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 APPELLEE

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

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STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it never required Walla to testify in chambers subject to cross-examination to establish the foundational requirements for 404(b)/405(b) evidence but instead merely expressed concerns with the proposed procedure and when Walla told the district court it was an academic issue because he had decided not to testify.

2. Whether the district court abused its discretion in declining to give Walla's requested special verdict form when Walla told the court it was not required to give it and the court instructed the jury that the State bore the burden to prove beyond a reasonable doubt that Walla's actions were not justified, that if the State failed to meet that burden, they must find Walla not guilty, and that all of the jurors must agree that Walla was guilty or not guilty in order to reach a verdict.

STATEMENT OF THE CASE

The State charged Appellant Kevin Charles Walla with Count I: deliberate homicide, in violation of Mont. Code Ann. § 45-5-102(1)(a), and Count II: unlawful possession of a firearm by a convicted person, in violation of Mont. Code

Ann. § 45-8-313(1)(b), after Walla shot and killed Richard Allen Bowers (Allen).[1] (Doc. 4.)

Walla filed a Notice of Affirmative Defense stating he would rely on a justifiable use of force (JUF) defense. (Doc. 25.) Walla also filed a Defendant's Notice of Intent to Introduce Reverse Rule 404(b) Evidence and Rule 405(b) Evidence. (Doc. 53.) Walla stated that, pursuant to his JUF defense, he intended to present evidence regarding his "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." (*Id.* at 1-2.)

In the State's response to Walla's notice, the State said it had not discovered any evidence that would support Walla's assertions about Allen. (Doc. 74 at 2.)

The State filed a motion in limine requesting an order prohibiting Walla from referencing or soliciting testimony regarding the victim's alleged character for violence, including specific acts of violence, until a proper foundation was laid. (Doc. 55 at 1.) The State requested that they address the foundation at a pretrial

[1] Prior to trial, the district court granted Walla's unopposed motion to sever the two counts. (Doc. 76.) The court also granted the State's motion to dismiss Count II after a jury convicted Walla of Count I. (Docs. 241, 242.)

hearing outside the jury's presence with Walla subject to cross-examination. (*Id.* at 2, 4.)

After the court requested briefing on the issue, the parties provided a proposed order stating that Walla could lay the foundation through his attorney outside the jury's presence and that the State could argue against admissibility. (Doc. 217, attached to Appellant's Br. as App. A.) The court expressed concern with the process outlined by the parties and proposed that Walla should testify in chambers and be subject to cross, but said they could "ruminate on that a bit" while they addressed other issues in the proposed order. (3/30/22 Tr. at 4-10.) After addressing the other issues, the court explained that it thought the proposed process created problems but said it would follow it if the parties agreed that was the process they wanted. (*Id.* at 16.)

Walla spoke with his attorney privately and then told the court that he had decided not to testify. (*Id.* at 17-22.) Walla's counsel stated that because Walla was not testifying, the issue had become an academic one, and counsel agreed that the court could strike the second paragraph from the proposed order. (*Id.* at 17, 23.)

The parties submitted stipulated jury instructions and a stipulated verdict form, but Walla also provided a supplemental form to which the State objected. (3/30/22 Tr. at 25-45.) The supplemental form asked for the following finding:

> We the jury, duly empaneled and sworn to try the issues in the above-entitled cause, enter the following unanimous decision regarding the State's Burden of proof, the State:
>
> _____
> (Write "Failed to prove" or "Proved" above)
>
> that the Defendant's actions were not justified.
>
> If you answered "Failed to prove" above, then you must write NOT GUILTY on the verdict form regarding the offense of Deliberate Homicide.

(Supplemented to the appellate record on 7/8/24, attached to Appellant's Br. as App. D.)

The State objected because there was no authority for the verdict form, it was confusing, and the stipulated jury instructions and verdict form appropriately instructed the jury. (3/30/22 Tr. at 25-26, 42). Walla acknowledged that unanimity can be assured through appropriate jury instructions and that a special verdict form was not required but persisted in his request that the form be submitted to the jury. (*Id.* at 44.)

The district court rejected the special form because the instructions, when read in conjunction, already instructed the jury of everything in the form. (*Id.*) The court explained that one instruction stated the jury's verdict as to guilty or not guilty had to be unanimous. (*Id.*) Another noted the State's burden of proving beyond a reasonable doubt that Walla's actions were not justified and said that if the State failed to meet that burden the jury must find Walla not guilty. (*Id.*)

The jury convicted Walla of deliberate homicide and found that Walla used a firearm in the commission of the offense. (Doc. 221.) The district court sentenced Walla to 100 years in prison with a 40-year parole restriction for the deliberate homicide conviction, and 10 years in prison for the weapons enhancement. (Doc. 236 at 2.)

