IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0147

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ALEXANDER GARRETT LAFORGE III,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, the Honorable Donald Harris, Presiding

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II. The district court erred when it denied Mr. LaForge's cautionary jury instruction for Kristi Alden, an incentivized witness who provided testimony crucial to the conviction.

III. The district court erred when it granted the State's restitution request for lost profits for the victim's parents' business despite insufficient evidence of actual losses.

STATEMENT OF THE CASE

Alexander LaForge was convicted of deliberate homicide after a four-day jury trial, sentenced to 100 years in prison with a ten-year consecutive weapons enhancement, ordered over objection to pay $80,361 restitution, and was granted an out-of-time appeal. 5/23/22 Sentencing Hearing at 78-79 (attached as Appendix A); Order granting out of time appeal (March 7, 2023)(attached as Appendix B); D.C. Doc. 98 (attached as Appendix C). Mr. LaForge appeals the award of lost income restitution in the amount of $72,000, the denial of his motion to

substitute counsel and the denial of his proposed jury instruction to view the testimony of an incentivized co-defendant with distrust. 10/1/21 Hrg. at 18-19 (attached as Appendix D); 10/6/21 Hrg. at 132 (attached as Appendix E).

FACTS OF THE CASE

On April 27, 2020, Brett Ness was killed by a single gunshot to the head on the porch of his residence. A police investigation determined that Mr. Ness sold methamphetamine to Jackie Medicine Horse a few days prior, and eight people arrived at Mr. Ness's residence in two cars on the afternoon of the shooting to address a dispute over the transaction. On June 18, 2020, the State charged Mr. LaForge with deliberate homicide for Mr. Ness's death. D.C. Doc. 3. For the next fifteen months, while Mr. LaForge was in custody, the case languished.

COUNSEL REQUESTS

On December 11, 2020, about six months after the Information was filed, the district court held a status conference where counsel for Mr. LaForge indicated that he had had no communication with Mr. LaForge since September 23, 2020. 12/11/20 Hrg. at 2. At the State's request, the court set a hearing to inquire into the status of the

attorney-client relationship. 12/11/20 Hrg. at 3. The court held a hearing three days later (the State was excluded from the hearing) where counsel and Mr. LaForge both testified about their relationship. 12/14/20 Hrg. In that hearing the court found that Mr. LaForge's complaints were not seemingly substantial but granted the request for new counsel anyway. 12/14/20 Hrg. at 38-39. One week later, Mr. LaForge was assigned new counsel. D.C. Doc. 25. On January 13, 2021 the court held a scheduling conference where trial dates were set. 1/13/21 Hrg.

For the next six months the record went silent: no documents were filed by either party and no substantive hearings held. On July 21, 2021, over a year into the proceedings, counsel for Mr. LaForge hastily filed the Omnibus form when it became apparent that the parties thought the Omnibus had been completed by prior counsel when in fact it had not been. D.C. Docs. 31, 32. Because of the late Omnibus filing, the court reset the trial date from August 9, 2021 to October 4, 2021. D.C. Docs. 28, 31.

Then, just three days before Mr. LaForge's deliberate homicide trial was to begin, the district court convened an unscheduled hearing

at the State's request. 10/1/21 Hrg. at 3. The State had been surveilling Mr. LaForge's jail calls and had intercepted a conversation that indicated Mr. LaForge's dissatisfaction with his appointed counsel. 10/1/21 Hrg. at 3. The purpose of the hearing was to preemptively inquire into Mr. LaForge's complaints about his counsel.

At the State's requested hearing, Mr. LaForge expressed his desire for new counsel. 10/1/21 Hrg. at 5. The State argued that the request was merely a "stall tactic" to delay the trial—even though Mr. LaForge had not requested this hearing. 10/1/21 Hrg. at 5. After excusing the State from the proceeding, the court took testimony from Mr. LaForge and his counsel. 10/1/21 Hrg. at 6.

