IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0722

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRYAN NEIL ARVIDSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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STATEMENT OF THE ISSUES

1. Whether Arvidson's trial counsel was ineffective for failing to present a different defense.

2. The State concedes that the written judgment does not conform to the oral pronouncement of Count IV, so the case should be remanded.

STATEMENT OF THE CASE

Appellant Bryan Neil Arvidson was charged in a Third Amended Information with Count I, attempted deliberate homicide; Count II, criminal endangerment; Count III, obstructing a peace officer or other public servant; and Count IV, tampering with or fabricating physical evidence. (Doc. 55.) As an alternative to Count I, Arvidson was charged with seven counts of assault on a peace officer in Counts V through XI. (*Id*.) A jury convicted Arvidson of counts I through IV. (Doc. 69.)

The court sentenced Arvidson for Count I, attempted deliberate homicide, to 40 years in prison; for Count III, obstructing a peace officer, to 6 months in jail; for Count II, criminal endangerment, to 6 years in prison with 5 years suspended, imposed consecutive to Counts I and III; and for Count IV, tampering with evidence, to 6 years in prison with 5 years suspended to "run consecutive to Count 3." (9/19/22 Tr. at 56-57.) The Amended Judgment and Commitment imposed Count IV consecutive to Count II. (Doc. 111 at 2, available at Appellant's App. B.)

On appeal, Arvidson argues that his counsel was ineffective for failing to provide a different defense to attempted deliberate homicide and that the written judgment does not conform to the oral pronouncement of the sentence for Count IV.

STATEMENT OF THE FACTS

I. Evidence presented at trial

At 6:47 p.m., on October 1, 2021, Arvidson called 911 to alert law enforcement that he was going to be shooting his gun in his yard in the Helena valley. (4/4/22 Tr. at 165-66; State's Ex. 5, Track 1, played at 4/4/22 Tr. at 176.) Arvidson's neighbors, Levi Cahoon (Cahoon) and Brittany Wigert (Brittany), were in their yard that evening. (4/5/22 Tr. at 315.) Cahoon was previously deployed in Iraq and has substantial experience being shot at. (*Id*. at 304-07.) That evening he heard shots, which he first thought were fireworks. (*Id*. at 316.) Around 7:30 p.m., Cahoon heard several shots that "produced a whizzing sound over [his] head." (*Id*. at 316; *see also id*. at 317, 322.)

Cahoon immediately yelled to his wife to seek cover, and he sought cover behind his truck. (*Id*. at 318.) They then retreated into their house. (*Id*. at 318-19.) Cahoon kept his kids in the back bedroom of his home, farthest from the gun shots. (*Id*. at 320-21.) While he was in his home, he heard the sound of a bullet hitting a hard object. (*Id*. at 320, 325.) Cahoon also heard BBs come down on top of their

house and vehicles. (*Id*. at 328-29.) Cahoon called 911 at 7:44 p.m. to report the shots in his yard. (*Id*. at 322.) Another neighbor reported gun shots around that time. (*Id*. at 388.) Cahoon called two more times later that evening, and Brittany called another time. (*Id* at 322.) He made the third call because the shooting was becoming more frequent. (*Id*.)

Cahoon's sister-in-law, Shelby Wigert (Shelby), and his mother-in-law, Michelle Wigert (Michelle), lived nearby. (*Id*. at 334, 347.) Shelby noticed that the shooting "got really out of hand" after 9 p.m. (*Id*. at 338-39.) She was afraid to be outside because there was nothing between her and Arvidson to protect her. (*Id*. at 340.) The first shots sounded like they came from a shot gun, but later shots sounded like they came from a pistol, and the last shots sounded like they came from a hunting rifle. (*Id*. at 341, 350.) During the last shots, Shelby and Michelle heard the sound of bullets ricocheting off the ground in a field near their house. (*Id*. at 341-42.) Michelle recorded 52 shots. (*Id*. at 352.)