STATEMENT OF THE FACTS

I. The offense

On December 31, 2019, Walla went to the Big Timber Bar with his 12-year-old daughter J.W. (3/28/22 Tr. at 135-36, 155.) Walla drank Budweiser and Apple Crown shots while J.W. drank Shirley Temples. (*Id.* at 136.) Walla called Allen, asking for a ride out of town to bail a friend out of jail. (*Id.*)

J.W. testified that Allen would come to their apartment once or twice a week "to hang out with [her] Dad." (*Id.* at 132.) When Walla and J.W. arrived at their apartment on New Year's Eve, Allen was waiting in their doorway. (*Id.* at 137.) Walla and Allen went into the living room. (*Id.* at 138-39.) Allen sat on the loveseat in front of the window, and Walla sat on the couch to the right of the window. (*Id*.) J.W. went to her bedroom. (*Id*.)

J.W. testified that there did not seem to be any tension between her father and Allen over the phone or when they first got to the apartment, but eventually the

two got into an argument about whether women really have one less rib than men. (*Id.* at 136-39.) J.W. went into the living room and told them it was not true. (*Id.* at 139-40.) Allen told J.W. to google it, and she did. (*Id.* at 140.) J.W. found an "article that was done by some prestigious place, some very fancy place[,] and [she] had trouble reading some of the words because they were very medical and [her] dyslexia" made it difficult to read. (*Id.*) Allen took her silence as her reading that she was wrong and he pointed his finger at J.W. "in like a victory kind of way and said that he was right[.]" (*Id.*) This made Walla angry. (*Id.*)

J.W. testified that when she corrected Allen and showed him the article, Allen realized that he was wrong, and "he was done with the argument." (*Id.* at 140.) J.W. said Allen was not mad and that he did not yell at Walla. (*Id.*) J.W. specifically said that she did not "remember Allen yelling at [her] dad ever." (*Id.*) After showing Allen the article, J.W. went back to her bedroom. (*Id.*)

J.W. usually stayed with her friend C.H. and her family on the weekends, and she made plans to meet her friend at C.H.'s mother's workplace. (*Id.* at 134-35, 141.) Walla told J.W. he would give her a ride, but he never did. (*Id.* at 142.) C.H. and her father left to pick up J.W. at about 5:17 p.m. (*Id*. at 142, 160-61, 172.)

When C.H. arrived, Walla was still seated on the couch, and Allen was still sitting on the loveseat. (*Id.* at 143-44.) C.H. and J.W. left the apartment, but once

J.W. closed the door to the apartment complex, she realized she had not brought any money with her, so she went back. (*Id.* at 144.)

J.W. grabbed some money from her room and then saw Walla come out of his room with a gun behind his back. (*Id.*) Walla told J.W. "he was gonna make Allen leave." (*Id.*) J.W. pushed C.H. out the door and into the car and told her that her dad was going to make Allen leave so they should probably go. (*Id.*) C.H.'s father testified that the girls were inside the apartment for about three to five minutes. (*Id.* at 163.) J.W. testified that she saw Walla through the window "standing in, in front of Allen and his hand was, his right hand was, outspread I guess, to his right." (*Id.* at 149.)

Walla called dispatch at 5:25 p.m., said that he was "in Stock Street Apartment" and that he "just shot a guy in [his] apartment that tried to rob [him] and he's laying on the couch." (*Id.* at 185; State's Tr. Ex. 1(A) 1-911_1_2019_12_31_17_24_54 at 0:00-0:17.)[2] Walla confirmed that he "had the gun" and that it was secured. (*Id.* at 0:24-0:31.) Walla said, "I shot him." (*Id.* at 0:31-0:24.) Walla told the dispatcher his name was Kevin Walla and said "I live in apartment three and he lives in the street and he tried to rob me. So I shot him."

[2] The State admitted transcripts of several audio and video recordings into the record as demonstrative exhibits. (State's Trial Exs. 1(B), 25(B), 26(B), 27(B), 28(B), 29(B), 30(B), 31(B).) The videos or audio recordings are the corresponding exhibit (A). For example, Walla's calls with 911 are available as State's Trial Ex. 1(A) and the transcripts are available under State's Trial Ex. 1(B).

(*Id.* at 0:43-0:53.) Walla continued, saying that "[my] kid just left with her friend to leave. He was trying to rob me[.]" (*Id*. at 0:55-1:01.) Walla said he shot the man in the stomach with a 22. (*Id.* at 1:09-1:10.) Walla asked where he should put the gun and dispatch told him to put it on the kitchen counter. (*Id.* at 1:31-1:35.) Walla told the dispatcher the man he shot was "laying on the bench now[.]" (*Id.* at 1:35-1:38.)

Deputies Josh Whaley and Kirk Johnston responded. (*Id.* at 191.) When the deputies saw Walla in the apartment complex hallway, Deputy Whaley noticed the butt end of a pistol sticking out of Walla's right back pocket. (*Id.* at 192.) Deputy Johnson handcuffed Walla and removed the pistol. (*Id.*) The pistol was "a nine shot Newland firearms 22 caliber pistol. There were eight rounds still live inside the cylinder. One round was expended." (3/29/22 Tr. at 13.)