Mr. LaForge revealed an almost complete lack of communication with his assigned counsel. 10/1/21 Hrg. at 11. Mr. LaForge testified that he had met with counsel a total of just *two times* during the entire year counsel had represented him and had met with the investigator only two times as well and expressed concern over the lack of communication in general. 10/1/21 Hrg. at 12. Mr. LaForge also testified about specific concerns he had regarding the legality of his arrest and finding and interviewing witnesses—issues he was never

able to raise with his attorney because of their lack of communication about the case. 10/1/21 Hrg. at 7-11. Counsel answered the judge's questions about the specific witnesses and concerns over the arrest and said that he could provide effective assistance of counsel. 10/1/21 Hrg. at 16-17. Counsel never rebutted Mr. LaForge's assertion that they had only met twice in preparation for his homicide trial.

The court denied Mr. LaForge's request for new counsel. 10/1/21 Hrg. at 18-19.

JURY INSTRUCTION REQUEST

Kristy Alden pleaded guilty to crimes stemming from the death of Mr. Ness and received consideration for her testimony in Mr. LaForge's case. 10/5/21 Hrg. at 188. She provided crucial testimony at trial.

Ms. Alden testified that Mr. LaForge told her the group was going to a house to "collect." 10/5/21 Hrg. at 174-175. She testified that Mr. LaForge lead the group when they arrived at Mr. Ness's house, telling her to stop the car. 10/5/21 Hrg. at 176. She testified that Mr. LaForge was the one who shot Mr. Ness and that Mr. LaForge admitted it to her: "He's dead I fucking killed him." 10/5/21 Hrg. at 181. She also testified that Mr. LaForge threated to kill both her and another individual if

they were to tell anyone that he killed Mr. Ness. 10/5/21 Hrg. at 187. She also testified that Mr. LaForge told her to get rid of her car by having it crushed to prevent being found by the police. 10/5/21 Hrg. at 188.

Mr. LaForge proposed the following jury instruction:

> Testimony of an accomplice or co-defendant. You have heard testimony from Kristy Alden, Raisha Blacksmith and James Fisher who are co-defendants and Garrett Door, Kally Ellsworth and Jaqueline Medicine Horse who are accomplices. Their testimony was given in exchange for promises by the government that they either would not be prosecuted or would receive favorable treatment in their individual cases. Their guilty plea is not evidence against Mr. Laforge and you may consider it only in determining that witness's believability. For those reasons, in evaluating the testimony of Kisty Alden, Raisha Blacksmith, James Fisher, Garrett Door, Kally Ellsworth and Jaqueline Medicine Horse, you should consider the extent to which their testimony may have been influenced by this factor. In addition, you should examine the testimony of Kisty Alden, Raisha

Blacksmith, James Fisher, Garrett Door, Kally Ellsworth and Jaqueline Medicine Horse with greater caution than that of other witnesses.

D.C. Doc. 55.

During the settling of the jury instructions after the close of evidence, Mr. LaForge agreed that the names of Garrett Door, Kally Ellsworth, and Jacqueline Medicinehorse should be deleted as there had not been sufficient evidence that those individuals were accomplices. 10/6/21 Hrg. at 131. His requested jury instruction then included only the co-defendants Kristy Alden, Raisha Blacksmith and James Fisher.

The State objected to it on the basis that determining whether a witness is accountable is solely within the province of the jury and to instruct the jury as requested would invade the jury's province. 10/6/21 Hrg. at 129. The State also argued that the instructions already given adequately covered the subject of witness credibility. 10/6/21 Hrg. at 129.

The court denied the instruction on the basis that the issue of witness credibility was adequately covered in the existing instructions and that "it would be improper for the Judge to invade the province of

the jury by instructing them to view certain witness testimony with greater caution, given that they are, under Montana law, the sole judges of witness credibility." 10/6/21 Hrg. at 132; D.C. Doc. 65.02. The court did give one cautionary instruction that addressed Fisher's testimony but did not explain its rationale why such an instruction was proper and one pertaining to Ms. Alden was not. D.C. Doc. 65.03 (Jury Instruction 15).

RESTITUTION ORDER

During the sentencing hearing, the State requested the court order $80,361 in restitution. 5/23/22 Hrg. at 15. Mr. LaForge did not object to $4,861 in restitution for funeral and burial expenses or $3,500 to the victim's compensation fund. 5/23/22 Hrg. at 25. Mr. LaForge did, however, object to the $72,000 request for lost income. 5/23/22 Hrg. at 26.

