IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0484

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ANDREW JOHN SMITH,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Tenth Judicial District Court,
Petroleum County, The Honorable Jon A. Oldenburg, Presiding

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ISSUES PRESENTED

Whether—when Appellant timely gave notice of pursuing a justifiable use of force (JUOF) defense but did not pursue a mental disease or defect (MDD) defense—the district court abused its discretion in granting the State's motion in limine to preclude MDD evidence in support of a mitigated deliberate homicide theory.

Whether Appellant meets his plain error burden based on his argument that Mont. Code Ann. § 46-16-503(2)—the statute detailing the process for jury questions "[a]fter the jury has retired for deliberation"—requires a district court to share with the parties the contents of evidentiary questions it receives from individual jurors during a trial but prior to deliberation.

STATEMENT OF THE CASE

The State charged Appellant Andrew John Smith with deliberate homicide for Smith's killing of 78-year-old Larry Patterson via stabbing him 8 times outside of an apartment complex in Winnett, Montana, on July 15, 2021. (*See* Doc. 3, First Inf.) The State later added a weapons enhancement charge for Smith's use of a knife. (Doc. 28 at 2, Am. Inf.)

The district court set an October 25, 2021 deadline for affirmative defenses. (Doc. 18 at 4.) Smith timely filed a JUOF notice. (Doc. 20 at 1.) The State

moved to set a deadline for Smith to disclose any possible MDD defense, which was granted. The court set the same deadline, October 25, 2021. (Docs. 22-23.)

Smith did not provide a MDD defense notice but explained that "[a]n evaluation has taken place but a report will not be made until discovery is received and evaluated by the person performing an evaluation." (Doc. 24.) In a later defense witness list, Smith clarified that Dr. Bowman Smelko "conducted [his] psychological evaluation[.]" (Doc. 29 at 1.) Smith listed Dr. Smelko along with Eli Karinen, a counselor who saw Smith prior to the incident, as possible witnesses. (*Id*. at 1-2.)

After the State affirmed that it had indeed provided discovery, it again moved for a MDD defense disclosure deadline, which the court granted, resetting it to November 26, 2021. (Docs. 41, 43.) Smith responded that he was still reviewing discovery. (Doc. 44.)

At a November 18, 2021 status hearing, defense counsel explained he had "spoken with [Smith]" and decided to "request an evaluation" and that they would obtain a "private" evaluator "out of Helena." (11/18/21 Tr. at 3; Doc. 45.) However, two months later, defense counsel explained "he does not believe the Defendant will raise the issue of mental health, and, therefore, a mental health evaluation will not be necessary." (Doc. 63, Min. Entry)

On January 14, 2022, the State moved to commit Smith to the Montana State Hospital (MSH) for a fitness evaluation under Mont. Code Ann. § 46-14-202, which was granted. (Docs. 65-66.)

On February 22, 2022, Smith filed an amended notice of affirmative defense, again asserting he would rely on a JUOF defense, but dropping Dr. Smelko as a possible witness, and otherwise reasserting his prior counselor, Karinen, as a possible witness, along with Nurse Practitioner Kimberlee Decker, who saw Smith prior to the incident. (Doc. 81 at 2.)

The State next filed a motion in limine: (1) to preclude Smith from introducing waived defenses; (2) to preclude Smith from presenting both a JUOF and a MDD defense; and, relevant here (3) to preclude Smith from introducing MDD evidence to support the lesser-included offense of mitigated deliberate homicide. (Doc. 86 at 2.) In response, Smith conceded that he could not present both JUOF and MDD defenses but offered that the results of the MSH evaluation would help him to decide which path to pursue. (3/14/22 Tr. at 11-12; Doc. 100 at 3-4.) Smith explained that Karinen's report on Smith's "delusional thought processes" could also be relevant to a MDD claim. (Doc. 100 at 4.) Finally, Smith opposed the State's request to preclude MDD evidence to support a mitigated deliberate homicide instruction, explaining that the MSH evaluation was

"ongoing" and affirming that, depending on its result, he "may rely on the [MSH] evaluation to argue mitigated deliberate homicide." (*Id*. at 6.)

At the next status hearing, the State explained that only Smith could request the MSH evaluation to include whether he had the state of mind or whether he could conform his behavior to the law. (3/9/22 Tr. at 3.) Smith then requested the full evaluation, which was granted. (*Id*.; Doc. 102.)

At the motion hearing, the State invited Smith to "clarify" where "they're going to get to this extreme mental or emotional stress to build in a lesser included." (3/14/22 Tr. At 13.) The State explained that an "external" provocation could be appropriate for a mitigated theory, but it was concerned that Smith would "bootstrap [MDD] evidence which can only come in to show the absence of mental state[.]" (*Id.*) Defense counsel confirmed he wanted to "bootstrap some of that" MDD evidence. (*Id.* at 15.) He explained his theory that Smith had a "deep seeded issue" in his mind and delusional thought processes that made him go to the "extreme" of "stabbing [Larry] until he died rather than trying to disarm him or try to do something like that." (*Id.* at 14.)

On March 28, 2022, the court partially granted the State's motion in limine. (Doc. 123.) It first noted that the deadline for asserting any affirmative defense was expired and the only one that was timely raised was JUOF. (*Id*. at 27-28.) However, the court held its decision in abeyance on any other affirmative defenses

pending the results of the MSH evaluation. (*Id*. at 28.) The court next ruled that, because under a JUOF defense the defendant concedes he acted purposely or knowingly, Smith could not raise both a JUOF and a MDD defense at trial. (*Id*. at 37.) Finally, relying on *State v. German*, 2001 MT 156, ¶ 11, 306 Mont. 92, 30 P.3d 360, and *State v. Martinez*, 1998 MT 265, ¶ 10, 291 Mont. 265, 968 P.2d 705, the court reasoned that—whether Smith intended to pursue a JUOF defense or a MDD defense—"either defense would result in an acquittal," thus an instruction for mitigated deliberate homicide was not appropriate. (*Id*. at 38.) The court also reasoned that Smith "acknowledged he was attempting to bootstrap MDD evidence to support a mitigated instruction[]" through his proffered witnesses and exhibits related to Smith's medical treatment prior to Smith killing Larry. The court explained that "[s]uch evidence would also be improper if [MSH] confirms that the Defendant was able to form the requisite mental state at issue in this case." (*Id*. at 39.)

At an April 4, 2022 hearing, despite Smith's apparent vacillations on whether or how an evaluation occurred, Dr. Smelko testified he did indeed evaluate Smith in August 2021 for three hours to consider Smith's mental state at the time of the offense. (4/4/22 Tr. at 6-7.) While Dr. Smelko had then shared his findings verbally with defense counsel, the findings "were not asked to be written up based on the results." (*Id*. at 7.)

On April 12, 2022, MSH evaluators concluded that Smith was fit to proceed, that he had a capacity to conform his behavior to the law, and that he acted purposely and knowingly. (Doc. 185 at 15.) Three days later, Smith submitted an amended witness notice, dropping prior counselor Karinen and NP Decker as possible witnesses. (Doc. 198.)