Law enforcement officers noticed that Walla seemed intoxicated. (3/28/22 Tr. at 193; 3/29/22 Tr. at 17.) Walla was slurring his speech and had a hard time following simple directions. (*Id.*) Deputies asked if anyone else was in the apartment, and Walla said yes, Allen was inside, but he told the deputies he did not know Allen's last name. (3/28/22 Tr. at 193.) Walla said Allen was not armed. (*Id.*)

After entering the apartment, the deputies found Allen on his knees on the floor, face down, with his chest resting on the loveseat. (3/29/22 Tr. at 12.) Allen's right hand was underneath him, and his left hand was down on the side of the

chair, on his knees. (3/28/22 Tr. at 194.) Allen had a checkered lighter in his left hand, and when Deputy Whaley moved Allen's body to ensure that he did not have a weapon in his right hand, a corn cob pipe fell to the floor. (*Id.* at 195.) Deputy Whaley noticed that Allen also had soot on his right hand. (*Id.*) Allen was barefoot. (*Id.* at 200.)

Deputy Whaley did a protective sweep of the loveseat and "found a large machete tucked between the back cushion and the back of th[e] chair, covered by a sweatshirt." (*Id.* at 194.) During the investigation, Deputy Whaley learned that several people had seen the machete, and it was known to belong to Walla. (*Id.*) Deputy Whaley testified that there were no signs of a struggle. (*Id.* at 195.)

Once law enforcement ensured the scene was safe and medical personnel arrived, Sergeant Seth Joseph Brown took custody of Walla, removed him from the crime scene, and placed him in his patrol car. (3/29/22 Tr. at 12.) Walla told Sergeant Brown that he thought the guy he shot was named Allen and said that Allen was the "crazy tweaker from next door." (State Tr. Ex. 26(A) at 2:53-3:00.) Walla said Allen "decided he wanted to rob me. This is the second time this has happened with people in this apartment, man." (*Id.* at 3:06-3:11.) Walla told Sergeant Brown, "I just barely got [my] kid and her friend out of there because he was sitting there being stupid." (*Id.* at 3:27-3:33.) After talking about an alleged

prior robbery attempt by a different individual, Walla said, "They tried to take my life. This is the second time they tried to take my life." (*Id.* at 4:53-5:35.)

At trial, Lynette Lancon, a firearm and toolmark examiner at the State Crime Lab, testified that distance analysis testing indicated that the muzzle of the firearm was more than two feet away from Allen's jacket at the time of discharge. (3/29/22 Tr. at 69.) Doctor Robert A. Kurtzman, Montana's Chief Medical Examiner, testified that "the bullet perforated the abdominal wall, causing damage, it perforated the mesentery, or the fatty tissue that surrounds the bowel, and a small caliber bullet was found lodged in the third lumbar vertebrae." (*Id.* at 92-93.)

"[T]he bullet trajectory [wa]s oriented from front to back, slightly left to right, and downward." (*Id.* at 92; State's Trial Ex. 57.) Dr. Kurtzman testified that the bullet perforated the aorta, which would have caused rapid bleeding, which typically would cause an individual to die within minutes. (3/29/22 Tr. at 109-10.) Photos taken when law enforcement arrived depicted Allen on both knees, chest down, and the hand with the pipe underneath the body. (*Id.* at 110.) Dr. Kutzman explained that Allen still "would have been able to engage[] in purposeful activity for some period of time after sustaining the wound[,]" so he could not say whether Allen was seated or standing at the time he was shot. (*Id.* at 110.) Allen may have been shot while sitting and then stood up, or he may have been standing when he was shot and then crouched down. (*Id.*) Dr. Kurtzman testified that there were no

injuries on Allen's hand that would indicate a struggle. (3/29/22 Tr. at 99.) Allen's blood alcohol level at the time of his death was .173, but no illegal or prescription drugs were detected. (*Id.* at 100, 112.)

Lori Reierson, a bartender at the V.F.W. bar in Glendive, Montana, testified that Walla was in the bar on May 20, 2020. (*Id.* at 119-21.) Lori said Walla came into the bar and asked Lori if she knew who he was. (*Id.* at 121.) Lori had never met Walla before that night. (Id. at 120-21.) Walla told Lori he was the favorite nephew of her boss, Larry Walla. (*Id.* at 120-21.)