Anita Ness, the victim's mom, testified in support of the $72,000 request for lost income. 5/23/22 Hrg. at 15-26. She testified that Mr. Ness had been a foreman in their family business of restoring log homes and that the business had had to either reschedule or cancel "three or four" jobs as a result of the death of Mr. Ness. 5/23/22 Hrg. at 15-16.

She could not recall the basis for the amount she requested. 5/23/22 Hrg. at 16. She testified that the business would have to hire and train a new foreman. 5/23/22 Hrg. at 16. She testified that no one had made any effort to hire a replacement foreman for Mr. Ness despite his death having been 25 months prior. 5/23/22 Hrg. at 24.

Mr. LaForge objected to the $72,000 request on the basis that it lacked supporting evidence. 5/23/22 Hrg. at 26. Ms. Ness had trouble recalling whether it was three or four jobs that the company had to cancel and could not recall the "figure" she used to calculate the amount she requested. 5/23/22 Hrg. at 16. She verified that she had no documentation showing the cancelled jobs or refunded deposits of money. 5/23/22 Hrg. at 20-21. She verified that the company suffered no out-of-pocket expenses related to this case. 5/23/22 Hrg. at 21. When asked whether any of the cancelled jobs had been re-ordered, she did not know. 5/23/22 Hrg. at 21. In fact, her entire basis for the request was that the company had to "reschedule or get cancelled" "like three or four jobs." 5/23/22 Hrg. at 16. She later responded affirmatively to a leading question from the State that the number was based on "at least four jobs that you had to have rescheduled." 5/23/22

Hrg. at 16. She was unable to clarify whether the jobs were cancelled or rescheduled. She testified that the current employees of the company could have done the work with some additional training and that training was done in-house and did not cost the company out-of-pocket expense. 5/23/22 Hrg. at 23, 24.

Over Mr. LaForge's objection, the court ordered him to pay the full amount of restitution requested. 5/23/22 Hrg. at 77-79; D.C. Doc. 98.

STANDARDS OF REVIEW

This Court reviews substitute counsel requests for an abuse of discretion. *State v. Johnson*, 2019 MT 34, ¶ 13, 394 Mont. 245, 435 P.3d 64.

The Court reviews claims of instructional error to determine whether the jury instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. *State v. DuBray*, 2003 MT 255, ¶ 88, 317 Mont. 377, 77 P.3d 247.

"'Restitution awards are mixed questions of law and fact that this Court reviews *de novo*.'" *State v. Holmes*. ¶ 6, 415 Mont. 528, 545 P.3d 57 (citing *State v. Arthun*, 2023 MT 214, ¶ 11, 414 Mont. 54, 538 P.3d 858). This Court reviews the decision to award restitution for

correctness and whether the district court's factual findings regarding the amount awarded were clearly erroneous. *Holmes*, ¶ 6 (citing *State v. Cleveland*, 2018 MT 199, ¶ 7, 392 Mont. 338, 423 P.3d 1074). "Such findings are clearly erroneous, *inter alia*, if not supported by substantial evidence." *State v. Coluccio*, 2009 MT 273, ¶ 40, 352 Mont. 122, 214 P.3d 1282 (overruled on other grounds).

SUMMARY OF THE ARGUMENT

The district court erred when it denied Mr. LaForge's request for new counsel. The State requested a hearing after surveilling Mr. LaForge's jail call. Mr. LaForge clearly articulated in the hearing that, despite his homicide trial set to begin in just three days, his attorney had only met with him two times in the year of representation. Counsel mischaracterized Mr. LaForge's request for new counsel as a possible request for a continuance and then, when prompted by the court twice, failed to even request the continuance to review hundreds of pages of discovery that had just been disclosed days before the trial was to begin. Counsel did not deny that there had been a complete breakdown of communication between he and Mr. LaForge.

