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STATE OF MONTANA
Case Number: DA 24-0284

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0284

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RYAN PATRICK DONAHUE,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from Montana Eighteenth Judicial District Court, Gallatin County
The Honorable Peter B. Ohman Presiding

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Respectfully submitted this 1 day of November, 2024.

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I. Whether the district court erred in excluding evidence of the alleged victim's propensity for violence and testimonial biases?

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STATEMENT OF THE CASE

This is an appeal from the district court's Judgment entered on March 5, 2024, following a jury trial.

On December 10, 2021, the State charged Appellant Ryan Patrick Donahue ("Donahue") by Information with Count I: Assault with a Weapon, a felony, in violation of Montana Code Annotated § 45-5-213 and Count II: Carrying a Concealed Weapon While Under the Influence, a misdemeanor, in violation of Montana Code Annotated § 45-8-327, both alleged to have been committed on November 22, 2021. The alleged victim was an individual named Marcus Joshlin ("Joshlin"). Doc. 3.

Donahue, an off-duty agent with the Drug Enforcement Administration (DEA), was accused of pointing a gun at Joshlin, causing reasonable apprehension of serious injury. Doc. 1. Donahue asserted the affirmative defense that he was justified in his use of force for self-defense. Doc. 34.

Evidence showed that Joshlin had a self-admitted propensity for violence and being a fighter, which Donahue moved *in limine* to admit at trial. Donahue

also moved to admit Joshlin's active warrants and unresolved criminal cases. Doc. 84, Motion *in Limine*, attached as Appendix A. The Court denied these portions of the motion and excluded the evidence. Tr. 9/6/23, at 8-10; Tr. 9/7/23, at 198-99. (Transcripts relevant to this appeal are attached as Appendix E).

The Jury convicted Donahue on both counts over his asserted self-defense claim. After trial, Donahue learned of possible errors in the jury-summoning process used by the clerk of court, and moved for a new trial. Doc. 100. After a hearing, the Court denied the motion and set the case for sentencing. The Court deferred sentencing for three years on Count 1, and issued a six month suspended sentence on Count 2, with conditions. Doc. 126, 3/5/24 Sentencing Order, attached as Appendix B.

Donahue appeals.

STATEMENT OF FACTS

Pretrial and Trial Motions to Admit Evidence

Donahue moved preemptively to admit evidence as to Joshlin's violent character as relevant to Donahue's self-defense claim, and Joshlin's unresolved warrants and criminal cases as bearing on his motivations and biases in testifying. App. A.

During the investigation of the case, Joshlin made unsolicited comments to the officers on scene that "I fight," "I fight a lot," "I like to fight," or some

variation thereof, over a dozen times. App. A, at 1-2. The State did not contest that Joshlin had made the statements relevant to his violent character. Additionally, Joshlin had been a suspect roughly two months prior in a September 13, 2021 investigation for assault, by the same officers investigating Donahue, and had lied to those officers on various topics ("September incident"). App. A, at 2-3. Joshlin had been charged related to the September incident, and still had not resolved the case. App. A, at 3.

Donahue moved *in limine* to admit this evidence at trial, under various theories of admissibility, both as to Joshlin's admitted character for violence as well as the specifics of the September incident and the fact that Joshlin had missed court and had warrants from the September incident. App. A, at 3 and Ex. C. The district court ruled that the incidents of untruthfulness during the September incident were admissible, the lies Joshlin told to the officers, but excluded the remaining evidence related to Joshlin's violent character (both admitted and from the September incident) and the unresolved nature of his legal matters. Tr. 9/6/23, at 8-11.

As trial unfolded, Joshlin and Donahue testified as to the events of the evening of November 22, 2021. The two recounted having met as strangers at a bar in Bozeman, drinking together, and continuing to a different bar where the alleged offenses occurred, the Haufbrau Bar.