After Cahoon's first call, Deputy Jake Isbell was dispatched to contact Arvidson. (*Id*. at 271-72.) Deputy Isbell met with Arvidson at his home around 8 p.m. (*Id*. at 273-74.) During their conversation, Arvidson had a pistol in a holster on his hip. (*Id*. at 278.) Arvidson told Deputy Isbell that he had been firing to the south. (*Id*. at 279.) Based on the direction Arvidson said he was shooting and Deputy Isbell's misunderstanding of where the complaint had come from,

Deputy Isbell thought at that time that the complainant who had called may have been mistaken about bullets flying over his head. (*Id*. at 278-79, 300.) Arvidson told Deputy Isbell that he was done shooting for the evening. (*Id*.) Because it is legal to shoot a firearm on private property, Deputy Isbell did not tell Arvidson that he could never shoot from his property. Instead, he discussed ways to make shooting safer by using a backstop. (*Id*. at 280.) Arvidson said he had guns to protect him and his family, and he claimed that death threats had been made against him. (*Id*. at 295.) Deputy Isbell subsequently talked to Cahoon and determined that he needed to continue his investigation. (*Id*. at 283.)

Around that time, Arvidson called dispatch asking why deputies had gone to his home. (*Id*. at 284, 395; State's Ex. 5, Tracks 7-10, played at 4/4/22 Tr. at 179-80.) Arvidson became hostile and argumentative and repeatedly yelled at the 911 dispatcher. (Tracks 8-10.) When a dispatcher asked him to stop cussing, he responded by screaming and then called the dispatcher a "stupid fucking cunt." (Track 10 at 3:90-4:30.)

When Deputy Isbell called Arvidson back, Arvidson became angry that he was not being called by a supervisor, and he complained about decades of unfair treatment from the sheriff's office. (*Id*.) Deputy Isbell told Arvidson that he could not shoot his 9-millimeter pistol that night. (*Id*.) Arvidson argued that he had the

right to shoot under the Second Amendment, but he promised that he would not shoot his pistol that evening. (*Id*.)

After that call ended at 9:41 p.m., Arvidson began shooting again, and neighbors complained again. (*Id*. at 286.) When Deputy Isbell called Arvidson back, Arvidson said he could shoot until 10 p.m., and he hung up. (*Id*. at 286-87.)

Officers were stationed near Arvidson's home, and they could see him on his porch and hear gunshots from a shotgun and a pistol. (*Id*. at 289, 366, 397-400.) Several officers trained in crisis negotiation spoke to Arvidson on the phone and asked him if he would disarm and speak with them calmly in person. (*Id*. at 363-66, 403.) He refused to meet with them without a firearm, and he refused to stop shooting. (*Id*. at 371, 403.) He swore frequently, hung up repeatedly, and was not interested in resolving the situation. (4/6/22 Tr. at 555.) Arvidson told one officer that he had until 11 p.m. "to be an asshole and on that note [ ] go fuck yourself." (4/5/22 Tr. at 364.) He then hung up on that officer. (*Id*.) Arvidson repeatedly complained that he was being racially profiled. (*Id*. at 363, 367-68, 395.)

At times, Arvidson was agitated and defiant and screamed. (*Id*. at 367, 369.) When asked if he would speak with law enforcement again, Arvidson told one officer, "No. Shut your fucking mouth." (*Id*. at 369.) At the end of that call, Arvidson said "Come see me and see what's up," in a threatening manner. (*Id*. at 369-70.) He then hung up. (*Id*.) During one call, Arvidson said the Special

Weapons and Tactics (SWAT) Team could come talk to him, and he was told that they were on their way. (*Id*. at 403.)

