoro was justified in his actions, the jury would be asked to determine what Santoro reasonably believed at the time."

(*State v. Santoro*, DA 21-0585, Brief of Appellee at 25-26 (Dec. 6, 2023)). The State's motion in limine on Mr. Marbut presented similar rational. (Dkt. 171 at 7-12).

In reply, Santoro argued that JUOF had both subjective and objective components.

> The reasonableness requirement is objective. Montana's justifiable use of force defense is sourced from Illinois's self-defense statute. Interpreting that statute, the Illinois Supreme Court has recognized the 'beliefs of the person threatened [must be] objectively reasonable.' Likewise, this Court has recognized that justifiable use of force requires the jury to assess 'what a reasonable person would believe under the same circumstances.' As the State otherwise acknowledges, 'a reasonable person standard' is 'an objective standard.

(*State v. Santoro*, DA 21-0585, Reply Brief of Appellant at 9-10 (Jan. 16, 2024).

In Dulaney's case, the State did not "dispute that Mr. Marbut could testify based on his training and experience that Edgar Torrey could have turned around in the amount of time that it took the Defendant to fire his weapon. Such testimony could be helpful to the jury to explain how Edgar torrey was struck in the back. However, that is precisely what the evidence in this case will show – that Edgar

Torrey was turning when the Defendant fired his weapon. The fact is not in dispute and Mr. Marbut's testimony would be cumulative and should be excluded pursuant to Mont. R. Evid. 403." (Dkt. 171 at 12-13).

In *Santoro* this Court reaffirmed the long-held criteria for "[q]uestions concerning expert testimony's reliability." *Santoro*, ¶ 23. The first criterion is "whether the expert field is reliable." *Id.* The State's opposition brief did not dispute this. The second criterion is "whether the expert is qualified." *Id.* Again, the State conceded Mr. Marbut was qualified to give expert testimony. The third and final criterion is "whether the qualified expert applied the reliable field to the facts." *Id.* As with the first two, the State appears to have conceded this prong of the analysis. "Under *M. R. Evid. 702*, the District Court needed to simply determine whether the expert field was reliable and whether the expert is qualified, leaving to the jury whether the qualified expert reliability applied the reliable field to the facts." *Santoro*, ¶ 23 *(citing and quoting McClue,* ¶ 22).

In *Santoro*, this Court found the district court

> ventured beyond its role and usurped the providence of the jury be excluding [the expert's] testimony. Rather than following our standard for admitting relevant and admissible expert testimony and allowing the State to attack [the expert'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 [the expert's] relevant and admissible testimony in this case was an abuse of discretion.

Santoro, ¶ 24. In Dulaney's case, the court placed the same thumb on the scale by excluding Dulaney's expert's relevant testimony under *Mont. R. Evid. 403*. (AOB, Appendix C at 6). This, too, was an abuse of discretion based on the State's repeated emphasis on the fact that R.T. was shot in the back a fact, which if true, was far more prejudicial to Dulaney than to the State.[6]

The district court's order granting the State's motion to exclude Mr. Marbut's testimony was predicated on the State's pre-trial concession that the State "will not argue at trial that the Defendant

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[6]The taboo of shooting a person in back is so ingrained in American culture that John Wayne was said to have demanded changes to Glendon Swarthout's novel, "The Shootist," in which the protagonist kills the bad guy by shooting him in the back, so Wayne could ensure his career would not be sullied by such a cowardly act. (See: https://en.wikipedia.org/wiki/The_Shootist#:~:text=In%20the%20book%20and%20original,would%20not%20do%20so%20now.)

should have recognized that the victim was turning to retreat when he pulled the trigger." (AOB, Appendix C at 6). The district court misapprehended the impact of the State's concession on Dulaney's ability to present a constitutionally complete defense to the charges. As Dulaney's counsel predicted, the State's supposed concession was used *ad nauseam* by the State, namely because R.T. was shot in the back this should have been an indication that Dulaney did not subjectively believe his use of force was necessary for his JUOF claim.

As the expert materials proffered by Dulaney's counsel demonstrate, a number of factors can contribute to a back-shot but still support subjectively reasonable and objectively reasonable beliefs that lethal force is justified. (Dkt. 138, Ex. A). In closing, the State argued "the one inescapable fact that the defendant can't evade is that E.T. was shot in the back." (Tr. at 747). The only reason Dulaney was unable to explain the shot in the back was because the district court had precluded relevant expert testimony that could have provided a reasonable and factual explanation. The validity of such an explanation was for the jury to decide after a full hearing on the

evidence, not for the district court to decide in a pretrial setting.

Just as the expert error was both reversible and non-harmless in *Santoro*, so is it reversible and non-harmless in Dulaney's case. Given the prosecutor's repeated reliance on the shot-in-the-back theme at trial, the State cannot demonstrate the district court's error was harmless, and the State cannot 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 485. Given the facts the jury heard at trial, had Mr. Marbut been allowed to testify, his testimony might have provided reasonable doubt among jurors.

In *State v. Reams*, 2020 MT 326, 402 Mont. 366, 477 P.3d 1118, the district court wrongfully excluded expert testimony for the defense. As here and in *Santoro*, the State argues the error was harmless. In *Reams*, however, this Court noted the qualitative difference between the wrongfully excluded evidence and the evidence admitted at trial: "Instead of presenting his own educational expert to present his evidence in a cohesive and coherent fashion in his case-in-chief, Reams was required to present it piecemeal by cross-examining the State's

experts in the State's case in chief." *Reams*, ¶19.

Dulaney wasn't even allowed such a piecemeal presentation because the district court's ruling effectively precluded cross-examination of the State's witnesses on the topic until Dulaney testified, thus making JUOF at issue. Therefore, Dulaney was the only witness to explain what could have been otherwise explained by "[a] witness who by education and experience has become an expert in . . . profession or calling," and who should have been "permitted to state an opinion as to a matter in which the witness [was] versed and which [was] material to the case. . . ." (MCJI 1-113 (2022) (Expert Witness)).

In light of the facts, Mr. Marbut's anticipated testimony, and the State's arguments at trial, the district court abused its discretion by denying Dulaney his expert witness. As with the constitutional concessions required for an invocation of JUOF, reversal is warranted on the district court's exclusion of Dulaney's expert witness.

Conclusion

The evidence at trial showed Dulaney wanted to experience a quiet night at home with his family. He did not want neighbors

drinking, shooting, and recklessly careening through his yard. The evidence demonstrates he had a subjective belief that his use of force was justified. JUOF requires that Dulaney actually believed that the danger existed, that his use of force was necessary to avert the danger, and that his belief in each of those aspects was reasonable event if it was mistaken. Criminal Law Commission, Comment, § 45-3-102.

Through two rulings, the district court required Dulaney to unconstitutionally admit to the mental states of the offenses and deprived him the ability to demonstrate his reasonableness was objective. The interests of justice require a new trial before the district court. Because the district court failed to recognize that, this Court is required to do so. Dulaney respectfully requests this Court reverse his convictions and remand his case for a new trial.

Respectfully submitted this 9th day of October, 2024.

/s/ Colin M. Stephens
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Certificate of Compliance

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Reply Brief is printed with proportionately-spaced Century Schoolbook typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 5,000 words. The exact word count, as calculated by my WordPerfect software and including tables and certificates, is 4,923.

Dated this 9th day of October 2024.

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CERTIFICATE OF SERVICE

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