Although the accounts of Joshlin and Donahue differed on various points, where they really diverged for the purposes of the criminal allegations and this appeal, are toward the end of the evening. Joshlin testified that he was essentially ready to part ways with Mr. Donahue, and that he intended to leave the bar with some girls to continue his evening of socializing. He testified that Donahue was not invited, and Donahue's reaction was to become angry, to pull a gun on Joshlin, demanding to be invited along. Tr. 9/6/23, at 205-208, 214-15. Joshlin denied he had made any threats, or said anything at all that would have provoked such a response. *Id*.; Tr. 9/6/23, at 247.

Donahue, by contrast, testified that at some point during the evening at the Haufbrau, Joshlin disclosed that he was involved in selling cocaine. Tr. 9/7/23, at 204-205. This caused Donahue to tell Joshlin that he was an agent with the DEA, and to stop associating with Joshlin. Tr. 9/7/23, at 151-52.

While Joshlin subsequently testified that he agreed he had at least discussed his history of drug distribution, he denied being involved currently in drug sales or having stated that to Donahue. Tr. 9/7/23, at 203.

Following this interaction Donahue testified that he no longer had any interaction with Joshlin until leaving the bar. Tr. 9/7/23, at 152. Donahue testified that when he tried to leave the bar, having just admitted a federal felony offense to

an active DEA agent, Joshlin intercepted him and threatened to kill him. Tr. 9/7/23, at 153-54.

Donahue testified that based on his experience and training, the nature of Joshlin's threat, the manner in which it was made, Joshlin's physical posture, their proximity, and other factors, that he very much considered the threat to be a real threat against his person. He testified that he pulled a firearm on Joshlin at this point to address and stop the threat on his life. Tr. 9/7/23, at 154-58.

Following this testimony, given the stark differences in the testimony and Donahue's unequivocal assertion of justified use of force, Donahue renewed his motion with the Court to admit Joshlin's violent character, his propensity for violence, but not any specific instances of violence. The Court again denied the motion. Tr. 9/7/23, at 197-200.

Post-trial Motion for a New Trial

Following trial, undersigned counsel and practitioners in Gallatin County in general became aware of a burgeoning issue related to jury summoning problems when the Eighteenth Judicial district courts began vacating trials in Gallatin County. Doc. 100, at 1. As such, Donahue filed a motion for a new trial on October 10, 2023. Doc. 100.

Response and reply briefing ensued, but the issue was still largely unfolding, so the district court held a hearing on December 22, 2023 to determine

the facts. Testimony was taken and seven exhibits were admitted, which are attached as Appendix C. The testimony and exhibits from December 22, 2023 establish the following facts.

The Clerk of the Eighteenth Judicial District Court ("Clerk") summons a single annual pool of jury for all district courts in the judicial district. This annual pool varies in size from year to year, based on historical jury trial needs of the district. Tr. 12/22/23, at 12-15. The annual term for a jury pool is July 1 through June 30 of the following year. Tr. 12/22/23, at 11.

In April of each calendar year, the Clerk sends a request to the Montana Office of the Court Administrator ("OCA") for a specific number of juror names based on these needs. Tr. 12/22/23, at 8-9. OCA in turn randomly pulls that number of juror names from the entire pool of registered voters and driver's license and State identification card holders residing in the County who meet juror eligibility requirements. Tr. 12/22/23, at 9-10. This list is provided to the Clerk generally in mid-to-late April of each year. Tr. 12/22/23, at 9.

For the July 1, 2023 through June 30, 2024 jury term, from which Donahue's trial jury was drawn, the Clerk requested and received a list of 10,000 names from OCA. Tr. 12/22/23, at 11. Upon receiving the list from OCA, the Clerk mailed postcards to the 10,000 potential jurors in the first week of May, 2023. Tr. 12/22/23, at 16-18.

The postcard requested that the potential jurors go online to fill out a questionnaire as to their eligibility requirements, or alternatively telephone or email the Clerk to request a paper copy. The mailing did not request a return mailing from the potential jurors. Tr. 12/22/23, at 19-20, App. C at 1.

The only means of response offered by the Clerk's notice were telephonic, online, or email (even if a physical copy were desired), and if a potential juror did not respond, they were excluded from potential jury service. App. C, at 1; Tr. 12/22/23, at 60.