The district court erred again when it denied Mr. LaForge's request for a cautionary jury instruction for Kristy Alden[1]. Ms. Alden provided the most stark and damaging evidence the State had: that Mr. LaForge said, ""He's dead I fucking killed him." Ms. Alden agreed to testify in return for a favorable plea agreement for the crimes she committed while with Mr. LaForge. Such incentivized testimony warranted an instruction to the jury to examine that testimony with greater caution than that of ordinary witnesses. Ms. Alden's testimony was crucial to the State's case: she testified that Mr. LaForge was the "ringleader," that he twice admitted to her that he killed Mr. Ness, and that he threatened the others present with violence if they told anyone. She was the only witness to specifically attribute to Mr. LaForge the quote, "He's dead I fucking killed him."

The district court also erred by awarding the full amount of restitution requested when the victim's claims lack substantial evidence. Although $72,000 was claimed as lost income for the Ness's log home restoration business, no affidavit or documentation

[1] Mr. LaForge does not appeal the failure to issue a cautionary instruction for any other of the incentivized witnesses.

accompanied the request. In her testimony, she could not remember how she calculated the number. She said the jobs may have been rescheduled rather than cancelled and did not explain how rescheduling jobs would cost the company $72,000. She was unable to provide any basis for the request and admitted that the company had not even begun to try to stem the claimed losses after 25 months. The evidence of losses was inadequate to sustain a $72,000 restitution award.

ARGUMENT

I. The district court abused its discretion when it denied Mr. LaForge's request for new counsel.

Mr. LaForge and his counsel suffered a complete breakdown in communication. Despite the homicide trial beginning in just three days, counsel had met with Mr. LaForge a total of only two times over ten months of representation and counsel inexplicably failed to request a needed continuance even after it became apparent that Mr. LaForge desired it, it was necessary due to a crushingly large discovery disclosure the week of trial, and the judge signaled his agreement.

Defendants have a constitutional right to effective assistance of counsel. U.S. Constitution amendment VI; Montana Constitution article II, § 24. While defendants do not have the right to choose

particular counsel, they are entitled to effective representation. So, when a breakdown of the attorney-client relationship is severe enough to prevent effective representation, a right to substitute counsel arises. *Johnson*, ¶ 18. Defendants are entitled to substitute counsel upon presenting facts that show: "(1) an actual conflict of interest; (2) an irreconcilable conflict between counsel and the defendant; or (3) a complete breakdown in communication between counsel and the defendant." *Johnson*, ¶ 19.

Trial courts must conduct an "adequate initial inquiry" upon a request for substitution counsel to determine whether the complaints are "seemingly substantial." *Johnson*, ¶ 21. An "adequate initial inquiry" is one where the judge thoroughly inquires into the factual basis of the complaint. *Johnson*, ¶ 21. After "consider[ing] a defendant's factual complaints together with counsel's specific explanations addressing the complaints," trial courts must subsequently conduct a hearing if the complaints are seemingly substantial. *Johnson*, ¶ 22.

Mr. LaForge and his counsel suffered a complete breakdown in communication. On 12/21/20, counsel assumed responsibility for

representing Mr. LaForge and after a routine scheduling conference, the record went silent for six months. D.C. Doc. 25. It was not until July 21, 2021 that anything happened on the record and when it finally did, it was to hold a delinquent omnibus hearing that neither party, nor apparently the district court, knew had been forgotten. D.C. Docs. 31, 32. The oversight by the court and parties forced the district court to continue the trial date to comply with Mont. Code Ann. § 46-13-110. D.C. Docs. 28, 31.

Three days before the rescheduled trial date the State requested a hearing and revealed that they had been surveilling Mr. LaForge's calls from the jail and wished to address Mr. LaForge's relationship with his new assigned counsel based on what they heard. 10/1/21 Hrg. at 3. At the hearing Mr. LaForge immediately cited a lack of communication as a problem and made clear that he had met with his new counsel only two times in the previous ten months of representation. 10/1/21 Hrg. at 4, 12.

Counsel never denied Mr. LaForge's claims of a complete breakdown in communications. 10/1/21 Hrg. at 12. While asserting that he could continue as effective counsel, he never specifically

addressed (and the judge never asked specifically) how many times he met with Mr. LaForge during the previous ten months. Notably, Mr. LaForge never wavered from and counsel never denied Mr. Laforge's assertion that there was a complete breakdown in communication. This breakdown in communication became even more manifest once the need for a continuance was disclosed to the court.