Based on the information Deputy Isbell learned from Cahoon, he decided to charge Arvidson with criminal endangerment. (*Id*. at 288.) The SWAT Team went to Arvidson's home around 11:45 p.m. with an armored vehicle referred to as the BEAR. (*Id*. at 290, 296, 404.) Arvidson was on his porch wearing a pistol in a holster on his hip when the SWAT Team arrived. (*Id*. at 410-11.) The SWAT team used the public address system to inform Arvidson that they were the sheriff's office, that he needed to disarm himself, and that he was under arrest. (*Id*. at 290, 301, 373, 410; 4/6/22 Tr. at 488, 557.) In addition, officers yelled verbal commands to Arvidson. (4/5/22 Tr. at 411, 450.) Arvidson was directed to turn around and walk backwards to the BEAR. (*Id*. at 451.)

Arvidson responded by laughing and pointing at the BEAR. (*Id*. at 412; 4/6/22 Tr. at 558.) He flipped off the officers, made masturbating gestures, and said "fuck you." (4/5/22 Tr. at 412; 4/6/22 Tr. at 504.) When Detective Jess Metcalf told Arvidson he was under arrest, Arvidson asked, "What for?" (4/6/22 Tr. at 504.) Arvidson later claimed, in a mocking manner, that he could not hear the officers over the diesel engine. Detective Metcalf did not believe him because they had had a back-and-forth conversation. (*Id*. at 504, 520, 523; *see also* 4/5/22 Tr. at 450.)

In an attempt to end the conflict, the SWAT Team shot at Arvidson with a "less lethal" round containing crushable foam and an irritant gas. (4/5/22 Tr. at 416.) One of the shots missed him, but the other hit him high on his leg. (4/5/22 Tr. at 416; 4/6/22 Tr. at 507-08.)

At that time, several officers were standing outside of the BEAR and one officer was standing up through an opening in the BEAR. (4/5/22 Tr. at 419-20, 450, 456, 458; 4/6/22 Tr. at 489-90, 502, 530-31.) Arvidson responded by going into his house and firing at the BEAR and the officers outside of the BEAR with a pistol. (4/5/22 Tr. at 417-18, 461; 4/6/22 Tr. at 509-10, 559.) Officers could see the muzzle flash from the gun that was pointed directly at them. (4/6/22 Tr. at 510, 534.) One officer later testified that "it was obvious he was trying to shoot at us. And . . . if he's trying to shoot at us, I felt he was trying to kill us." (*Id*. at 534.)

Arvidson fired seven rounds. (*Id*. at 648.) At least two rounds hit the BEAR. (4/5/22 Tr. at 418-19; 4/6/22 Tr. at 495, 512.) Officers heard bullets flying by. (4/6/22 Tr. at 495, 512, 529, 545.) In response, officers scrambled back into the BEAR while the officer in the hole fired two shots toward Arvidson. (4/5/22 Tr. at 421, 461-65; 4/6/22 Tr. at 514.)

Arvidson stopped shooting, but he remained in his home until the early morning. (4/5/22 Tr. at 465; 4/6/22 Tr. at 515.) He called 911 after he was shot with the less lethal round and complained that "law enforcement tried to kill me."

(State's Ex. 5, Track 15 at 0:33-0:40.) He said he "had to return fire." (*Id*. at 1:10-1:19.) He complained that he had been fighting with law enforcement for 30 years and then began hysterically crying that they were trying to kill him and his family. (*Id*. at 1:20-1:50.)

Deputy Matt Kultgen began talking to Arvidson. (*Id*. at 1:55-2:17.) While Deputy Kultgen was talking, Arvidson yelled to his family to "get down." (*Id*. at 2:15-2:22.) Deputy Kultgen asked Arvidson to come out to resolve the issue. (*Id*. at 2:23-2:28.) Arvidson refused and asserted that law enforcement came to pick a fight with him. (*Id*. at 2:28-2:48.) Arvidson again told Deputy Kultgen that he "had to" respond with shots. (*Id*. at 3:05-3:14.) Arvidson asserted that he had received a death threat and murder threat from his neighbors. (*Id*. at 3:20-3:25.)