The Clerk received responses from some potential jurors, but not from others. Of the potential jurors who responded, they are either removed from the jury term for some reason or are available based on their response and submitted questionnaire. The responding jurors who were removed were either excused for a term, permanently excused, or were removed because they had moved out of the County, were deceased, or the postcard was returned as undeliverable without a forwarding address. Tr. 12/22/23, at 25.

The Clerk used a software system from which trial juries were drawn. When the initial list of 10,000 names is received, the jurors are not categorized into groups yet and instead are defaulted to a status of "none." Tr. 12/22/23, at 24. As potential jurors respond, they were then put into groups within this software system. The first group worth noting is "available with questionnaire."

Id. This is the group of people who responded to the postcard mailing by submitting a questionnaire and have either not requested excusal or the judge has denied or deferred an excusal decision. Tr. 12/22/23, at 24-25.

As of July 1, 2023, the "available with questionnaire" group included 3,522 names. Tr. 12/22/23, at 26. It was this group of people who then constituted the pool of trial jurors. Tr. 12/22/23, at 28-29.

People who are removed from jury service are given other designations, the three primary and largest groups being excusal only for that annual term (850 names as of July 1, 2023), permanent excusal (266 names as of July 1, 2023), and those who have moved out of the jurisdiction (1,086 names as of July 1, 2023). Tr. 12/22/23, at 33-34.

The Clerk generally forwards requests for excusal to the judges of the District for review. Tr. 12/22/23, at 53. However, if a potential juror specifies any dates they wish not to serve on a jury, the Clerk simply marks the person as unavailable for those dates but otherwise puts the person in the "available with questionnaire" group without involving a judge. This selective removal for specified dates is granted without exception by the Clerk, so long as the potential juror gives dates. It might be for a sporting event, a holiday weekend, or no stated reason at all, and the issue is not presented to a judge for review. It is unknown how many of these excuses were given. Tr. 12/22/23, at 53-55.

Prior to the trial in this case, those who did not respond to the postcard were left in the software system without a designation, as "none," and were not used when pulling a trial jury. Tr. 12/22/23, at 48. The "available with questionnaire" group is the group from which trial juries were drawn prior to September 8, 2023, including the jury for Donahue's trial. Tr. 12/22/23, at 28-29.

The "available with questionnaire" group diminishes in size as the term goes on due to people being called for trials. Tr. 12/22/23, at 32-35. The "available with questionnaire" group from which trial juries were drawn included approximately 2,935 names as of August 15, 2023 when the jury was pulled in Donahue's case. Tr. 12/22/23, at 32.

Sometime apparently in late August or early September 2023, the Clerk became aware of issues in Cascade and Flathead Counties related to a failure to certify non-responding jurors to the Sheriff's office for personal service. Tr. 12/22/23, at 42. As such, The Clerk began compiling a list of non-responsive jurors for certification to the Sheriff, and the Clerk testified the process took three days. Tr. 12/22/23, at 47-48. The names of non-responding jurors were not certified to the Sheriff's office until September 8, 2023, the day on which Donahue's trial concluded. A total of 3,759 names were certified to the Sheriff for personal service on that date. Tr. 12/22/23, at 35-36, 47.

As such, the issue was known and remedial efforts were underway on or about September 5, 2023, prior to the start of trial in this case. The issue was not brought to the attention of the Court or counsel for either party.

The Clerk testified that prior to September there had been no plan in place to address the non-responding jurors or to certify a list of non-respondents to the Sheriff. Tr. 12/22/23, at 50. The Clerk testified that the process could have been completed prior to the July 1, 2023 start of the jury term. Tr. 12/22/23, at 50-51.

The procedure for calling trial juries changed on or about September 8, 2023. After that date, those who had not responded to the postcard were given a designation of "available without questionnaire" and were included in the pool of people from which trial juries are drawn. Tr. 12/22/23, at 48, 60-61. If their names were drawn, the Sheriff expedited attempts to serve them.

However, when Donahue's trial occurred, only those who had responded and were marked "available with questionnaire" were used as potential jurors, which included 2,935 names. Tr. 12/22/23, at 32, 60-61. Conversely the number of excluded, unavailable jurors as of September 8, 2023 was 3,759 people. Tr. 12/22/23, at 64-65.