Counsel told the court that Mr. LaForge might be requesting a continuance rather than new counsel to review lengthy discovery that had just been disclosed. Oddly, counsel then failed to actually ask for the continuance even though the judge indicated a willingness to grant one had *counsel* requested it. 10/1/21 Hrg. at 20. Counsel indicated to the court that Mr. LaForge would be justified in requesting a continuance given the large volume of discovery that had just been disclosed, and the court twice gave counsel the opportunity to request one but inexplicably counsel never did. 10/1/21 Hrg. at 20-21. Counsel explained to the court that "we have been inundated this week with new transcripts and such and it is fairly overwhelming. Mr. LaForge is not going to have, in my opinion, sufficient time to read each one of those." 10/1/21 Hrg. at 16. Counsel admitted upon questioning by the

judge that he had not even read the discovery that had recently been disclosed even though trial was about to begin. 10/1/21 Hrg. at 16.

Counsel also undermined Mr. LaForge's request for new counsel, explaining (without any basis on which to do so) that Mr. LaForge's request was not really for new counsel but instead for a continuance (which counsel did not even request):

> Alex is right. There's approximately close to 300 pages of transcripts to read, and I can't tell the Court what's in those yet because I haven't read them. I know that it would make Mr. ---I don't think Mr. LaForge is necessarily unhappy with me. He's unhappy with the fact these things are coming late in the game, and they are concerning; and briefly flipping through them, it does change the tenor of the case for us… Mr. LaForge, maybe instead of just asking for a change of counsel, he may be asking for an additional couple of weeks to prepare for this. I don't think that's an unreasonable request on Mr. LaForge's part.
>
> 10/1/21 Hrg. at 20.

The judge made it abundantly clear that he would consider a motion to continue through counsel, but counsel inexplicably withheld any motion or request:

> Court: Well, I'm not going to entertain a request from Mr. LaForge. I will entertain a request from you [counsel], but that request has not been made yet, so it's not in front of me at this time.
>
> Mr. Merchant: I understand, Your Honor.
>
> Court: So I'm not going to rule on a request that hasn't been made through counsel.
>
> Mr. Merchant: Fair enough.

10/1/21 Hrg. at 21.

Counsel emphatically explained to the court that neither he nor Mr. LaForge would have time to even read the discovery before trial and that Mr. LaForge wanted a continuance. Yet counsel declined to actually request a continuance even when repeatedly prompted to do so by the court. Counsel explained away Mr. LaForge's legitimate request for new counsel by indicating a dire need for a continuance and then failed to request the continuance. Counsel undermined Mr. LaForge's

legitimate request for new counsel and thwarted Mr. LaForge's apparent need for a continuance. The inexplicable episode reveals a hollow façade of the right to counsel accorded Mr. LaForge. The district court failed to substantively address Mr. LaForge's real and legitimate concerns. Merely airing the concerns of a defendant in open court while undermining their arguments and thwarting legitimate motions demonstrates the complete breakdown in communication that undermined Mr. LaForge's right to counsel. The judge ruled, in accordance with Mr. LaForge's counsel's arguments, that Mr. LaForge's complaints were not seemingly substantial. 10/1/21 Hrg. at 19.

This episode demonstrates that there was a complete breakdown of communication between Mr. LaForge and his counsel, which counsel never denied or challenged. The district court clearly did not consider "counsel's specific explanations addressing the complaints", because counsel never even offered such explanations. *Johnson*, ¶ 22. Counsel then thwarted Mr. LaForge's obvious need for a continuance all but offered by the court in a clear demonstration that communication had broken down. The court erred by denying Mr. LaForge's request for new counsel. This Court must therefore vacate the judgment and

remand for a new trial. *City of Billings v. Smith*, 281 Mont. 133, 141, 932 P.2d 1058, 1063 (1997).

II. The district court erred when it denied Mr. LaForge's cautionary jury instruction.

"He's dead I fucking killed him." 10/5/21 Hrg. at 181. That is what Ms. Alden swore to the jury that Mr. LaForge said to her. Her testimony was crucial to the State's case. Mr. LaForge requested a cautionary jury instruction for Ms. Alden's incentivized testimony because she took a deal to plead guilty for her role in the death of Mr. Ness in return for her testimony against Mr. LaForge. D.C. Doc. 55.