The crisis negotiation team continued talking to Arvidson throughout the night. (4/5/22 Tr. at 472; 4/6/22 Tr. at 518, 564-68.) During the calls, Arvidson suggested that he did not know that it was law enforcement that had shot at him, and he claimed it could have been gang members trying to harm his family. (4/6/22 Tr. at 568.)

Around 6 a.m., Arvidson's wife and kids left the home. (4/5/22 Tr. at 298-99, 272.) Arvidson surrendered at 6:48 a.m., after officers used a flash bang distraction device. (4/5/22 Tr. at 299; 4/6/22 Tr. at 518, 537.)

Later that day, Cahoon and an officer observed marks on a power pole in Cahoon's yard and on Cahoon's fence that appeared to have been made by impact

from a projectile. (4/4/22 Tr. at 205-06, 210-11; 4/5/22 Tr. at 330-32.) There was also evidence of shooting in Arvidson's yard. There were cavities in the ground where bullets had impacted the ground and continued on, there were marks on a wooden play set that appeared to have been made by pellets in a shotgun shell, and plastic wads from shotgun shells indicated that shots were fired to the south, which was the direction of Cahoon's home. (4/5/22 Tr. at 244-46.) There were also marks on and damage to the BEAR caused by the bullets hitting it. (*Id*. at 248, 263-67; 4/6/22 Tr. at 630-32.) Arvidson's pistol was found in a freezer. (4/5/22 Tr. at 258; 4/6/22 Tr. at 625.) Shell casings had been moved from where they had been fired and were found near the freezer. (4/5/22 Tr. at 262; 4/6/22 Tr. at 625-30.)

The jury found Arvidson guilty of attempted deliberate homicide, criminal endangerment, obstructing a peace officer, and tampering with or fabricating physical evidence. (4/6/22 Tr. at 716-17.)

II. Arvidson's defense

During Arvidson's opening statement, his counsel, Steven Scott, said that law enforcement did not identify themselves when they went to Arvidson's house in the BEAR, and Arvidson did not know it was law enforcement. (4/4/22 Tr. at 152.) Scott said the headlights of the BEAR were bright, so Arvidson could not see

anything else, and he could not hear anyone announce that it was law enforcement over the sound of the BEAR. (*Id*.)

Scott said Arvidson "shoots but he doesn't believe he's shooting at law enforcement. He believes he's shooting at neighbors that had—that he had believed wanted to come over and kill him and his family." (*Id*. at 153.)

During cross-examinations, Scott elicited testimony that Arvidson told law enforcement he had "received death and murder threats against him," and he had firearms to protect him and his family. (4/5/22 Tr. at 295.) Scott demonstrated that several officers did not write in their reports or state in a pretrial interview that they identified themselves as law enforcement when they arrived in the BEAR. (*Id*. at 297, 376-77, 427; 4/6/22 Tr. at 520, 538.) Scott also elicited testimony that the lights on the BEAR could be blinding, and it might not have been possible to read the side of the BEAR. (4/5/22 Tr. at 378, 430.) He also elicited testimony that it may not have been possible to hear what an officer was saying over the sound of the BEAR's engine. (*Id*. at 430.) Scott also questioned the adequacy of the investigation by asking why investigators did not use a trajectory rod to determine the path of bullets and emphasized that they did not find bullets or metal pellets in the neighbors' yards. (4/6/22 Tr. at 652-56.)

During Arvidson's closing argument, Scott argued that there was "no attempted murder . . . because the State can't prove that my client ever shot at the

BEAR." (4/7/22 Tr. at 709.) Scott asserted that "[n]o one testified that any of the damage to the BEAR was not there prior to this call[,]" and he pointed out that there was no report on the condition the BEAR was in before the incident. (*Id*.) He emphasized weaknesses in the investigation and inconsistencies in the officers' testimony. (*Id*. at 710-11.)

III. Arvidson's counsel

Arvidson's case was reassigned to Scott on February 17, 2022, nearly four months after he was charged. (Doc. 9.) At the final pretrial conference on March 10, 2022, Scott informed the court that the case would go to trial. (3/10/22 Tr. at 3.) Scott informed the court, "[w]e'll be ready for trial[.]" (*Id*. at 4.)