Testimony was also taken from the Gallatin County Sheriff's Office civil service division, Christine Koosman ("Koosman"), who had been in the position

since 2016. Tr. 12/22/23, at 68, 71. Koosman testified that only two previous times during her tenure had a list of non-responsive jurors been received from the Clerk's office, once in 2016 and once in 2020. Tr. 12/22/23, at 71.

Koosman noted staffing issues make it difficult to serve everyone on the list of 3,759 people received this year from the Clerk, as the Sheriff's office only serves an average of 3,000 documents annually. Tr. 12/22/23, at 69, 76. Koosman acknowledged that if service of non-responsive jurors were done consistently every year, with planning and coordination from the Clerk's office, the staff shortage could be addressed through budgeting, as the Sheriff's Office is a public agency. Tr. 12/22/23, at 79-80.

Koosman further testified that the Sheriff's office affirmatively reaches out to the Clerk every year to see if they should be expecting a list of non-responsive jurors to serve. Tr. 12/22/23, at 79. Despite this annual reminder, the Clerk's office had provided a list only in three of the preceding eight jury terms (2016, 2020, and then on September 8, 2023). Tr. 12/22/23, at 70-71, 78.

As of the December 22, 2023 hearing, Koosman testified that the Sheriff's Office had subsequently attempted to serve 573 people from the list received from the Clerk. Tr. 12/22/23, at 83. A breakdown of the Sheriff's results, as of the December, 2023 hearing was:

322 Questionnaires received
2 Deceased
20 GCSO unable to serve
91 Moved out of Jurisdiction
62 Term Excused
8 Permanently Excused
2 Refusing to fill out questionnaire
66 Served but no questionnaire still received

Tr. 12/22/23, at 38-41, 57; App. C, at 17

The Sheriff's Office continued to attempt service on non-responding jurors as needed throughout the duration of the jury term. Tr. 12/22/23, at 83. Koosman testified that the Sheriff's office has means and access to databases and information to effectuate service beyond a simple address from a driver's license or voter registration. Tr. 12/22/23, at 80-81.

Following the hearing, the State and Donahue submitted their arguments on the motion for the district court's consideration, Docs. 116 and 116.1, attached as Appendix D, laying out the legal theories of each party. The district court denied the motion on February 1, 2024. Doc. 117, attached as App. F.

The court proceeded to sentencing on March 5, 2024, and this appeal ensues.

STANDARD OF REVIEW

District courts generally retain broad discretion when ruling on the admissibility of evidence at trial subject to review for an abuse of discretion.

Courts are nonetheless bound by applicable rules of evidence and statutes on evidence admissibility, and a ruling based on application of an evidentiary rule or statute is subject to *de novo* review. *State v. Daniels*, 2011 MT 278, ¶ 11, 362 Mont. 426, 265 P.3d 623.

The denial of a motion for new trial alleging violations in the formation of a jury is a conclusion of law, and is reviewed for correctness. *State v. LaMere*, 2000 MT 45, ¶ 14, 298 Mont. 358, 2 P.3d 204.

SUMMARY OF THE ARGUMENT

That Joshlin has a propensity and character for violent conduct is not speculative, or from a third party, it was admitted repeatedly and profusely by Joshlin to the investigating officers. Donahue was prevented from informing the jury about Joshlin's violent character, which went to the heart of the issue in this case where a claim of self-defense was determined by the jury. The crux of the case was for the jury to determine credibility between the incompatible testimonies of Joshlin and Donahue, in a 'he-said, he-said' situation. Because this Court has held that such evidence is admissible, the conviction should be reversed.

Joshlin's motivations to testify, in the nature of his warrants and unresolved criminal cases, was also admissible as bearing on his credibility which was critical for the jury to analyze in reaching a verdict.

The district court erred in denying Donahue's motion for a new trial, because the Clerk's process allowed jurors to self-select, used only disapproved methods of jury summoning, and excluded a huge swath of the annual jury pool from service in Donahue's trial.