During trial, Smith submitted proposed jury instructions that included instructions for JUOF along with instructions for mitigated deliberate homicide. (Doc. 210.)

After the State's case, Smith testified for the defense, claiming JUOF. (Trial Tr. at 677.) The State presented several rebuttal witnesses. (*Id*. at 731-45.)

During instruction settling, defense counsel summarily offered without elaboration that trial testimony had occurred that "might support" his mitigated deliberate homicide instructions. (Trial Tr. at 777.) The State responded that Smith's JUOF defense precluded a mitigated instruction, and regardless "[t]here hasn't been any evidence presented in this case of any mitigation whatsoever[.]" (*Id*. at 778.) The court responded, "Court agrees[,]" and denied Smith's instructions. (*Id*. at 777-78.)

The jury found Smith guilty of deliberate homicide and the weapon enhancement. (Doc. 218; Trial Tr. at 842-44.) For deliberate homicide, the court sentenced Smith to the Montana State Prison (MSP) for 100 years, none suspended,

and a 40-year parole restriction. (Doc. 236 at 2, available at Appellant's App. A; Sentencing Tr. at 29.) For the use of a dangerous weapon, the court sentenced Smith to 10 years at MSP, no time suspended, consecutive. (Doc. 236 at 2; Sentencing Tr. at 30.)

FACTS PRESENTED

I. The offense

Larry Patterson, a 78-year-old man at the time of his death, grew up in Montana but worked as a truck driver out of Phoenix, Arizona, until he was 76 years old. (Trial Tr. at 317.) He had a prosthetic left leg below the knee from a 2007 motorcycle accident. (*Id*. at 319-20.) The leg had a 10-year lifespan, but Larry had it on for 15 years, so the ankle portion was not working properly. Larry thus had to brace himself on something nearby if he was standing. (*Id*. at 320-21.) He was right-handed. (*Id*. at 328.)

Larry's stepdaughter Tracy Taynor considered him a father figure but also one of her best friends. (Trial Tr. at 319.) After her mom passed, Larry lived with her and her family for a couple years in Missouri. (*Id*. at 322.) When they decided to move back to Montana, they moved to a one-bedroom ranch house in Petroleum County, but there was no room for Larry. (*Id*. at 323-24.)

They found an opening at the Winnett Apartments. (Trial Tr. at 325.) This was a good option because it was close enough to Tracy's place so that she could still take care of Larry, but it also allowed him to be independent. (*Id*.) They signed the lease on July 1, 2021, and four days later, Larry and his miniature dachshund Zoey moved into Apartment #1—located across the outdoor common area from Smith's Apartment #6. (Trial Tr. at 325-26, 338, 340-41, Ex. 2.)

Tracy visited Larry every day. (Trial Tr. at 326.) While there, she noticed Smith outside smoking or on his phone several times. (*Id*.) Smith gave Tracy an "uneasy feeling." (*Id*.) While Larry had already made friends with the other three neighbors in the complex, Smith was "very standoffish[.]" (*Id*. at 326-27.) One day, Tracy took Larry for errands. Upon returning to Larry's apartment, she saw Smith outside. (*Id*. at 327, 333.) Tracy said to Larry, "[H]ey, I think you need to steer clear." (*Id*.) Larry looked at Tracy and said, "I know." (*Id*.)

On July 15, 2021, Tracy took Larry to a seniors' event. (Trial Tr. at 328.) She dropped Larry off at his apartment at 1:45 p.m. (*Id*. at 329.) An hour before Larry would be killed that evening, he called Tracy and left a message, asking for the Amazon password. (*Id*. at 331, State's Ex. 60, offered, admitted, and published at Trial Tr. at 330-31.)

Smith's fiancé Kymber Sandman lived with Smith in Apartment # 6. Kymber worked at her family's business, the Winnett Bar. (Trial Tr. at 338,

340-41; *see also* State's Ex. 2, layout of apartment complex.) She had not met Larry, but she had seen him around the complex, usually while he was sitting outside his apartment and smoking his pipe. (*Id*. at 339, 341.) She noticed Larry was friendly with the other residents. (*Id*. at 342.) She was not aware of Smith ever speaking with Larry. (*Id*.)

On July 15, 2021, Kymber and Smith did not have to work. (Trial Tr. at 343-44.) They went to Kymber's family's bar to pick up items for their expected baby, as Kymber was around six months pregnant. (*Id*. at 344.) Then they went back to their apartment and watched movies. (*Id*. at 345.) At some point, Kymber saw Smith get up, grab something off the table, and walk outside. (*Id*.) Smith did not say anything, but Kymber thought he was "[v]ery cold and emotionless" as he left. (*Id*. at 345-46.)

Kymber soon heard a "popping or banging noise[]" which sounded like "a screen door shutting hard[.]" (Trial Tr. at 346.) She waited a few minutes, then got up to see what that sound was, heading outside. (*Id*. at 346-47.) It was around 7:15 p.m., and still daylight. (*Id*. at 347.)

Kymber saw Larry "holding onto himself and stumbling around" toward the courtyard between the two apartments but near the "front of [Larry's] apartment." (Trial Tr. at 347.) Blood was spurting from his torso and he had his hands on his body. (*Id*. at 347-48.) There was nothing in Larry's hands. (*Id*.) He extended one

arm and collapsed on the ground in the courtyard, not far from where he was stumbling. (*Id*. at 348-49.)

She saw Smith standing in the courtyard, around five feet from Larry. (Trial Tr. at 349-50.) Smith was holding a knife in his hand. (*Id*.) She asked, "[W]hat happened[?]" and "[W]hat did you do?" (*Id*. at 348.) Smith was "very agitated[]" and "angry." (*Id*. at 349.) She saw Smith's bloodstained sweatshirt and blood trickling from Smith's arm. (*Id*. at 350.)

Kymber instructed Smith to call an ambulance "for both of them," but Smith "made it clear that he was going to the bar[,]" which was located across the street. (Trial Tr. at 351, 600; *see* Ex. 2.) Smith said that he was going there for "a cigarette" and "possibly a drink." (Trial Tr. at 351.)

After Smith left, Kymber called 911. (Trial Tr. at 351.) The 911 operator told Kymber to apply pressure to Larry's wounds, but Kymber could not find any actively bleeding wounds, and she said Larry was not "responding at all in any way." (Trial Tr. at 352; *see also* 911 call at 3:40 in State's Ex. 4, published at Trial Tr. at 357.) She observed cut marks on Larry's chin and on his chest. (Trial Tr. at 352.) She thought she heard Larry emit "a raspy breathing sound[.]" (*Id*. at 353.) She then said, "I think he's gone." (Ex. 4 at 4:25-4:28.)

Meanwhile, Smith entered the Winnett Bar and encountered Kymber's father, Kale Sandman. (Trial Tr. at 375.) Sandman observed that Smith "wasn't

wearing a shirt[]" and said "half-jokingly" that Smith couldn't come into the bar without a shirt on. (*Id*.) When Smith turned around, Sandman saw that he had blood on him, so he followed Smith outside. (*Id*. at 376.) He asked what was going on. (*Id*.) Smith responded, "[S]ome dude just shot me." (*Id*.) Smith was "a little amped up" and showed Sandman the wound on his arm. (*Id*.)