The trial was held April 4-7, 2022. Scott never requested a continuance or expressed any concern about his preparation. (*See generally* 4/4/22-4/7/22 Tr.)

After Arvidson was convicted at trial, he filed a Notice of Missrepesenting of Defendant's Legal Councle [sic]. (Doc. 76.) In the notice, he raised several complaints about Scott. (*Id*.) He attached a letter Scott sent Arvidson on March 1, 2022, informing him that Scott had been assigned to his case. (Doc. 76, Ex. B.) Scott told Arvidson "I have not had time to read your file yet and am unfamiliar with your case. When I get up to speed, I will talk with you. I know trial is coming up soon, I do not know if I will be ready to go by then or not." (*Id*.) Arvidson attached

a second letter from Scott, dated March 3, 2022, stating that a doctor would be coming to evaluate Arvidson based on his prior counsel's concern about his mental health. (Doc. 76, Ex. A.) Scott also stated, "I am still in the process of reading your file but wanted to update you on what is happening." (*Id*.)

Arvidson later filed a Motion Requesting New Legal Attorney. (Doc. 81.) He claimed that he had asked Scott to get body camera footage that would have shown that officers never told him to stop shooting, they did not identify themselves when they arrived, and "they pulled up to my home and said your [sic] under arrest then opened fire." (*Id*. at 1.) Arvidson filed other motions complaining about his counsel, law enforcement, and the prosecutors on his case. (*See* Docs. 75, 86, 87, 91, 93-94.) In Arvidson's motions, he disputed the evidence presented at trial. (*See id*.)

At the time scheduled for the sentencing hearing, Scott informed the court that he had not been able to talk to Arvidson because Arvidson told him he was fired. (6/30/22 Tr. at 5.) Scott suggested that the case should be reassigned. (*Id*. at 6.) Arvidson told the court that Scott "doesn't follow anything that I've requested[,]" and "My intent is that I just show that I was set up on this, and he didn't allow this to go." (*Id*. at 7.) Arvidson stated, "this is my ship, they need to steer where I tell them to[.]" (*Id*. at 8-9.) The court directed the Office of the State Public Defender to appoint new counsel. (*Id*. at 11.) Arvidson was represented by different counsel at his sentencing hearing. (9/19/22 Tr.)

SUMMARY OF THE ARGUMENT

Arvidson's ineffective assistance of counsel claims challenging his attempted deliberate homicide conviction should not be reviewed on direct appeal because the claims are not record based. His claims challenge the defense chosen by counsel, which is a strategic decision that cannot be evaluated without knowing counsel's reasons for his decisions. Instead, the claims are more appropriate for a petition for postconviction relief.

If this Court reviews Arvidson's ineffective assistance of counsel claims, they should be denied. Arvidson's counsel faced the difficult job of defending Arvidson when the evidence plainly demonstrated that Arvidson repeatedly fired at law enforcement officers. Although Arvidson stated that he "had to" return fire (State's Ex. 5, Track 15 at 3:05-3:14), and he was agitated, the evidence did not support a finding that Arvidson's use of force was justified or that he committed attempted mitigated deliberate homicide, instead of attempted deliberate homicide. Arvidson displayed a series of unreasonable behaviors, which culminated in him firing at officers from inside his home. Arvidson's counsel could not establish that Arvidson reasonably believed that shooting at officers from inside his home was necessary to prevent imminent death or serious bodily harm to a person, which is required to justify the use of force likely to cause death or serious bodily injury. Similarly, Arvidson's counsel could not demonstrate that Arvidson had a reasonable

explanation or excuse for his stress. Arvidson repeatedly escalated the conflict throughout the evening in an unreasonable manner and rejected efforts by law enforcement to calmly end the conflict. As a result, there was not any good defense to Arvidson's conduct. Given the difficulty created by the evidence, counsel's performance was not deficient.