ARGUMENT

I. THE COURT ERRED WHEN IT EXCLUDED EVIDENCE OF THE VIOLENT CHARACTER OF THE ALLEGED VICTIM AND TESTIMONIAL BIASES.

A. Character for Violence Admissible

Joshlin's self-admitted character as a violent individual is admissible. Mont. R. Evid. 404(a)(2). An alleged victim's "character for violence [is] admissible … as a 'pertinent' character trait vis-a-vis [a] justifiable use of force defense." *State v. Sattler*, 1998 MT 57, ¶ 43, 288 Mont. 79, 95, 956 P.2d 54, 64. This rule allows character testimony, but does not always allow specific instances of conduct, which Donahue did not seek to admit under this prong of his motion. Mont. R. Evid 405.

Joshlin repeatedly stated he had a violent tendency, that he fought a lot, and that indeed he enjoyed fighting. There were over a dozen such statements made, putting his violent character on obvious display. This violent character was pertinent and admissible under *Sattler* and Mont. R. Ev. 404(a)(2).

As noted above, the central issue for the jury to resolve was weighing the directly conflicting testimony of Joshlin and Donahue. Joshlin, who claimed he was assaulted because Donahue was upset about not being invited to an after-party, and Donahue, who described a violent threat from Joshlin that necessitated a use of force. Donahue should have been permitted to show the jury Joshlin's violent character which was directly relevant to the jury's consideration of whether Joshlin was being truthful or whether there was a reasonable doubt about his claims.

The misinterpretation of this rule of evidence, reviewed *de novo*, shows that the district court erred in excluding the evidence and on this basis alone the jury's verdict should be reversed.

B. Credibility of Witness Joshlin

"The credibility of a witness may be attacked by any party, including the party calling the witness." Mont. R. Evid. 607. The September 13 incident bears directly on the credibility of Joshlin, and Donahue's right to explore Joshlin's credibility on cross examination of his accusers is protected by both the Montana Constitution's Article II §24, and the Sixth Amendment to the United States Constitution.

Although the district court permitted inquiry into Joshlin's lies to police officers, the September incident as a still-pending criminal offense was also

relevant to show why Joshlin might want to curry favor with those same investigating agencies, namely the Bozeman Police Department, who also investigated the current incident.

Joshlin knew he had failed to appear on the disorderly conduct citations from September 13, 2021 when he was speaking with officers in this case. He had every reason to paint himself as the victim in order to avoid being treated harshly, and in order to be handled with kid gloves as the victim of an assault with a weapon. The incident occurred only two months prior to the incident for which Donahue was convicted, and both Joshlin and investigating officers acknowledged recognizing each other on scene from the prior incident. In light of this, he would have been motivated by fear or favor of those same investigating officers.

The Supreme Court has held that, apart from character evidence, other legal proceedings are relevant because a witness may be "affected by fear or favor growing out of" their own legal proceedings. *Alford v. United States*, 282 U.S. 687, 693, 51 S. Ct. 218, 220 (1931).

Cross examination must be allowed to reveal "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. 308, 316–17, 94 S. Ct. 1105, 1110 (1974). For example, in one case a juvenile's probation status should have been admitted into evidence. "Not only might [the witness] have made a hasty and

faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but [he] might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation." *Id*., at 311 (emphases added).

"The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' … [T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id*., at 316-317 (internal citation omitted). "[D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id*., at 318.

It is not necessary that the witness actually have been promised anything by the officers, or the government; a desire, hope or even "expectation" of lenient treatment is relevant to a person's reliability and credibility. *Alford*, at 693.

The unresolved criminal case against Joshlin arising from the September 13 incident was relevant to show what Joshlin might have feared … it was not some unrelated criminal offense bearing on issues not relevant to this case (where it might be sufficient to reference an un-named prior charge). It tied into the admissible violent character evidence discussed above - a fight in which claims of

self-defense, primary aggression, and assaultive behavior were directly at issue. Joshlin's statements to officers on November 22, 2021 would certainly have been colored by his fear or favor to be gained by those same officers when the prior case did not turn out as he had hoped and was still pending. Additionally Joshlin would have known that he had missed court in that case, issues that Donahue should have been allowed to explore on cross-examination.