Smith asked Sandman for "a drink and a cigarette." (Trial Tr. at 376.) Sandman told Smith he would not be getting a drink, but he did hand Smith a cigarette and a lighter. (*Id*.) He instructed Smith to "sit right there" at the bench outside the bar and went back into the building to call 911. (*Id*. at 376-77.) The 911 operator informed him that they were already in contact with "somebody who was involved" but they did not mention Kymber. (*Id*. at 377.) Concerned about a possible "active shooter[,]" Sandman asked Smith where Kymber was. Smith responded, "[O]ver there." (*Id*.)

Sandman saw Kymber across the street. (Trial Tr. at 377.) He told her to "get away," but Kymber responded that she was speaking with 911. (*Id*. at 377-78.) Ultimately, Sandman assisted Kymber away from the scene onto the opposite sidewalk near the bar because she started "hyperventilating" and "having a panic attack." (Trial Tr. at 354; *see also* Ex. 4 at 6:00.) After seeing Larry's body, he attempted to get Kymber "settled down." (Trial Tr. at 378.) Kymber

"collapsed" into her father's arms and said, "I think he's dead." (*Id*. at 378, 353-54.) Sandman sat her down on the sidewalk near his bar. (*Id*. at 378.)

Sandman instructed Kymber to "keep an eye on [Smith] and to make sure that he stayed there." (Trial Tr. at 354.) When Smith reapproached Kymber, she told Smith he was "probably going to go away for a long time because of what happened." (*Id*.)

Sandman approached Larry and saw blood pooled around him and several cut marks. (Trial Tr. at 379.) He recognized Larry, who had visited his bar before. (*Id*. at 379.) There was no pulse or breathing. (*Id*.)

Sandman walked back to Kymber. (Trial Tr. at 380.) Smith joined. (*Id*.) Sandman asked Smith, "What the fuck did you do?" (*Id*.) Smith responded, "I just went over there to see what the fuck he was doing there." (*Id*. at 381.) Sandman said, "[W]hat do you mean?" (*Id*.) Smith said, "I just wanted to know what the fuck he was doing there." (*Id*.) Sandman said, "[F]or god sake, he fucking lives there." (*Id*.) Smith responded, "[W]ell, I didn't know that." (*Id*.)

Sandman inquired, "[W]hat went on?" Smith said, "[Larry] got up, I started to wrestle with him, you know. I grabbed him. I could feel him reaching for a gun." (*Id*.) Sandman replied, "[S]o what did you do?" Smith said, "[W]ell, I don't know. I don't know." (*Id*.)

Sandman ordered Smith to walk away. Smith complied. (Trial Tr. at 381.) Sandman asked Kymber whether Smith still had the knife on him. (*Id*. at 355, 382.) According to Sandman, Kymber said she did not know, but Kymber testified that she said Smith might still have one in his pocket. (*Compare id.* at 355, 382.)

Sandman approached Smith and asked about the knife. (Trial Tr. at 382.) Smith was sitting down but stood up and started walking toward Sandman. (*Id*. at 383.) He instructed Smith to stop. (*Id*.) Smith took the knife out and held it out to his side. (*Id*.) The knife was open with blood still on it. (*Id*. at 383-84.) Sandman reached toward his own gun, but did not draw it yet, saying, "Stop and drop that knife or I will end you." (*Id*. at 383, 386.) Sandman then instructed Smith to back up and sit back down on the sidewalk away from the knife. (*Id*. at 383.) Smith complied. (*Id*. at 384; *see* Ex. 20, offered, admitted, and published at Trial Tr. at 503.)

Ray Rowton, ambulance driver, A-EMT Kimberley Jensen, and EMT Joel Odermann, responded to the scene. (Trial Tr. at 384, 429-30.) Odermann noticed "severe blood loss" as well as "several wounds to [Larry's] torso and chin[.]" (*Id*. at 419.) Jensen saw no active bleeding. (*Id*. at 432.) Larry's chest, face, neck, and most of his torso was covered in blood. (Trial Tr. at 419; Ex. 12, offered, admitted, and published at Trial Tr. at 420.) Odermann attempted to use a defibrillator, but there was no heart rhythm. (*Id*. at 421.) Jensen unsuccessfully

attempted chest compressions. (*Id*. at 433.) Rowton protected the scene pending police arrival. (*Id*. at 401, 407.) After consulting with a doctor, they were advised to cease care. (*Id*. at 406, 422, 436.)

II. Smith's admissions

The EMTs next attended to Smith. (Trial Tr. at 424.) Jensen noted Smith was alert and orientated. (*Id*. at 444.) Smith had a wound to his upper left arm and a corresponding injury to the chest wall. (*Id*. at 437-39.) He reported he was shot. (*Id*. at 422.) Smith also had through-the-skin lacerations to his right pinky and pointer finger. (*Id*. at 442, 447.)

Reserve Deputy Adam Tholt arrived. (Trial Tr. at 454.) He secured the scene and located the weapons. (*Id*. at 454-55.) After Deputy Gary Fitzgerald arrived, he and Deputy Tholt contacted Smith. (Trial Tr. at 466, 456. 472.) Deputy Fitzgerald asked Smith, "[W]hat happened?" As Deputy Tholt would testify, Smith responded that "he bear hugged [Larry] to try and stop him from drawing the gun while he was stabbing him." (Trial Tr. at 456; *see id*. at 466 (Deputy Fitzgerald affirming Smith said that "[Larry] was going for a gun, and he pulled his knife").

Lewistown EMT Lashawna Johnson arrived on-scene at approximately 8:32 p.m. (Trial Tr. at 478.) She treated Smith. (*Id*. at 479.) Before administering

fentanyl for pain management, Johnson also asked Smith what happened. (*Id*. at 480, 489.) This question was part of her planned treatment. (*Id*. at 480.) Smith said:

> I knew the guy was new to town and was just trying to have a conversation with him. He started coming at me aggressively. I knew he had a gun so I gave him a bear hug to keep him from shooting me. I pulled out my knife and had to defend myself, and stabbed him multiple times.

(Trial Tr. at 482; State's Ex. 5 at 2, published at Trial Tr. at 481.)

Smith was transported to the hospital. Deputy Tholt was in the ambulance, and heard Smith repeat the same story he earlier told them on-scene. (Trial Tr. at 456.) EMT Johnson noted that Smith's demeanor was "that he felt proud about what he just did." (*Id*. at 482.)

After hospital discharge, Deputies Tholt and Fitzgerald arrested Smith. (*Id*. at 457.) Upon them informing him he was under arrest, Smith put his head down and said, "Okay." (*Id*. at 468.)