After asking Lori for Larry's phone number and leaving Larry a message, Walla began talking to Lori and others in the bar about something that happened in Big Timber at Walla's apartment. (*Id.* at 122-23.) Walla told Lori that on New Year's Eve, "he was having a few beers with a guy across the hall that was a preacher or wanting to be a preacher." (*Id.*) Walla said "[h]is daughter and friend came home, she was spending the night, she came home to get some stuff. And he said after that I just got sick of him, went in and got a gun, and shot him." (*Id.* at 123.) Lori said Walla also "said something about his daughter was walking by the window." (*Id.* at 123.) Lori said Walla told the story a few times that night and that the details remained the same each time. (*Id.* at 123-24.)

II. Filings and hearings regarding the foundation procedure for 404/405 evidence

In Walla's notice of intent to introduce 404(b) and 405(b) evidence, he stated that, pursuant to his JUF defense, he intended to present evidence regarding his "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.) In support, Walla provided the following summary:

> The record indicates that Mr. Walla reported that R.A. Bowers was trying to rob him. 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. The evidence and statements anticipated to be presented at trial would not be hearsay because they will 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. Any statements would not be offered for the truth of the matter asserted therein.

(*Id.* at 3-4.)

The State filed a response in partial opposition to Walla's notice of intent to introduce 404(b) and 405(b) evidence. (Doc. 74.) The State said it had not discovered any evidence thus far that Allen had a history of violence, assaultive

behavior, aggression, committing robberies, or drug use. (*Id.* at 2.) The State noted the toxicology report indicated that no controlled substances were detected in Allen's body and that there was no evidence that Allen knew Walla won money gambling. (*Id.*)

The State filed a motion in limine requesting that Walla be prohibited from referencing or soliciting testimony regarding Allen's alleged character for violence, including specific acts of violence, until a proper foundation was laid in a pretrial hearing. (Doc. 55 at 1-2.) The State asserted that any attempt to establish the foundational requirements should be done outside the jury's presence and whether the foundational requirements have been satisfied should be tested through cross-examination by the State. (*Id.* at 4.) The State noted a similar procedure was used to determine whether foundational requirements were met before permitting an expert witness to testify. (*Id.*)

Prior to trial, the State filed Motions in Limine Nos. 1-12, again requesting that inadmissible character evidence of the victim be excluded unless and until Walla met the foundational requirements. (Doc. 198 at 2-6.) The State requested a hearing outside the jury's presence and that the State be permitted to cross-examine Walla during the hearing. (*Id.*)

During the jury trial, outside of the jury's presence, Walla's counsel raised the issue of the procedural process for establishing the admissibility of evidence of

any alleged specific acts of violence attributable to Allen. (3/29/22 Tr. at 136-41.) The parties agreed that before Walla could offer any evidence of these alleged specific acts by Allen, Walla would have to establish that he knew about the specific acts and relied upon those specific acts in the degree of force he used against Allen. (*Id.* at 137-38.)

The State reiterated that Walla should be subject to cross-examination at the hearing. (*Id.* at 137-38.) Walla asserted that this process would be "violative of his 5th Amendment Right" because it would force Walla "to be cross examined outside the presence of the jury" and provide the State "two bites at the apple[.]" (*Id.* at 138.) The district court asked the parties for briefing on the matter and indicated they would address the issue the following morning. (*Id.* at 139-40.)

The next morning, the parties provided the district court with a proposed order addressing pending issues, including the admissibility of evidence of specific acts of violence alleged to have been committed by Allen. (Doc. 217, attached to Appellant's Br. as App. A.) The proposed order said:

> 2. As to specific acts of violence alleged to have been committed by Richard Allen Bowers, the Defendant will be permitted to make an offer of proof outside the presence of the jury through his counsel. Counsel must establish that the Defendant had either actual knowledge of the alleged acts or learned of the specific acts through conversations from Richard Allen Bowers, and that the Defendant relied on those acts immediately prior to

> his use of deadly force. The parties will then be free to argue as to the admissibility of those alleged acts.

(*Id.* at 1.)

The district court asked for clarification on the process outlined by the proposed order, asking if the State was just going to accept what Walla put forward as true. (3/30/22 Tr. at 4.) The State said it "would allow that to be proffered through counsel and it would have to be, yes, I mean there's really no, no cross examination there. I mean we're not in a position to cross examine defense counsel I don't think." (*Id.* at 4.) The State continued saying that as it understood it, Walla's counsel would be representing what they believed Walla's testimony would be and then the State could challenge the admissibility of that evidence. (*Id.* at 5.)

The district court said its impression was that Walla was attempting to use this process to "test[] the Court's evidentiary rulings to decide whether in fact the defendant should testify or not." (*Id.* at 6.) The court was concerned that Walla would be "making this proffer with no cross examination, and [it would] have to determine whether that's sufficient evidence for, for the defense." (*Id.* at 8.) The court questioned whether that would be an advisory opinion from the court as to what the evidence would be when it was presented to the jury. (*Id.* at 8.)