In Montana, when a government witness is motivated by personal gain such as a favorable plea deal in return for testimony that is crucial to the State's case, district courts must instruct the jury to examine that testimony with greater caution than that of ordinary witnesses. *State v. Grimes*, 1999 MT 145, ¶ 45, 295 Mont. 22, 982 P.2d 1037. If the district court refuses such a cautionary instruction, "the standard of prejudice is whether the testimony was crucial to the State's case in light of other evidence." *Grimes*, ¶ 46. If there is a reasonable possibility that the error might have contributed to the conviction, then

the defendant was prejudiced, and the case must be reversed. *Grimes*, ¶ 46.

Ms. Alden pleaded guilty to crimes stemming from the death of Mr. Ness and received consideration for her testimony in Mr. LaForge's case. 10/5/21 Hrg. at 188. Ms. Alden was convicted of obstructing justice in connection with her role in this case and agreed to testify in return for a sentence of ten years with five years suspended commitment to the department of corrections. 10/5/21 Hrg. at 188.

The district court ruled that the requested cautionary instruction would invade the jury's province: "…it would be improper for the Judge to invade the province of the jury by instructing them to view certain witness testimony with greater caution, given that they are, under Montana law, the sole judges of witness credibility." 10/6/21 Hrg. at 132; D.C. Doc. 65.02. This ruling was in direct conflict with *Grimes*.

While the jury is ultimately the "sole judges of witness credibility," the district court was dead wrong that he could not caution the jury about incentivized witnesses. In fact, this Court unequivocally endorses such an instruction: "…when a government informant motivated by personal gain rather than some independent law enforcement purpose

provides testimony, a cautionary instruction is the more prudent course of action." *Grimes,* ¶ 45. And contrary to its own reasoning, the district court did give an instruction to view the testimony of James Fisher with "distrust" if the jury found he was legally accountable for the alleged crime. D.C. Doc. 65.03 (Jury instruction number 15). No jury instructions cautioned the jury regarding Ms. Alden's incentive and possible resulting bias. The court refusal to give Mr. LaForge's proposed instruction regarding Ms. Alden was in error.

In *State v. Grimes* this Court held that a cautionary instruction was necessary because no other similar instructions had been given regarding the incentivized witness, even though an instruction had been given to view the defendant's admissions with caution. *Grimes,* 43-45. This Court based its reasoning on well established, forty-year old Ninth Circuit reasoning in *Guam v. Dela Rosa* (9th Cir.1981) 644 F.2d 1257.

Ms. Alden's testimony was crucial to the State's case as the other evidence left room for doubt, and Ms. Alden's testimony resolved that doubt in the State's favor.

Ms. Alden testified that Mr. LaForge was essentially the ringleader of the group of people that were present when Mr. Ness was shot. She testified that Mr. LaForge told her the group was going to a house to "collect." 10/5/21 Hrg. at 174-175. She testified that Mr. LaForge continued to lead the group when they arrived at Mr. Ness's house, telling her to stop the car. 10/5/21 Hrg. at 176. She testified that Alex was the one who shot Mr. Ness and that Mr. LaForge admitted it to her: "He's dead I fucking killed him." 10/5/21 Hrg. at 181. She also testified that Mr. LaForge threated to kill both her and another individual if they were to tell anyone that he killed Mr. Ness. 10/5/21 Hrg. at 187. She also testified that Mr. LaForge told her to get rid of her car by having it crushed to prevent being found by the police. 10/5/21 Hrg. at 188. Although she testified that she did not personally see the shot that killed Mr. Ness, she said that Mr. LaForge admitted to shooting him twice.

The only compelling evidence of Mr. LaForge being the shooter is the testimony of Ms. Alden. None of the other evidence presented by the State was as crucial to show that Mr. LaForge was the shooter.

This case must be reversed for the lack of a cautionary instruction. *Grimes*, ¶ 46.

III. The district court erred when it granted the State's restitution request for lost profits for Mr. Ness's parents' business.