III. The scene evidence, the crime lab analysis, and the autopsy

Department of Criminal Investigation (DCI) Agents Craig Baum and Ryan Eamon responded to the scene that night. (Trial Tr. at 506.) Agent Eamon noted blood on both the grass and concrete, indicating the attack occurred in both areas. (Trial Tr. at 662.) The gun was located "approximately 4 to 5 feet" away

from where Larry lay, indicating that Larry was "unarmed at some point" during the attack. (*Id*.)

Agent Eamon discovered different angled knife wounds on Larry, and Smith had "injuries on his hand that were consistent with the change of the position of the knife blade, and then the knife blade slipping from the blood that was covered on it, and cutting his hand." (Trial Tr. at 663.) The "knife wound that was on [Larry's] neck" was "level." (*Id*. at 665.) Because Smith was "5 foot 6" and Larry was "6 foot 2," Smith would have had to use an "upward stroke" if they had both been standing. (*Id*. at 665.) But because of the different hand positions, the knife was turned downward, an uncommon angle. (*Id*. at 665-66.)

Agent Eamon explained there was "substantially more blood" on Larry's shirt than on his pants. If a person was standing, the blood should have dripped down his chest and saturated his pants. (Trial Tr. at 667-68; *see* State's Ex. 37.) Further, no blood was on the bottom of Larry's shoes, indicating that he "was on the ground when he was attacked." (Trial Tr. at 661.) Finally, because Larry had blood on the *inside* of his right jeans pocket, along with knowledge that Larry kept his gun inside of his pocket, Larry must have been already "bleeding when he went to get the gun." (*Id*. at 668.)

Agent Eamon explained the gunshot wound on Smith was "straight and level." (Trial Tr. at 666.) Because of Smith's and Larry's relative heights, the

angle of the gunshot should have been "downward" if they were both standing. (*Id*. at 667.) A Crime Lab analysis showed Smith's sweatshirt had a defect in the arm area that was "consistent with being in close contact or contact with the muzzle of that firearm during discharge." (*Id*. at 625.)

Agent Baum investigated the gun evidence and concluded that, in the five-cartridge gun belonging to Larry, one cartridge was fired while the four other cartridges were not fired. (*Id*. at 597; Ex. 15, published at Trial Tr. at 597-98.) The firearm was determined to be "functioning as designed" and had no problems with its action or mechanism. (Trial Tr. at 614.)

Forensic Pathologist Dr. Walter Kemp completed Larry's autopsy. (Trial Tr. at 553.) The manner of death was a homicide, and the cause of death was due to blood loss from "multiple stab wounds." (*Id*. at 584.) The eight stab wounds throughout Larry's body led to that result. (*Id*. at 565-583.) There were no drugs in Larry's system. (*Id*. at 561.)

Smith had THC in his bloodstream—over twice the limit for DUI in Montana. (Trial Tr. at 524-26; Ex. 51, offered and admitted at Trial Tr. at 528.) Smith is right-handed. (Trial Tr. at 513.)

IV. The trial

A. The State's case

The State presented the above testimony from eyewitnesses, medical witnesses, law enforcement, investigators, and technicians.

B. The defense

Smith testified he "didn't know" Larry and their prior interaction was limited. (Trial Tr. at 691.) He would see Larry smoking his pipe when he was outside smoking a cigarette. (*Id*. at 692.) Smith claimed that, a couple days prior to the incident, Larry made an "unsettling" comment to him. (*Id*. at 693.) He asked, "[H]ey, what did you mean by that?" but Larry did not respond. (*Id*.) Smith felt this was "disrespectful." (*Id*. at 694.) Smith purportedly advised Larry to "stay away" from himself and Kymber and went back into his apartment, deciding not to discuss the interaction with Kymber. (*Id*.)

Smith testified that in the early evening, Smith and Kymber were in his apartment. Smith went outside to smoke. (*Id*. at 698.) He did not have his lighter or matches with him. (*Id*. at 699.) He saw Larry sitting in his chair in front of his apartment. (*Id*. at 699, 726.) He approached Larry and asked for a light, but Larry was silent. (*Id*. at 699.) Smith waited for "10, 15 seconds" and found Larry's non-response "irritating[.]" (*Id*. at 699.) He thought Larry should not have any

"reason to ignore me." (*Id*. at 700.) Smith threw his cigarette away in another neighbor's ashtray but decided to return to "confront[]" Larry. (*Id*. at 699-70.)

Smith testified he stood a few feet from Larry and said, "Hey, do you—do you have a problem with me?" (Trial Tr. at 700.) There was no response. Smith next said, "[W]hat the fuck is your problem[?]" Larry was "sitting down[]" at that point. (*Id*.) But Larry was in "continued silence" and Smith "didn't know what else to ask him." (*Id*.) Smith purportedly repeated, "[W]hat the fuck is your problem[?]" and then said, "What are you doing here then?" (*Id*.)

Smith testified that Larry next stood up and pulled a gun out of his pocket. (Trial Tr. at 701.) Smith explained he then "kind of bear hugged" Larry, but that he then "separated" from Larry and "pulled out [his] knife." (*Id*.) Smith said he got "two feet" of separation, giving him time to draw his knife out of his own pocket and open it. (*Id*. at 724.) Smith explained he was "alarmed" and "scared" due to Larry's gun. (*Id*. at 703.) Smith testified he said, "[B]ack the fuck up, put the fucking gun down." (*Id*. at 704.) But Larry then shot Smith in his left arm. (*Id*. at 704-05.)

Next, Smith purportedly "snapped[.]" (Trial Tr. at 705-06.) He explained he was in "heightened awareness[.]" (*Id*. at 703.) Smith was relying on his training that his dad gave him about situations when guns are pointed toward you. (*Id*. at 705-06.)

Smith again "bear hugged" Larry and began stabbing him. (Trial Tr. at 706.) Smith explained that they continued to "struggle" although "it wasn't like a fistfight[.]" (*Id*. at 707.) He "struggl[ed] back and forth with the pistol in [Larry's] hand." (*Id*.) This lasted for "a few minutes[.]" (*Id*. at 722.) Smith claimed he maintained control of Larry's gun with his left hand and stabbed him with his right hand. (*Id*. at 726.) He did not remember "changing hand positions." (*Id*. at 727.) Smith purportedly continued stabbing Larry, even while he was "backing up from him" and that he "stabbed him until the gun left his hands." (*Id*. at 708.) Smith explained he then saw Kymber. (*Id*. at 709.)

Smith admitted he told Kymber he was going to the bar, but offered an alternative explanation at trial that he thought Sandman's wife could be at the bar. He explained she had EMT experience and "that was the best chance of getting help for any of us." (*Id*. at 711.)

On cross-examination, Smith claimed that the several witnesses were mistaken regarding his on-scene statements. (Trial Tr. at 720-21.) Smith conceded that Larry could have been intimidated by him when Smith approached him. (*Id*. at 719.) Smith did not remember precisely where he stabbed Larry the eight times. (*Id*. at 722-23.) Smith admitted he "might have" called Larry "a fool" during his subsequent jail calls to Kymber. (*Id*. at 727.) Smith did not recall having recently

told Deputy John Gatlin at the jail that he threw Larry to the ground and stabbed him as Larry was standing up. (*Id*. at 728.)