The State explained how the parties arrived at the agreement:

> I think the parties are in a position where they disagree as to what the procedure should be in regard to laying foundation for specific acts of conduct. You know, it's the State's position as we indicated yesterday that really the law provides that this foundation should be laid outside the presence of the jury, by the defendant, and then tested through what's the what's the equivalent of *voir dire* of the defendant, to ensure that he had knowledge of these, these acts, and he relied on those. The defense's position was well then, you're getting two, two bites at the apple, and they believe that that the matter should be handled in pretty much the way that we've described it here. So, what, what we've what we've discussed is that this would seem to I guess take away any appellate issues in the event it came to that in regard to this issue and just kind of, intend to streamline the process, but I understand Your Honor's concerns.

(*Id.* at 8-9.)

Referencing the court's concern about issuing an advisory opinion, Walla's counsel said it would be no different if Walla testified and was subject to cross-examination. (*Id.* at 9.)

The district court explained that if Walla's attorney offered what he believed Walla would testify to, he was not getting Walla's testimony under oath nor cross-examination to evaluate whether Walla's testimony met the foundational requirements to admit it. (*Id.* at 10.) The court said, "maybe we can ruminate on that a bit," and then addressed the other issues in the proposed order. (*Id.*)

The district court circled back to the issue stating:

> COURT: Okay, I don't know if you guys want to discuss number two further or whatever, or that's how you want to go, I'm not going to interfere with your right to do it, I think it creates some problems,

> creates some problems on the record, creates some problems, but you know I understand, that a lot went in to negotiating. So, if you want to talk about those issues, I think we should, because I want, I want, I want all the parties to agree that this is what the Court needs to do before the Court's gonna do it.

(*Id.* at 16.)

The court granted Walla's counsel's request to speak with Walla outside for a moment. (*Id.* at 16.) When the parties returned, Walla's counsel explained why addressing paragraph two in the proposed order was no longer necessary:

> MR. SNODGRSS: Your Honor, in regards to number 2. We certainly wanted Mr. Walla to hear this proposed order 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 want to 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 that discussion most likely will make the answer to number two academic.

(*Id.* at 16-17.)

Walla told the court he did not wish to testify, affirmed that he understood the implications of that decision as to his defense, and affirmed that he had not been pressured into making the decision. (*Id.* at 21-22.)

Walla's counsel instructed the court that "with respect to that order we have no issue with the Court striking from the order any references or adopting the order as is, but I think that some of the matters in there have been resolved by

Mr. Walla's decision." (*Id.* at 23.) The court specifically confirmed that Walla's counsel was referencing paragraph two, the provision regarding the process for laying the foundation for evidence of specific acts of violence alleged to have been committed by Allen. (*Id.*) Walla's counsel confirmed, and the district court struck paragraph two from the proposed order. (*Id.*; Doc. 217 at 1.)

III. Procedural history regarding Walla's requested special verdict form

On the last morning of trial, the parties also addressed jury instructions. (3/30/22 Tr. at 25-49.) The parties provided the court with a set of stipulated proposed jury instructions and a stipulated verdict form, but the State indicated that it anticipated objecting to a special verdict form Walla planned to introduce. (3/30/22 Tr. at 25, 30.) The State explained that there was no authority for the verdict form and it would only serve to confuse the jury. (*Id.* at 26.) The State clarified that it "agree[d] that that we have to you know disprove beyond a reasonable doubt that the force was reasonable, but the jury's been, will be fully and accurately instructed with that regard by the instructions that that we provided[.]" (*Id.*)

Walla's counsel provided the court with the supplemental verdict form which stated:

> Regarding Defendant Kevin Walla's justifiable use of force defense, we the jury understand that the State must prove beyond a reasonable doubt that the Defendant's actions were not justified and if the State failed to prove Defendant's actions were not justified then we must find him not guilty.
>
> We the jury, duly empaneled and sworn to try the issues in the above-entitled cause, enter the following unanimous decision regarding the State's Burden of proof, the State:
>
> _____
> (Write "Failed to prove" or "Proved" above)
>
> that the Defendant's actions were not justified.
>
> If you answered "Failed to prove" above, then you must write NOT GUILTY on the verdict form regarding the offense of Deliberate Homicide.

(Supplemented to the appellate record on 7/8/2024, attached to Appellant's Br. as App. D).