Further, there is not a reasonable probability that the outcome would have been different if counsel had pursued a different defense because the evidence undisputably demonstrated that Arvidson fired at the officers without reasonable justification. Arvidson has therefore failed to demonstrate that he was denied the effective assistance of counsel.

The State concedes that the case should be remanded to correct the judgment.

ARGUMENT

I. Standard of review

Claims of ineffective assistance of counsel are questions of law and fact which this Court reviews de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861.

This Court reviews for legality a criminal sentence imposing over one year of incarceration. *State v. Moore*, 2012 MT 95, ¶ 10, 365 Mont. 13, 277 P.3d 1212.

This Court reviews whether the district court adhered to the applicable sentencing statutes de novo. *Id.*

II. Arvidson has failed to demonstrate that his counsel was ineffective for failing to present a different defense.

A. Standard applicable to ineffective assistance of counsel claims

This Court reviews ineffective assistance of counsel claims applying the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant arguing ineffective assistance of counsel under the *Strickland* test has a burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948; *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473.

A trial counsel's performance is deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow*, ¶ 20 (following *Strickland*, 466 U.S. at 688). There is a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and the defendant 'must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Whitlow*, ¶ 21 (quoting *Strickland*, 466 U.S. at

689). This highly deferential review of counsel's performance is necessary to "eliminate the distorting effects of hindsight." *Worthan v. State*, 2010 MT 98, ¶ 10, 356 Mont. 206, 232 P.3d 380.

As *Strickland* noted, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland,* 466 U.S. at 689. *Strickland* instructs that every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." For that reason, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. Thus, a defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. *Strickland* further instructs that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id*.

To establish that the defendant was prejudiced by counsel's deficient performance, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability

sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

B. This Court should decline to review Arvidson's ineffective assistance of counsel claim on direct appeal because counsel's reasons for choosing the defense he used and not pursuing other defenses is not record based.

This Court reviews ineffective assistance of counsel claims on direct appeal if the claims are based solely on the record. *State v. Rovin*, 2009 MT 16, ¶ 24, 349 Mont. 57, 201 P.3d 780. Because there is a "strong presumption that counsel's actions are within the wide range of reasonable professional assistance, a record which is silent about the reasons for the attorney's actions or omissions seldom provides sufficient evidence to rebut this presumption." *State v. Sartain*, 2010 MT 213, ¶ 30, 357 Mont. 483, 241 P.3d 1032 (quotation marks and citation omitted). As a result, if the record does not demonstrate "why" counsel did or did not take an action, the ineffective assistance claim is more suitable for a petition for postconviction relief. *Id.* A claim may be addressed on direct appeal, "[i]n rare instances," if there is no plausible justification for defense counsel's actions or omission. *State v. Fender*, 2007 MT 268, ¶ 10, 339 Mont. 395, 170 P.3d 971.

Arvidson's claim that Scott was deficient for shifting his defense and for failing to offer a defense of justifiable use of force or argue for a mitigated deliberate homicide instruction criticizes the strategy chosen by defense counsel. But there is

no record of why counsel chose the strategy he chose. Because the record does not contain the information necessary to evaluate this claim, this claim is more appropriate for postconviction relief.

This Court has previously held that a claim that counsel was ineffective for failing to pursue a justifiable use of force defense is not record based where the record does not contain the reason for counsel's strategy. *State v. Hendricks*, 2003 MT 223, ¶¶ 8-9, 317 Mont. 177, 75 P.3d 1268. The Court held that when the record is insufficient to determine whether counsel provided ineffective assistance, the appropriate remedy is to deny the claim and require the defendant to raise the claim in a postconviction relief proceeding. *Hendricks*, ¶ 11. Similarly, this Court has held that counsel can, for strategic reasons, choose not to offer a lesser-included offense instruction. *State v. Parrish*, 2010 MT 212, ¶ 26, 357 Mont. 477, 241 P.3d 1041. This Court has routinely declined to consider other ineffective assistance of counsel claims where the record does not explain the reason for counsel's actions. *E.g.*, *State v. Bristow*, 2023 MT 188, ¶¶ 14-16, 413 Mont. 403, 537 P.3d 103 (counsel's reason for incorrectly stating that mitigated deliberate homicide is not a lesser-included offense of deliberate homicide was not record-based); *State v. Henderson*, 2003 MT 285, ¶¶ 11-19, 318 Mont. 31, 78 P.3d 848 (counsel's reason for saying the defendant would testify and then not calling him was not record-based).