C. The State's rebuttal

Tracy explained that Larry was not confrontational, nor had Larry shared with her any purported warning from Smith that he should "stay away" from Kymber and Smith. (Trial Tr. at 731-33.)

Sandman testified that Smith never asked for help when he entered the bar. (*Id*. at 734.)

Through Sheriff Cassell, the State published a letter Smith wrote to Lisa and Sandman describing his version of the incident. (State's Ex. 65, offered, admitted and published at Trial Tr. at 737.) The letter did not mention Smith asking Larry for a lighter. (Trial Tr. at 738; Ex. 65 at 1.) Instead, Smith said in the letter that he approached Larry and asked "who he was working for[.]" (Ex. 65 at 1; Trial Tr. at 738.) Smith also detailed in the letter that, after Larry drew his weapon, Smith "push[ed] him to the ground[.]" (Ex. 65 at 2; Trial Tr. at 738.)

The jury also heard Smith's jail phone call to Kymber. (Trial Tr. at 740; Ex. 66.) Smith said, "all I did was go out there and say, 'Hey man, who do you work for?'" (Ex. 66 at 0:00-0:05, offered, admitted, and published at Trial Tr. at 743.) And Smith said after he was shot he "started stabbing the fool." (*Id*. at 0:10-0:15.)

Deputy John Gatlin affirmed that he had a conversation with Smith at the jail. (Trial Tr. at 745.) In the CCTV video played for the jury, Smith told Deputy Gatlin:

> Well, he pulled a gun on me and. . .'Hey man who the fuck do you work for?' Well, [*unintelligible*] he drew a fucking gun on me, so I fucking pushed him, took my pocketknife out, unfolding my pocketknife while he's getting up, and I fucking [*unintelligible, sounds like "get to him"*] and he shot me, I put a knife in his throat as he pulled the gun. He shot me in the arm and then I stabbed him to death.

(Ex. 67 at 0:05-0:25, offered, admitted at Trial Tr. at 743, published at 746.)

V. Facts related to pre-deliberation juror questions

A. First question

Trial occurred from April 18, 2022 to April 21, 2022. During the State's case-in-chief on April 20, 2022, Agent Baum testified about the crime scene evidence. (Trial. at 591.) Next, a break was taken. (*Id*. at 608.) Outside the presence of the jury, the district court held a party conference:

> **COURT**: Just for the record, I would state that I did receive a question from the jury but it's strictly an evidentiary question. I instructed the bailiff to inform them that it was an evidentiary question and I could not answer it.
>
> I'm not going to reveal what's contained in the note as it may influence counsel's questioning moving forward. So we'll keep it for the record and we won't inform them anymore than that.
>
> **STATE**: Understood.

COURT: Okay. You can bring in the jury.

(*Id*. at 608-09.)

The district court was necessarily referencing Juror Joseph Jassak's April 20 question: "On the firearm were rounds 1 and 2 misfires[?]" (Doc. 214.) This was responsive to Agent Baum's testimony that he had "no idea" why the fired cartridge was in the 3rd position. (Trial Tr. at 599.) This question was also prescient to the very next witness's testimony, Lynette Lancon, Forensic Firearm and Toolmark Examiner at the State Crime Lab, who would explain that "one of the cartridges" was not fired but had a "firing pin impression on it." (*Id*. at 619.) A possible explanation was a "misfire." (*Id*.) Lancon affirmed that the fifth position cartridge was the possible misfire. (*Id*. at 621; *see also* Ex. 15.) There was no misfire in the fourth position cartridge. (*Id*. at 623-624.) While a misfire during the incident was one possible explanation, she couldn't say "exactly what happened." (*Id*. at 623.)

B. Second question

The next day, Juror Connie Voight submitted a note asking, "Who collected the known DNA[?]" and "Who labeled the known DNA[?]" (Doc. 215.) After the State's rebuttal but before closing argument, the court and the parties conferred:

> **COURT**: We're in chambers. We'll go on the record. All counsel are present. We got another note from the jury. This one, again, is an evidentiary question and I don't think I should

> review it with counsel, again, because you know, if it's an issue that's out there, I don't want to specifically tip either counsel off on how to answer it to the jury because they're going to have to rely on their own notes in evidence.
>
> So I wanted to let you know that we got a second one. At least they're thinking. So any objection from the State?
>
> **STATE**: No, Judge.
>
> **COURT**: Defendant?
>
> **DEFENSE COUNSEL**: No, Your Honor.
>
> **COURT**: Okay. All right. We'll keep it in the record sealed.

(Trial Tr. at 796.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it concluded that Smith's MDD evidence could not support a mitigated deliberate homicide theory. First, it was only admissible to prove his lack of mental state in support of a MDD defense. But Smith did not pursue a MDD defense. Smith also relied upon a JUOF defense and thus necessarily conceded he acted purposely and knowingly. Second, Smith's JUOF theory, if accepted by the jury, would have led to his acquittal, thus Smith was not entitled to a lesser-included instruction. Third—and to the extent this Court would review Smith's implicit claim of instructional error—neither Smith's MDD evidence nor Smith's trial testimony would have supported the notion that

Smith acted under a reasonable extreme mental or emotional stress to justify a mitigated instruction.

Regarding Smith's second issue, this Court should decline to exercise plain error based on Smith's unpreserved claim that the district court was required to share with the parties the contents of pre-deliberation juror questions. No authority exists to support Smith's claim and persuasive authority contradicts it. Both jurors submitted individual notes pertaining to evidentiary questions during the trial. Neither juror indicated a bias or prejudice against Smith. The district court ensured the fundamental fairness of the proceedings and avoided the overemphasis of individual pieces of evidence at trial by informing the parties about the notes without informing them about the contents, and instructing the jury that it would not answer the questions. While the parties were informed about this course of action, neither party objected. Further, no evidence exists that the jury collectively discussed or submitted the questions or that they pre-judged Smith. Smith fails to show plain error.

STANDARDS OF REVIEW

Issue 1: A district court's ruling on a motion in limine is an evidentiary ruling and therefore reviewed for an abuse of discretion. *State v. Thomas*, 2020 MT 281, ¶ 13, 402 Mont. 62, 476 P.3d 26 (citation omitted). Abuse of

discretion occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Id.* (citation and internal quotations omitted).

Issue 2: This Court generally does not address issues raised for the first time on appeal. *State v. George*, 2020 MT 56, ¶ 4, 399 Mont. 173, 459 P.3d 854 (citation omitted). It may discretionarily review unpreserved claims alleging errors implicating a criminal defendant's fundamental rights under the common law plain error doctrine. *Id.* (citations omitted). "The party requesting reversal because of plain error bears the burden of firmly convincing this Court that the claimed error implicates a fundamental right and that such review is necessary to prevent a manifest miscarriage of justice or that failure to review the claim may leave unsettled the question of fundamental fairness of the proceedings or may compromise the integrity of the judicial process." *George*, ¶ 5 (collecting cases).

ARGUMENT

I. The district court properly exercised its discretion in precluding MDD evidence for a mitigated deliberate homicide theory.