This evidence was admissible under the Montana Rules of Evidence and existing caselaw, and where Joshlin's credibility was central to the case and the jury's verdict, its exclusion requires reversal.

II. DEFECTS IN THE JURY SUMMONING PROCEDURES USED IN THIS CASE ARE STRUCTURAL ERROR REQUIRING REVERSAL.

The Clerk's process of summoning trial juries in Gallatin County, including the jury for Donahue's trial, is contrary to Montana law, and requires reversal.

Both the Sixth Amendment to the United States Constitution and Article II, Part II, §24 of the Montana Constitution ensure the right of defendants to an impartial jury. The manner of selecting an impartial jury is generally controlled by state statute, and material deviation from the jury selection statutes constitutes structural error of constitutional magnitude requiring reversal. *State v. Bearchild*, 2004 MT 355, ¶ 19, 324 Mont. 435, 440, 103 P.3d 1006, 1009; *See also, State v. LaMere*, 2000 MT 45, ¶ 23, 298 Mont. 358, 2 P.3d 204. In *LaMere*, possible

jurors were only contacted by phone contrary to statute, resulting in exclusion of "an entire class of people." *Bearchild*, at ¶20.

In interpreting adherence to jury selection statutes, this Court has noted that "if [a] statutory provision is wrong, the Legislature is free to change it, but, so long as it remains a part of the law of this state, it is the duty of the courts to see that it is observed." *State v. Groom*, 49 Mont. 354, 141 P. 858, 859 (1914).

"It is not the right of the individual necessarily involved, but rather the entire jury system and the selection procedures which must be protected, and when a showing is timely brought before this court we would be remiss in our duties if we permitted *material deviation* or departure from the procedures spelled out by the legislature." *State ex rel. Henningsen v. District Court*, 136 Mont. 354, 360, 348 P.2d 143, 146 (1959) (emphasis supplied).

Although a deviation from the jury statutes must be material in order to constitute structural error, the bar is low. Even the apparent minimal deviation of not using the correct capsules for juror names (for which the 21st century equivalent might be a cell or row in an Excel spreadsheet) was constitutionally deficient despite the fact that there was "not even a suggestion of fraud, disenfranchisement of citizens to act as jurors, or any personal reproachable conduct." *Id*., at 357. The *Henningsen* Court noted a defendant's right to a jury summoned according to the law and that it had "[r]epeatedly . . . required the trial

court to substantially comply with the statutes in procuring a jury. Any material deviation or departure is a denial of fundamental constitutional rights." *Id*., at 359–60 (internal citations omitted).

This Court has recognized that "counsel ha[s] a right to rely on the judge and clerk to follow their statutory duties" in the process of summoning juries. *Dvorak v. Huntley Project Irr. District*, 196 Mont 167, 172, 639 P.2d 62, 64-65 (1981). "[I]f counsel does not have knowledge, or means of knowledge, of the irregularity in the drawing of the jury, or the panel from which it is selected until after the verdict, the question may be raised for the first time on motion for a new trial." *Id*., at 171-72. (*quoting Ledger v. McKenzie*, 107 Mont. 335, 85 P.2d 352 (1938)).

In collecting cases on the issue, the Court has since reaffirmed that "statutory violations of selection procedures require reversal of the verdict," and "substantial compliance with [jury selection] statutes [is] required" even when the deviations in some of those cases appeared innocuous and absent reproachable conduct. *Tribby v. Nw. Bank of Great Falls*, 217 Mont. 196, 206, 704 P.2d 409 (1985).

The Court held that material deviations from jury selection statutes undermine the right to an impartial jury and that such noncompliance itself requires a new trial even if the party could not show that the eventual panel was not impartial, nor that a class or group was unconstitutionally excluded because

that is an independent "second inquiry on this issue." *Id*., at 207. The first inquiry, whether there are "violations or material deviations from the statutes," requires a new trial. *Id*. "[N]o prejudice need be shown where there has been a substantial failure to comply with the statutes governing the procurement of a trial jury." *LaMere*, at ¶ 66.