The deceased's mother requested $80,361 in restitution. 5/23/22 Hrg. at 15. She testified that her son had been a foreman in the family's log home restoration business and that his death had resulted in the $72,000 in lost income to the business. 5/23/22 Hrg. at 16-18. But she could not explain how she calculated that number or even prove that her business had, in fact, lost substantial income.

Mr. LaForge did not object to $4,861 in restitution for funeral and burial expenses or $3,500 to the victim's compensation fund. 5/23/22 Hrg. at 25. Mr. LaForge did, however, object to the $72,000 request for lost income. 5/23/22 Hrg. at 26.

District courts must require payment of full restitution when any victim suffers a pecuniary loss. Montana Code Annotated § 46-18-201(5). Pecuniary loss means "all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts or

events constituting the offender's criminal activities, including without limitation out-of-pocket losses, such as medical expenses, loss of income…, expenses reasonably incurred in attending court proceedings related to the commission of the offense." Mont. Code Ann. § 46-18-243(1)(a).

The State holds the burden to prove restitution by a preponderance of the evidence. *State v. Aragon*, 2014 MT 89, ¶ 16, 374 Mont. 391, 321 P.3d 841.

While supporting documentation is not required to support a restitution order, there must be evidence sufficient to support the amount awarded. *Aragon*, ¶ 14. Where the testimony or affidavit of the party claiming restitution is insufficient to support the request, reversal of the restitution award is required. *Aragon*, ¶ 21; *Coluccio*, ¶ 45; *State v. Kirn*, 2012 MT 69, ¶ 8, 364 Mont. 356, 274 P.3d 746; *State v. Brown*, 263 Mont. 223, 226, 867 P.2d 1098, 1100, (1994) "[A]ssumptions, ballpark figures from friends, and purely speculative calculations are insufficient information upon which to make findings of fact." *State v. Passwater*, 2015 MT 159, ¶ 14, 379 Mont. 372, 350 P.3d 382 (citing *Colluccio*, ¶ 45).

The court awarded restitution here based upon an unsupported claim. Ms. Ness testified in support of the award but could not answer even basic questions about the basis for the $72,000 she requested for lost profits in the business. The calculation that led to the request for $72,000 was purely speculative and thus an insufficient basis for the court to make any findings of fact about it. *Passwater*, ¶ 14.

At the beginning of her questioning, the State asked on direct examination if there was a figure that she had used to calculate the request for $72,000. 5/23/22 Hrg. at 16. Ms. Ness replied that although she was sure that there was, she could not recall it. 5/23/22 Hrg. at 16. She never recalled it or offered anything on which to base the $72,000 request. Her entire basis for the request was that the company had to "reschedule or get cancelled" "like three or four jobs." 5/23/22 Hrg. at 16. She later responded affirmatively to a leading question from the State that the number was based on "at least four jobs that you had to have rescheduled." 5/23/22 Hrg. at 16. No explanation was given for how rescheduled jobs cost the company $72,000.

On cross-examination, she acknowledged that the company suffered no out of pocket losses. 5/23/22 Hrg. at 21. She claimed on

cross-examination that the jobs had been cancelled rather than delayed but did not know whether or not the cancelled jobs had been re-ordered. 5/23/22 Hrg. at 21. She testified that she had no invoices or orders, or tax returns that would show proof of the claimed loss. 5/23/22 Hrg. at 21-22. Although the reason they could not complete the jobs was the death of Mr. Ness, who was a foreman, she testified that they had not even attempted to hire anyone to replace him or train one of the existing employees to replace him despite the passage of over 25 months. 5/23/22 Hrg. at 24.

After cross-examining Ms. Ness, counsel for Mr. LaForge stipulated to $8,361 in restitution, but objected to the $72,000 requested for lost profits and suggested that since Ms. Ness was seemingly unprepared for the hearing, that the court continue the hearing for 30-60 days "so that they can provide some more verification to the restitution request." 5/23/22 Hrg. at 26. The court instead awarded the full amount of restitution requested. 5/23/22 Hrg. at 77-79; D.C. Doc. 98.