A. Applicable law

A mental disease or disorder is "an organic, mental, or emotional disorder that is manifested by a substantial disturbance in behavior, feeling, thinking, or

judgment to such an extent that the person requires care, treatment, and rehabilitation." Mont. Code Ann. § 46-14-101(2)(a).

Before trial, evidence may be presented to show that the defendant is not competent to stand trial based on a mental disease or defect. *State v. Korell*, 213 Mont. 316, 322, 690 P.2d 992, 996 (1984); Mont. Code Ann. § 46-14-103. At that time, the court considers the defendant's fitness to proceed or whether a person is "unable to understand the proceedings against the person or to assist in the person's own defense[.]" Mont. Code Ann. § 46-14-103. To aid the court's determination, the court typically receives a report on the defendant's mental condition. *See* Mont. Code Ann. § 46-14-206; *see also* Commission Comments to Mont. Code Ann. § 46-14-103 (fitness determined through either the psychiatric report provided for in Mont. Code Ann. § 46-14-206 or through a hearing.)

At trial, MDD evidence is "admissible to prove that the defendant did or did not have a state of mind that is an element of the offense." Mont. Code Ann. § 4614-102-. Thus, MDD evidence is admissible to prove "that the defendant did not act purposely or knowingly." *Korell*, 213 Mont. at 322, 690 P.2d at 996; *see also State v. Meckler,* 2008 MT 277, ¶¶ 11-12, 345 Mont. 302, 190 P.3d 1104. For example, in a homicide case, this Court explained that while MDD evidence was admissible to show the defendant "did not have the necessary state of mind to

commit the homicide[]" it was not appropriate to "buttress [the defendant's] credibility." *State v. Dannells*, 226 Mont. 80, 86, 734 P.2d 188, 192-93 (1987).

A defendant who pursues a JUOF defense "concedes that he acted purposely or knowingly." *State v. St. Marks*, 2020 MT 170, ¶ 20, 400 Mont. 334, 467 P.3d 550 (collecting cases).

A person commits mitigated deliberate homicide if the person "purposely or knowingly causes the death of another human being . . . but does so under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse." Mont. Code Ann. § 45-5-103(1). The "reasonableness of the explanation or excuse must be determined from the viewpoint of a reasonable person in the actor's situation." *Id*. A mitigating circumstance is "not an element of the reduced crime that the state is or required to prove or an affirmative defense that the defendant is required to prove." Mont. Code Ann. § 45-5-103(3).

B. Discussion

1. Smith does not expressly challenge the district court's conclusion that he was not entitled to a mitigated deliberate homicide jury instruction.

As an initial matter, in Smith's statement of the issues, Smith argues that the district court erred "when it precluded Smith from seeking a lesser-included offense instruction" for mitigated deliberate homicide, thus Smith appears to challenge the district court's pretrial ruling on the State's motion in limine. (Appellant's Br. at 1.)

This is confirmed in the body of Smith's argument when Smith discusses the pretrial ruling and asserts it "was error." (*Id*. at 10-13.)

However, Smith's standard of review suggests that he is challenging the district court's given jury instructions—not the pretrial determination. (*Id*. at 10.) If that were true, Smith would be challenging the district court's denial of his mitigated deliberate homicide instructions offered at the close of the evidence. Then, the two-factor test would be applicable in determining whether a lesser-included instruction was warranted, including the second factor of whether Smith's proposed instructions were "supported by the evidence[.]" *State v. Craft*, 2023 MT 129, ¶ 13, 413 Mont. 1, 532 P.3d 461. But Smith does not explain in briefing how he presented any evidence at trial entitling him to a mitigated deliberate homicide instruction, other than summarily asserting at the end of his argument—like he did at trial—that he has "presented sufficient evidence to warrant the instruction" during his own trial testimony. (Appellant's Br. at 26.)

Accordingly, to the extent Smith implicitly argues that his proffered instructions at the close of trial testimony were appropriately "supported by the evidence[,]" he has wholly failed to show he was entitled to such an instruction. Indeed, the district court did not err in precluding an instruction for which Smith never offered any fact in support. (Trial Tr. at 777-78.) Thus, the State relies upon Smith's statement of the issues to guide the briefing. However, if applicable, the

State further explains below how the district court did not err because Smith did not present any evidence in mitigation.

2. The district court did not abuse its discretion when it held that Smith improperly attempted to utilize MDD evidence to prove mitigation.

One basis for the district court's grant of the State's motion in limine was because Smith "acknowledged he was attempting to bootstrap MDD evidence to support a mitigated instruction[]" and—depending on the then-pending results of the MSH evaluation—"[s]uch evidence would also be improper if [MSH] confirms that the Defendant was able to form the requisite mental state at issue in this case." (Doc. 123 at 39.) The district court did not abuse its discretion in ruling Smith's backdoor attempt to introduce MDD evidence was inappropriate, as further explained below. The State will now detail the effect of possible MDD evidence Smith considered presenting.

a. Dr. Smelko

Dr. Smelko evaluated Smith for three hours in July 2021 and was asked by defense counsel to not write up a report based on his conclusions. While defense counsel listed him as a possible witness early in the proceedings, he was dropped soon after the MSH evaluation was ordered. (Docs. 29, 81.) Smith never thereafter expressed an intent to rely on Dr. Smelko for any purpose.

b. Karinen and NP Decker's reports

Any evidence or testimony from Smith's prior treating medical professionals would have been subject to Mont. R. Evid. 402 and 403 objections. (Doc. 86 at 11.) However, even assuming counselor Karinen and NP Decker could have been permitted to testify, they could not have established any mitigation evidence concerning Smith's "extreme mental or emotional stress" contemporaneous to the homicide. All Karinen could have established at trial is that she had two counseling sessions with Smith prior to his offense and observed some delusional thought processes. (*See* Doc. 86, Ex. 1.) And NP Decker could have testified as to medical appointments prior to the incident and she could have described which medications Smith was currently taking. (*See* Doc. 86, Ex. 2.) Indeed, these were the purposes that Smith offered for their potential testimony. (Doc. 81 at 2, Am. Notice of Affirmative Defense; Doc. 99 at 1-2.) And Smith specifically wanted Karinen for a possible MDD defense. (Doc. 100 at 4.)

However, as recognized at certain points by both parties and the district court, the pending results of the MSH evaluation were critical to determining how the trial would move forward—including whether Smith would press a MDD defense. Smith reasonably abandoned Karinen and NP Decker as possible witnesses shortly after the MSH evaluation was released, (Doc. 198), as the results

would not have supported an MDD defense, nor would they have constituted facts in mitigation, as further explained below.

c. The MSH evaluation

The MSH evaluation could not have been admissible for a mitigated deliberate homicide theory. The purpose of the evaluation was to aid in the district court's fitness determination, and it would have only been admissible at trial to prove the absence of mental state to support a MDD defense. Mont. Code Ann. §§ 46-14-102, -103; *see Korell*, 213 Mont. at 322, 690 P.2d at 996; and *Meckler*, ¶¶ 11-12. But Smith abandoned any potential MDD defense after the unfavorable evaluation was released. Moreover, Smith expressly conceded he acted purposely and knowingly by relying on a JUOF defense. *St. Marks*, ¶ 20. In contrast, a mitigating factor is "not an element" of mitigated deliberate homicide, Mont. Code Ann. § 45-5-103(3), and has nothing to do with MDD evidence showing the absence of a mental state aspect of his crime. Accordingly, the evaluation would not have been admissible for the purposes that Smith had previously sought to introduce MDD evidence.