When an error in the genesis of a jury pool occurs, "[t]he fact that no actual prejudice has been shown is irrelevant. Whether a different verdict would have resulted had the statutory procedures been followed is purely speculative, conjectural and impossible to determine." *Dvorak*, 196 Mont. at 172 (emphasis added).

A. Manner of Contact and Response

"The clerk of court shall serve notice by mail on the persons drawn as jurors and require the persons to *respond by mail* as to their qualifications to serve as jurors." §3-15-405 M.C.A. (emphasis supplied). Then, "[i]f a person fails to respond to the notice, the clerk shall certify the failure to the sheriff, who shall serve the notice personally on the person and make reasonable efforts to require the person to respond to the notice." *Id*.

The manner of contacting jurors by postcard complies with the statute requiring a mailing. However, failure to include a means or a request for return mail, as the statute requires, placed the burden on the potential juror to use either

the internet (to fill out the questionnaire or to email the Clerk) or a phone to respond. Despite there being no requirement to show prejudice, this practice did have a likely effect of shaping the 2,935 "available with questionnaire" names from which Donahue's jury was drawn, as illustrated by the testimony of the Clerk related to the age group of those who requested a physical questionnaire. Tr. 12/22/23, at 27-28.

The effect of this electronic response request is also emphasized by the dicta in *LaMere*, where the Court noted a telephone-only method of jury summoning likely had disproportionate effect on certain groups of people without telephone access. *LaMere*, at ¶¶6-7. Giving jurors the only response method of phone or internet had the likely effect of excluding people with various backgrounds and incomes as noted by the *LaMere* Court.

Regardless, the policy is a substantial deviation from the statutory procedures and violates §3-15-405 M.C.A.; this material noncompliance requires reversal regardless of prejudice. *Id.*, at ¶66.

B. Excusals Without Cause or Judicial Approval

Testimony established that a person is able to self-excuse from jury service for any dates they choose simply by noting the dates on their returned questionnaire. The request can be for any reason or no reason, so long as dates are given, and the requests are not relayed to a Judge for determination. Despite the

inability of the Clerk's office to single out who had been excluded on specific dates, Donahue's trial took place the week of the Labor Day holiday in 2023. Regardless of any demonstrable prejudice, this process of excusal is non-compliant with §3-15-313 and 405 M.C.A.

C. Exclusion of Non-Responding Jurors

People from the original OCA list of 10,000 names who simply did not respond to the postcard were outright excluded from the jury pool. This resulted in two skewed groups of people at the time Donahue's trial jury was drawn: 2,935 persons "available with questionnaire" from which the jurors were picked, and the notably larger group of approximately 3,759 people who had not responded. This disparity is significant, and the failure to include the names as potential jurors or to certify these 3,759 people to the Sheriff for personal service violates §3-15-405 M.C.A.

The problem appears to have been avoidable at several stages. Despite a spotty history of compliance with the statute, it cannot be said that the Clerk was unaware of its duties in this regard. The Sheriff's office testified that previous certifications of non-responders had been made in 2016 and 2020. Perhaps most troubling is the unrebutted testimony that the Sheriff's office calls the Clerk's office every year to request the list, and still no list was provided for five out of the seven previous years. Additionally, the Clerk apparently was aware of the problem

at the very latest on September 5, 2023, and yet did not notify the Court or the parties prior to the commencement of Donahue's trial.

Further, it appears that no list would have been ever certified to the Sheriff for the 2023-2024 term, had the problems in Cascade and Flathead Counties not come to light. At the very least, it is undisputed that at the time Donahue's trial jury was summoned, no list had been certified and non-responders, though greatly outnumbering the remaining "available" jurors, were completely excluded from the jury draw.

A system that excluded a greater number of potential jurors than the included number, in direct violation of statute, cannot be said to have comprised a fair cross-section of the community.

Testimony was elicited from the State regarding the disparity between the overall OCA data pool for Gallatin County, approximately 180,000 names, and the census.gov data indicating a theoretical county population of 125,000. First, as noted, the census data states that the numbers are estimated based on prior census info and are simply an extrapolation.