Even though a victim's testimony or sworn affidavit explaining their loss may be sufficient with no documentation required, it is still

error to award restitution unsupported by substantial evidence. *Aragon*, ¶ 21; *Coluccio*, ¶¶ 37, 45. Even if the court judged Ms. Ness's credibility and demeanor as impeccably truthful, the court erred because regardless of her credibility and/or demeanor, the State failed to offer evidence sufficient to prove Mr. LaForge owed her $72,000. The $72,000 she requested as lost profits had no basis in fact much like in *State v. Aragon*.

Aragon collided with someone's garage while driving drunk in Billings. The district court ordered him to pay for the cost of repainting the entire house. *Aragon*, ¶ 6. Aragon argued that the award to repaint the entire home was in error because he had only damaged the garage and the insurance adjuster did not include the house repainting in his estimate. *Aragon*, ¶ 6. Faced with two different estimates at how much Aragon's drunken collision cost to repair, neither of which had much support, this Court held that the evidence for the necessity of repainting of the entire house was insufficient to support the amount awarded and remanded the case for a hearing to determine the proper amount of restitution. *Aragon*, ¶ 20. Like here, the court in *Aragon*

only had a bare claim, a dollar amount without substantial evidence to support it.

Similarly, in *Coluccio*, this Court reversed for a determination of restitution when the victim's speculative calculations were held to be "insufficient information upon which" to base a restitution award. *Coluccio*, ¶ 45. Coluccio had drunkenly turned left in front of a motorcyclist on Highway 200 near Jonsrud in Missoula County, killing the motorcyclist. The court ordered Coluccio to pay $1,400,000 in restitution to the deceased's widow. The award comprised of $10,000 for counseling, $20,000 for the value of future home repairs that the deceased would no longer be able to perform, and $1,338,504 in lost wages of the deceased. This Court held, "[w]e cannot conclude that the amounts set by the District Court for counseling services, home repair services, and lost wages were substantiated by evidence in the record as required by § 46-18-243(1)(a)." *Coluccio*, ¶ 45. Like here, the victim's testimony at the sentencing hearing was insufficient to support the award of restitution:

> "[the victim] stated she was "at a loss" when calculating the counseling expenses, she "assumed" the home repair expenses, her

husband had the "potential" to make $92,000 a year, and she did not know how her attorney-friend prepared lost income figures she presented. Assumptions, ballpark figures from friends, and purely speculative calculations are insufficient information upon which to make findings of fact."

Coluccio, ¶ 45.

Here, like in *Coluccio* and *Aragon*, Ms. Ness had nothing but bare numbers and speculation to offer when asked how she arrived at the $72,000 lost profits request. Even on direct examination at the very beginning of the hearing, she admitted that she could not recall the "figure" that formed the basis for the $72,000 request. 5/23/22 Hrg. at 16. On cross examination, she admitted that the current employees of the company could have done the work with some additional training and that training was done in-house and did not cost the company out-of-pocket expense. 5/23/22 Hrg. at 23, 24. She also testified that no one had made any effort to hire a replacement for Mr. Ness despite his death having been 25 months prior. 5/23/22 Hrg. at 24. And she verified that she had no documentation showing the cancelled jobs or refunded deposits of money. 5/23/22 Hrg. at 20-21. Ms. Ness's claim for

$72,000 in lost wages simply was not "substantiated by the evidence in the record," as it is required to be by Mont. Code Ann. § 46-18-243 (1)(a).

The restitution award must be reversed and this case remanded to the district court to properly determine the amount of restitution owed. *Aragon*, ¶ 21.

CONCLUSION

This Court should reverse the court's denial of Mr. Laforge's request for new counsel, vacate the judgment, and remand for a re-trial. *Smith*, 281 Mont. at 141.

This Court should reverse the denial of Mr. LaForge's request for cautionary instructions, vacate the judgment, and remand for a re-trial. *Grimes*, ¶ 46.

If neither of the first two issues is dispositive, this Court should reverse the award of restitution and remand to the trial court for a determination of the proper amount of restitution. *Aragon*, ¶ 21.

Respectfully submitted this 18th 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 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 6,018, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Gregory Hood
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APPENDIX

CERTIFICATE OF SERVICE

I, Gregory Nelson Hood, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-18-2024:

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