Notably, once the evaluation was completed, Smith reasonably did not ask the district court to use it to support a mitigated theory based on his alleged delusions either. Smith's pretrial theory was that he had a "delusional thought process" that "there are in fact people that were trying to kill him[.]" (3/14/22 Tr

at 16.) This was allegedly "a deep seeded mental disease" which prompted Smith to stab Larry "until he died rather than trying to disarm him[.]" (*Id*. at 14.) But according to the MSH evaluation, Smith:

> did not have any specific beliefs regarding [Larry] representing a danger to him. He has consistently maintained that his altercation with [Larry] resulted from his pulling a gun on him when he asked who he worked for, and his actions were simply in self-defense at that point. There is no evidence that clearly demonstrates specific beliefs about [Larry] that would illustrate a substantially or wholly impaired appreciation of the criminality of harming him. Moreover, there is little evidence to suggest that [] Smith's psychosis resulted in an inability to conform his behavior to the requirements of the law, as he had been able to manage his behavior in the community relatively well, despite the presence of psychotic symptoms. His actions on the day in question, although disinhibited to some degree, appear to be the result of more longstanding personality traits and a general tendency toward impulsivity, as opposed to a limited capacity to control his behavior as a result of his psychosis. His actions leading up to and following the altercation were fairly calm, goal-directed, and cooperative which suggests an intact ability to control his behavior.

(Doc. 185, Eval. at 14-15.)

Ultimately, the MSH evaluators concluded that Smith "was acting with knowledge and purpose at the time, and that he knew he was physically harming another human being and that his actions could cause physical injury or death." (*Id*. at 15.) Smith's "knowledge is evident in his verbalizations immediately after the interaction reflecting that he clearly knew who he was, where he was, and what he was doing." Moreover, Smith "described his actions both immediately after the altercation and during the summary interview as purposeful, in that he maintained

he was defending himself and was engaging in behaviors designed to disarm [Larry] and prevent himself from getting shot or otherwise injured." (*Id*.) In other words, given the evaluation's contents, Smith was fit to proceed and he clearly could not pursue a MDD defense, nor could he support a mitigated theory. Further, Smith had long ago already committed to a JUOF defense. (Doc. 20.)

d. Smith's statements in the evaluation

In addition to the unfavorable evaluation conclusions, Smith's own statements in the same evaluation disavowed any mental illness or prior animus toward Larry. Smith "denied having persecutory beliefs about [Larry] or others." Smith "did not specifically indicate that he believed [Larry] planned to harm him in any way prior to the altercation." (Doc. 185, Eval. at 12.) In fact, Smith "consistently maintained that his actions were in self-defense." (*Id*. at 4.) Smith knew he would be asserting a JUOF defense and that he would be required to testify, which he wanted to do. (*Id*. at 6.) He was "not interested in asserting [a MDD defense]" because "he did not believe his actions at the time were because of mental illness." (*Id*. at 4.) Importantly, Smith "denied experiencing hallucinations[]"and did "not believe he has a mental illness" and denied he had a "distortion of perception of reality[.]" (*Id*. at 4-5.)

3. The district court did not abuse its discretion when it precluded Smith's instruction because Smith raised a JUOF defense.

Another basis for the district court's grant of the State's motion in limine was this Court's precedent that a JUOF defense, if believed, "would result in an acquittal[.]" (Doc. 123 at 38.) The district court did not err in relying on the plain language of these cases. "A trial court need not give an instruction on a lesser-included offense when there is no evidence to support it. A lesser-included offense instruction is not supported by evidence when the defendant's evidence or theory, if believed, would require an acquittal." *State v. Burkhart*, 2004 MT 372, ¶ 39, 325 Mont. 27, 103 P.3d 1037 (citing *German*, ¶ 11). Specifically, "[a] defendant's justifiable use of force defense precludes a lesser-included offense instruction because the defense essentially admits the elements of the charged offense, including mental state. If proven, the defense requires an acquittal." *German*, ¶ 20 (citing *Martinez*, ¶ 15).

Here, Smith raised a JUOF affirmative defense which, if proven, would result in an acquittal. Smith testified that Larry was the aggressor, drew a gun on him and shot him first, thus he acted only in self-defense. (Trial Tr. at 701, 704-05.) Smith testified he immediately went into a mode of "heightened awareness" and he relied on his prior self-defense training to make himself a smaller target and to not lose sight of the gun. (*Id*. at 703-06.) Smith explained he

stabbed Larry with his right hand while holding the gun away from him with his left hand. (*Id*. at 726.) A lesser-included instruction of mitigated deliberate homicide would not be appropriate because Smith's JUOF theory, if believed, would have resulted in an acquittal.

4. Smith's MDD evidence and Smith's trial testimony did not show mitigation.

While Smith does not specifically raise a question of jury instructional error, even if this Court were to consider the issue, the district court did not err in concluding that Smith was not entitled to the mitigated deliberate homicide jury instruction because no evidence in mitigation existed or was presented at trial. (Trial Tr. at 777-78.)

"[M]itigating factors arise from some sort of direct provocation, not simply the buildup of stress and anger." *State v. MacGregor*, 2013 MT 297A, ¶ 50, 372 Mont. 143, 311 P.3d 428 (citation omitted). An example of a direct provocation is when "the passions and jealousies ignited when a romantic partner ends a relationship." *MacGregor*, ¶ 52 (citing *State v. Azure*, 2002 MT 22, 308 Mont. 201, 41 P.3d 899; *State v. Gratzer*, 209 Mont. 308, 682 P.2d 141 (1984). Accordingly, "[a] finding of 'extreme emotional or mental distress for which there is reasonable explanation or excuse' will not lie where the only mitigating circumstances asserted are the defendant's anger and intoxication." *State v. Miller*, 1998 MT 177, ¶ 22, 290 Mont. 97, 966 P.2d 721 (citation omitted).

For example, in *State v. Howell*, 1998 MT 20, 287 Mont. 268, 954 P.2d 1102, after Howell had knifed a person visiting his residence across his throat, he underwent a psychological examination by Dr. Bernard Peters, who also testified at trial. *Howell*, ¶¶ 11, 15. Dr. Peters explained that Howell was "easily irritated" and "angered" and had a depressive disorder but there was no evidence of the disorder at the time of the offense. *Id.* ¶ 22. He also "found no evidence" of 'hallucinations[] or delusions." *Id.* On appeal, this Court rejected Howell's assertion that he was entitled to an instruction of attempted mitigated deliberate homicide, explaining that "simply being intoxicated or angry does not support a finding of extreme mental or emotional stress for which there is a reasonable explanation or excuse." *Id.* ¶ 23. And even though Howell testified he was "afraid" of the other person and Howell claimed to have acted to protect "his defenseless friend," this Court explained that "Howell's anger or fear, without more, does not support a finding" for reasonable extreme mental or emotional distress. *Id.* ¶ 24.