More importantly, any argument that the OCA list is inherently flawed and that the non-responding jurors are inconsequential or potentially nonexistent, is rebutted by the evidence presented in this case. First, those who have moved out of county, are deceased, or are undeliverable by the post office comprise in excess

of 1,000 names that were not within the non-responders because they had already been addressed by the Clerk. Tr. 12/22/23, at 33-34. Meaning the potential for non-resident names to be on the list certainly existed, but there was already a mechanism by the Clerk that had removed many of them - over 10% of the original list.

Lastly, the Sheriff's subsequent successes belie any contention that personal service was futile or not effective. Of the 573 attempts at service, only 113 were unreachable or demonstrably not eligible jurors (moved out of county or deceased). This represents a success rate of over 80 percent at contacting actual residents of the county who were potential jurors from the list of non-responders.

And after removing those who were excused or even those who still failed to respond after personal service, the Sheriff generated 322 valid "available with questionnaire" jurors. This is over 56% of the 573 people they attempted to serve as of December 20, 2023.

Extrapolating that success would suggest that of the 3,759 non-responders certified to the Sheriff, in excess of 2,100 may be residents, and respond with a valid questionnaire when served. Comparing that number with the pool size available for Donahue's trial of 2,935 illustrates that the exclusion of non-responders involved an enormous proportion of potential jurors residing in the county and reachable by the Sheriff.

D. Potential Jurors Effectively Were Allowed to "Opt Out"

Lastly, the system used resulted in a self-exclusionary honor system of the sort directly condemned by the *LaMere* Court. The non-responding people of the original 10,000 names were simply excluded from jury service. Just as the *LaMere* Court hypothesized a person could simply choose not to return a phone call, ignoring a postcard in the mail is just as easy, and the constitutional damage to a fair cross-section jury pool is the same.

> "[It] undermines the principle of granting juror excuses only on the basis of objective criteria. As LaMere suggests, a phone-dependent summoning procedure constitutes an impermissible, 'largely voluntary jury system'; a prospective juror is allowed to excuse himself or herself from possible jury duty simply by failing to return the clerk's phone call. This we will not countenance."

LaMere, at ¶73 (emphasis supplied).

The method used here is no less prone to self-selection for jury service. A person can simply be removed from the jury pool of their own volition, whether the Clerk's postcard is discarded as perceived junk-mail or deliberately ignored.

> Jury duty cannot be lightly shirked, as the telephone summoning method allows, without doing violence to the democratic nature of the jury system. "[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.

Id., at ¶ 74.

The failure of the Clerk to certify a list of non-responding jurors to the Sheriff for service is a material breach of the jury summoning statutes. Their

elimination from the jury pool created an essentially *voluntary* jury system of the sort *LaMere* warned.

The cumulative effect of all these errors in the jury selection process deprived Donahue of his constitutional right to a fair and impartial jury by eliminating any likelihood that the jury constituted a fair cross section of the community.

The Clerk's delayed response, and any alleged staff or resource shortages are not excuses for the defects in jury empanelment in Donahue's case. "[I]f [a] statutory provision is wrong, the Legislature is free to change it, but, so long as it remains a part of the law of this state, it is the duty of the courts to see that it is observed." *State v. Groom*, 49 Mont. 354, 141 P. 858, 859 (1914).

The material deviation from the jury summoning statutes that were utilized by the Clerk in this case resulted in a jury pool that was less than half the size of what it was only a month later when the non-responders were added into the pool.

For all the reasons above, the flawed jury summoning procedures constitutes structural error that requires reversal.

CONCLUSION

For the foregoing reasons, Donahue asks the Court to vacate and reverse the convictions in this matter and remand to the district court for further proceedings.

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APPENDIX CONTENTS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quotes and indented mater, and the word count calculated by Microsoft Word for Windows is 6,584 words, excluding certificates of service and compliance.

By: /s/ Nicholas Miller

Nicholas Miller

CERTIFICATE OF SERVICE

I, Nicholas Miller, hereby certify that I have served a true and accurate copy of the foregoing Appellant's Opening Brief to the following, on November 1, 2024:

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