The State objected, noting that the stipulated verdict form was the approved verdict form from the jury instructions committee. (3/30/22 Tr. at 42.) The State explained that not only was Walla's special verdict form not necessary, but "as drafted[,]" the form was confusing. (*Id.*) Because the form was without authority and written in a way that would tend to confuse the jury, the State told the district court that the form should be rejected. (*Id.*) The State pointed to the stipulated and approved instruction that explained the State must prove beyond a reasonable doubt that Walla's actions were not justified. *Id.*

Walla cited *United States v. Ramirez*, 537 F.3d 1075 (9th Cir. 2008), and stated that when self-defense is raised at trial, "the jury must be unanimously convinced that the Defendant did not act in reasonable self-defense to support a conviction." (3/30/22 Tr. at 44.) Walla acknowledged that "[u]nanimity can be assured through appropriate jury instructions" and that a "special verdict form to that effect is not necessarily required." (*Id.*) Walla continued, "I want to be clear, this isn't something that is required, but it is something that we believe in Montana, under the Montana Constitution, where you have heightened rights over the federal constitution, that this burden, the jury must reject it, before they can get to the verdict form with deliberate homicide." (*Id.*)

Walla also cited to *State v. Brodniak*, 221 Mont. 212, 718 P.2d 322 (1986), asserting that the district court has the discretion to give a special interrogatory, specifically here, a form that says the jury understands the State has the burden to disprove justifiable use of force beyond a reasonable doubt and that they unanimously find that the "State failed or did not fail to disprove that burden[.]" (*Id.* at 45.) Walla said that they "need[ed] to hear from the jury that they properly rejected" the justifiable use of force defense "before considering the verdict form on deliberate homicide." (*Id.*)

The district court pointed out that they already had an instruction "that commands the jury that any verdict that they have must be unanimous and that all

12 must agree, either guilty or not guilty in order to reach a verdict." (*Id.*) The court explained that the instructions already addressed the issue when read in conjunction. (*Id.*) The court noted the instruction that said it was the State's burden to prove beyond a reasonable doubt that Walla's actions were not justified and that if the State failed to prove beyond a reasonable doubt that the Defendant's actions were not justified, the jury must find the defendant not guilty. (*Id.*) The court said that it believed the instructions properly instructed the jury on the issues and that "an additional interrogatory such as this will only confuse the jury and in many aspects is duplicative." (*Id.* at 46.)

The court declined to give Walla's requested special verdict form. (*Id.*) The court instructed the jury on the elements of deliberate homicide and on the parameters of justifiable use of force. (*Id.* at 52.) The court instructed the jury that the State had the burden of proving beyond a reasonable doubt that Walla's actions were not justified, and if the State failed to prove beyond a reasonable doubt that Walla's actions were not justified, they must find Walla not guilty. (*Id.* at 54.) The court instructed the jury that the verdict must be unanimous; thus, all 12 of them must agree Walla is either guilty or not guilty in order to reach a verdict. (*Id.* at 55.) The jury unanimously found Walla guilty of deliberate homicide and unanimously found that Walla used a firearm in the commission of the crime. (*Id.* at 90-91; Doc. 221, attached to Appellant's Br. as App. C.)

SUMMARY OF THE ARGUMENT

Walla incorrectly asserts that the district court rejected the parties' proposed order permitting Walla to lay the foundation for evidence of specific acts of violence allegedly committed by Allen through Walla's attorney outside the jury's presence without being subject to cross-examination. The record reflects that the district court expressed concerns about the process, but ultimately told the parties that it would not interfere if that was the process the parties wished to use. Instead, after speaking privately with his attorney, Walla told the court he did not wish to testify, and Walla's counsel explained that because Walla was not going to testify at trial the issue had become merely academic. The district court could not have abused its discretion because it did not reject the proposed order; Walla agreed that the provision should be struck from the proposed order because it was no longer relevant.

Walla's counsel correctly told the district court that it was not required to provide the jury with the requested special form. The district court instructed the jury on the elements of deliberate homicide, on the parameters of justifiable use of force, that the State must prove beyond a reasonable doubt that Walla's actions were not justified, that if the State failed to meet that burden, the jury must find Walla not guilty, and that the jury's decision as to guilty or not guilty must be unanimous. In combination with the district court's instructions, the general verdict

form adequately addressed the State's burden and unanimity without the danger of confusion that Walla's proposed special verdict form could have caused. The jury's unanimous verdict that Walla was guilty of first-degree murder means the jury unanimously found that Walla had not acted in self-defense. The district court did not abuse its discretion in declining to provide the jury with Walla's requested special verdict form.

ARGUMENT

I. Standard of review

This Court reviews jury instructions to determine whether, as a whole, they fully and fairly instruct the jury on the law applicable to the case. *State v. Michaud*, 2008 MT 88, ¶ 16, 342 Mont. 244, 180 P.3d 636. District courts are given broad discretion in instructing the jury, and this Court reviews the district court's decisions regarding jury instructions for an abuse of discretion. *Michaud*, ¶ 16.

This Court reviews issues concerning a verdict form for an abuse of discretion. *Dean v. Sanders County*, 2009 MT 88, ¶ 23, 350 Mont. 8, 204 P.3d 722 (citing *Ele v. Ehnes*, 2003 MT 131, ¶ 18, 316 Mont. 69, 68 P.3d 835).

II. The district court did not abuse its discretion when it never rejected the stipulated procedure for establishing the foundation for 404/405 evidence and Walla agreed that the court should strike the stipulation after he decided not to testify.