Here—despite Smith's own statements repeatedly disavowing any mental illness and the MSH evaluation concluding that delusions did not impact Smith during the incident in question—even accepting Smith's MDD pretrial theory that he was under the delusion that Larry was possibly scheming to kill him, there was no testimony or evidence presented that Larry directly provoked a reasonable

response from Smith such that Smith was entitled to a mitigated instruction. By Smith's admission, he and Larry did not know each other prior to the incident. (Trial Tr. at 691.) He also reapproached Larry after throwing away his cigarette to "confront[]" him. (Trial Tr. at 699-700.) All Larry had done, in Smith's view, was not talk to him and not give him a lighter. (*Id.*) Smith even admitted that Larry could have been intimidated by him when Smith approached him. (*Id*. at 719.) Smith's decision to confront Larry considering a mere alleged slight was not objectively reasonable. Instead, like in *Howell*, Smith was simply irritated, which is insufficient to show mitigation. (*Id.* at 694, 699-700.) And even considering the Crime Lab marijuana results and assuming Smith was intoxicated, that would not be a reasonable excuse either. (*Miller*, ¶ 22; *see* Trial Tr. at 524-26.)

An instruction is supported by the evidence when there is "some basis from which a jury could rationally conclude that the defendant is guilty of the lesser, but not the greater offense." *Craft*, ¶ 13 (citations omitted). This Court has reasoned that "limited pieces of evidence without more" will "not support a finding" of mitigation. *Id.* ¶ 17. Here, there was no reasonable basis for the mitigated instruction in Smith's proffered MDD evidence, in Smith's testimony, or in the MSH evaluation. At the close of the evidence, Smith did not offer any reason to support his proffered mitigation instruction because none existed. If this Court

reaches the issue, it should hold that Smith has failed to show he was entitled to a jury instruction on mitigated deliberate homicide.

II. Smith fails to show he is entitled to plain error reversal regarding pre-deliberation juror questions.

In his plain error claim, Smith argues that the district court's treatment of the juror questions violates "the plain language" of Mont. Code Ann. § 46-16-503(2). That statute is entitled "Conduct of jury after retirement—advice from court[,]" which provides:

> *After the jury has retired for deliberation*, if there is any disagreement among the jurors as to the testimony or if the jurors desire to be informed on any point of law arising in the cause, they shall notify the officer appointed to keep them together, who shall then notify the court. The information requested may be given, in the discretion of the court, after consultation with the parties.

(emphasis added.) But here, the juror questions occurred pre-deliberation. A "fundamental aspect of 'plain error' is that the alleged error indeed must be 'plain.'" *State v. Godfrey*, 2004 MT 197, ¶ 38, 322 Mont. 254, 95 P.3d 166. No violation of the statute occurred.

Indeed, Smith acknowledges "the irony in emphasizing . . . pre-deliberation questions when the statute plainly contemplates questions arising during deliberations[,]" but he claims that he has the right to an impartial jury. (Appellant's Br. at 28-29.) The State agrees, but the pre-deliberation questions

did not signal any bias against Smith. Both questions were evidentiary in nature. Smith cannot identify any possible impact from the questions that could have infected the jury or affected the jury's ability to remain fair and impartial. Persuasive authority has held that "[m]ere questions from individual jurors prior to actual deliberations do not constitute jury misconduct." *People v. Davis*, 10 Cal. 4th 463, 548 (1995) (citing *People v. Anderson*, 52 Cal. 3d 453, 481 (1990)). The court found that when a pre-deliberation note did not "evince bias" on the part of the questioning juror or suggest impropriety, "no duty" existed for the trial court to conduct an individual inquiry into the juror or to discharge the juror. (*Id*.)

And the district court's decision to not disclose the contents of the questions to either party—without objection—preserved the impartiality of the jurors and the fundamental fairness of the proceedings. The court did not address the substance of the questions themselves but gave a "non-answer" by declining to answer the questions. The court's actions here prevented the over-emphasis of any one piece of evidence from either party during trial and protected the flow of information and evidence. This makes sense amid an uncompleted trial.

Contrary to the cases submitted by Smith, this is not the situation where the trial court failed to consult with the parties during questions submitted in the midst of deliberation, *see Rogers v. United States*, 422 U.S. 35, 36 (1975), and *United States v. Carter*, 973 F.2d 1509, 1514-15 (10th Cir. 1992), or when a trial

court intruded into the jury room and discussed matters with jurors after the case had been submitted to the jury, *United States v. Koskela*, 86 F.3d 122, 12-125 (8th Cir. 1996), and *State v. Tapson*, 2001 MT 292, 307 Mont. 428, 41 P.3d 305.

Smith nonetheless argues "the more obvious concern is that the notes indicate the jury began to discuss both the case and the evidence before the case had been submitted for deliberations." (Appellant's Br. at 33.) Smith does not cite the record in support of this allegation of pre-deliberation collusion and juror misconduct. And the notes themselves do not have any pluralization or indication of any sort of debate or collective question. They are both signed and written as individualized questions from individual jurors. Accordingly, there is no indication that the questions tendered here indicated that the jurors had commenced their deliberations or had formed any tentative conclusions regarding whether Smith had committed deliberate homicide midway through trial.

This Court "presume[s] that the jury upholds its duty and follows a district court's instructions." *State v. Erickson*, 2021 MT 320, ¶ 27, 406 Mont. 524, 500 P.3d 1243 (citation omitted). Here, the jurors were repeatedly admonished prior to trial:

> First, do not talk about this case either among yourselves or with anyone during the course of this trial . . . You should only reach your decision after you have heard all the evidence, after you have heard my final instructions, and after the attorneys' final arguments. You may only enter into discussion about this case with other

> members of the jury after it is submitted to you for your decision. All such discussions should take place in the jury room.

(Doc. 216, Given Instr # 3; Trial Tr. at 26-27 (reading preliminary instructions) Trial Tr. 272-73 (referring to instruction # 3 to be hereafter referred to as "the admonishment" and reading it after the jury panel was sworn); *Id*. at 290-91 (reading preliminary jury instructions again prior to opening statements); *see also id*. at 394, 460, 520 (intermittent admonishments during breaks). The jury was also prohibited from letting anyone else talk about the case in their presence, and to report any such activity if it occurred. *See* Instr. # 3. No reports of juror misconduct exist in this record.

Smith fails to meet his burden to show that plain error review "is necessary to prevent a manifest miscarriage of justice or that failure to review the claim may leave unsettled the question of fundamental fairness of the proceedings or may compromise the integrity of the judicial process." *George*, ¶ 5.

///

CONCLUSION

This Court should affirm.

Respectfully submitted this 12th day of November, 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 9,961 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
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CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-12-2024:

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