As an initial matter, Walla completely ignores the district court's statements that it was "not going to interfere" with the parties' right to address the foundational requirements as outlined in paragraph two of the stipulated proposed order. Although the court expressed concerns with the outlined procedure, it never rejected it. However, even if the court had required Walla to testify in chambers subject to cross-examination on the preliminary matter of admissibility of 404/405 evidence, it would not have been an abuse of the court's discretion.

"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," Mont. R. Evid. 404(a); however, there is an exception for "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused." Mont. R. Evid. 404(a)(2); *State v. Daniels*, 2011 MT 278, ¶ 23, 362 Mont. 426, 265 P.3d 623 (citation omitted).

Evidence of the victim's reputation is admissible only after the issues of self-defense and the identity of the aggressor have been raised. *State v. Logan*, 156 Mont. 48, 64, 473 P.2d 833, 842 (1970). Evidence of a victim's past is "irrelevant and inadmissible" if the defendant does "not establish that his knowledge of [the victim's] past led him to use the level of force he employed."

State v. Montgomery, 2005 MT 120, ¶ 20, 327 Mont. 138, 112 P.3d 1014. A defendant cannot offer his own out-of-court statement that someone else told him about alleged violent acts by the victim in support of a justifiable use of force claim. *State v. Mont. Ninth Judicial Dist. Court*, 2014 MT 188, ¶ 9, 375 Mont. 488, 329 P.3d 603.

When character evidence is admissible, Mont. R. Evid. 405 provides the methods of proving character. *Daniels*, ¶ 23. Rule 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 in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or 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.

Montana Rule of Evidence 104 addresses preliminary questions of evidence admissibility and the process for determining admissibility. Pursuant to Mont. R. Evid. 104(c), "[h]earings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness and so requests." "The accused does not, by testifying upon a preliminary

matter, become subject to cross-examination as to other issues in the case." Mont. R. Evid. 104(d).

Montana Rule of Evidence 104(d), which is identical to the Federal rule, "was adopted because it expresses good policy, like that of subsection (c), in encouraging the accused to testify in such preliminary matters, so that the admissibility of evidence is more easily determined." Commission Comment to Mont. R. Evid. 104(d). Further, a defendant's Fifth Amendment rights are protected because a defendant testifying on a preliminary matter may testify without fear that that testimony will be used against him at trial except for impeachment. *United States v. Gomez-Diaz*, 712 F.2d 949, 951-52 (5th Cir. 1983) (*citing Simmons v. United States*, 390 U.S. 377 (1968)), *reh'g denied*, *United States v. Gomez-Diaz*, 717 F.2d 1399 (5th Cir. 1983), *cert. denied*, *Gomez-Diaz v. United States*, 464 U.S. 1051 (1984)).

The plain language of Mont. R. Evid. 104(d), which discusses the bounds of cross-examination of an accused in a preliminary hearing, acknowledges that the State may cross-examine the accused as to matters at issue in the preliminary matter. As federal courts have noted, the identical Fed. R. Evid. 104(d) does not mean that a defendant has a right to limit his testimony on a preliminary matter to one single phase of a preliminary issue. *Gomez-Diaz*, 712 F.2d at 951-52 (magistrate correctly interpreted Rule 104(d) to permit full cross-examination on the preliminary matter of consent if defendant testified at the suppression hearing).

While the district court in this case expressed concern that the stipulated procedure created problems, the court told the parties it would not interfere with their right to use the procedure if they addressed the issues and confirmed that all parties wanted to proceed. These statements occurred *before* Walla told the district court that he had decided not to testify, undermining Walla's assertion that he "declined to testify" "[i]n light of the District Court's indicated ruling[.]" (Appellant's Br. at 38.)

Pursuant to Mont. R. Evid. 104(d), the district court would have properly exercised its discretion if it had required Walla to testify in chambers subject to cross-examination on the preliminary matter of 404(b) and 405(b) evidence; however, the district court never ordered that requirement. The court struck the stipulated provision from the proposed order because Walla told the court that any ruling on the issue would be purely academic because he did not want to testify at trial. The district court did not abuse its discretion because the alleged error Walla complains of never occurred.

III. The district court did not abuse its discretion by rejecting Walla's proposed special verdict form because the jury instructions properly instructed the jury on the State's burden and unanimity.

The district court did not abuse its discretion in rejecting Walla's requested special verdict form because the jury instructions properly instructed the jury that it was the State's burden to prove beyond a reasonable doubt that Walla's actions were not justified, that if the State did not meet that burden, the jury must find Walla not guilty, and that the jury's verdict of guilty or not guilty must be unanimous. Walla's counsel was correct when he told the district court that the proposed special verdict form was "not required" and the court properly exercised its discretion in rejecting the confusing and duplicative verdict form. (3/30/22 Tr. at 44.)

Special verdict forms and jury interrogatories are generally disfavored in criminal jury trials, and the form of the verdict is within the trial judge's discretion. *See e.g., Black v. United States*, 561 U.S. 465, 472 (2010) (absence of a criminal rule authorizing special verdicts suggests that a trial court should proceed with caution in using them in criminal cases); *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998); *United States v. Pforzheimer*, 826 F.2d 200, 205 (2nd Cir. 1987). Ordinarily, "a general unanimity instruction suffices to instruct the jury that they must be unanimous on whatever specifications form the basis of the guilty verdict." *United States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999). When the

general unanimity instruction does not raise any risk of confusion, a district court does not have to provide a specific unanimity instruction. *See State v. Vernes*, 2006 MT 32, ¶¶ 21-25, 331 Mont. 129, 130 P.3d 169.

Walla claims that neither the jury instructions nor the verdict form instructed the jury that it must unanimously find that the State met its burden to prove beyond a reasonable doubt that Walla's actions were not justified. (Appellant's Br. at 44.) Walla cites *Ramirez* and *United States v. Southwell*, 432 F.3d 1050, 1053 (9th Cir. 2005), to support his assertion that this was an abuse of discretion warranting reversal. (*Id.*) However, Walla's reliance on *Ramirez* and *Southwell* is misplaced.

In *Southwell*, the jury was presented with three possible verdicts: guilty, not guilty, or not guilty by reason of insanity. 432 F.3d at 1051-52. The jury was instructed that if it unanimously found the government had proved each element of the offense beyond a reasonable doubt, the verdict was guilty; if the jury unanimously found the government had not proved each element beyond a reasonable doubt, the verdict was not guilty; if the jury unanimously found the government proved each element beyond a reasonable doubt but unanimously agreed that the defendant had shown by clear and convincing evidence that he was insane, then the verdict was not guilty by reason of insanity. *Id.*

During deliberations, the jury sent a question asking if they could find the defendant guilty if the jury unanimously found the State proved each element of the offense beyond a reasonable doubt but they did not unanimously agree that the defendant was sane or insane. *Id.* Defense counsel asked the court to instruct that they could not find the defendant guilty if they were not unanimous on the issue of insanity, but the court declined. *Id.* On appeal, the failure to provide a clarifying instruction when the jury identified a legitimate ambiguity in the instructions was found to be an abuse of discretion. *Id.* at 1052-53.

In *Ramirez*, the Ninth Circuit concluded that the district court did not abuse its discretion in rejecting a defendant's special unanimity verdict form when the court added the language "with all of you agreeing" to the self-defense instruction. 537 F.3d at 1080, 1083-84. The court noted that unlike in *Southwell*, there was no confusion as to unanimity. *Id.* at 1083.

The following year, in *United States v. Nobari*, 574 F.3d 1065 (9th Cir. 2009), cert. denied, *Nobari v. United States*, 562 U.S. 1066 (2010), the Ninth Circuit found that a district court did not abuse its discretion when it did not give a special unanimity instruction for an entrapment defense because the case did "not present the unusual circumstances that might have warranted a specific unanimity instruction." 574 F.3d at 1081. The court clarified that although it "held in *Southwell* that unanimity is required for a jury to reject an affirmative defense," the

court "did not hold . . . that district courts are required to give a specific unanimity instruction on all affirmative defenses." *Id.* The court cautioned that a specific unanimity instruction "is not required in most cases." *Id.*

Here, the district court instructed the jury on the elements of deliberate homicide, on the parameters of justifiable use of force, and that "the State has the burden of proving beyond a reasonable doubt that the Defendant's actions were not justified." (Doc. 220, Inst. No. 26.) The jury was instructed that "[i]f you find that he/she has offered evidence of justifiable use of force, but that the State has failed to prove beyond a reasonable doubt that the Defendant's actions were not justified, you must find the Defendant not guilty." (*Id.*) The district court instructed the jury that "[t]he law requires the jury verdict in this case to be unanimous. Thus, all twelve of you must agree that the defendant is either guilty or not guilty in order to reach a verdict." (*Id.*, Inst. No. 33.) The jury never submitted any questions before returning a verdict.

Had any jury member been convinced that the State failed to prove that Walla's actions were not justified, this juror would have accordingly found Walla not guilty of the crime. The jury verdict showing that the jurors unanimously found Walla guilty of first-degree murder means the jury unanimously found that Walla had not acted in self-defense. As in *Nobari* and *Ramirez*, when the instructions are read together, there is no confusion as to unanimity.

The general verdict form, in combination with the district court's instructions, adequately addressed the State's burden and unanimity without the danger of confusion that Walla's proposed verdict form could have caused. The trial court properly exercised its discretion when it declined to give Walla's confusing and redundant special verdict form.

CONCLUSION

This Court should affirm Walla's conviction.

Respectfully submitted this 11th day of October, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,797 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Christine M. Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-11-2024:

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