Because the record does not explain why counsel did not pursue a justifiable use of force defense or request an instruction on the lesser-included offense of mitigated deliberate homicide, this claim is not record based and should only be considered in a petition for postconviction relief.

This is not one of the rare circumstances where there was no plausible justification for counsel's conduct. Pursuing a justifiable use of force defense would have required Arvidson to admit that he attempted to kill law enforcement or to at least argue that as an alternative theory. *See State v. King*, 2013 MT 139, ¶ 26, 370 Mont. 277, 304 P.3d 1 (defining justifiable use of force as an affirmative defense that "admits the doing of the act charged, but seeks to justify, excuse or mitigate it."); *see also* Mont. Code Ann. § 45-3-102. A defendant is not entitled to an instruction on a lesser included offense if the defendant's theory would require an acquittal on the lesser included offense. *State v. Craft*, 2023 MT 129, ¶ 16, 413 Mont. 1, 532 P.3d 461. Scott may have reasonably made a strategic decision not to pursue this defense given the risk of acknowledging that Arvidson attempted to kill officers.

Further, the record does not contain any information about the conversations that occurred between Arvidson and Scott, so it is impossible to know whether Arvidson was willing to let Scott pursue a justifiable use of force defense. *Strickland* instructs that the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's

actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 691. As a result, "inquiry into counsel's conversations with the defendant . . . may be critical to a proper assessment of counsel's . . . litigation decisions." *Id*. Without knowing what conversations occurred between Arvidson and Scott, it is impossible to evaluate the reasonableness of Scott's strategic decisions not to pursue a justifiable use of force defense. As a result, this claim is more appropriate for postconviction.

Similarly, there is a plausible justification for Scott's failure to pursue the lesser-included offense of mitigated deliberate homicide. This Court has held that defense counsel can make a reasonable strategic decision to forgo a lesser included offense instruction. *State v. Leyba*, 276 Mont. 45, 915 P.2d 794 (1996); *State v. Sheppard*, 270 Mont. 122, 128-30, 890 P.2d 754, 757-59 (1995); *see also Bashor v. Risley*, 730 F.2d 1228 (9th Cir. 1984) (concluding it was not ineffective for counsel to pursue a strategy requiring the jury to either find the defendant guilty of deliberate homicide or acquit him outright, rather than pursuing a lesser-included offense). Given that forgoing a lesser-included offense instruction has been recognized to be a reasonable strategic decision, there was a plausible justification for counsel's failure to pursue the claim.

Further, without knowing what conversations were had between Scott and Arvidson, it is impossible to know whether Arvidson was willing to let Scott pursue

a defense of mitigated deliberate homicide. Defendants in two other cases did not want their counsel to pursue that defense, *Leyba*, 276 Mont. at 50,; 915 P.2d at 797, *State v. Turner*, 2000 MT 270, ¶ 12, 302 Mont. 69, 12 P.3d 934, and Arvidson may have been similarly opposed to pursuing that defense.

None of Scott's strategic decisions can be fairly evaluated without knowing what Arvidson told Scott. Arvidson's post-trial statements demonstrate that his position was that he was "set up" by law enforcement, who came to his home and started firing at him. (Doc. 81 at 1; 6/30/22 Tr. at 7.) That claim is belied by the evidence presented at trial, but Arvidson's assertions may have dictated the defense chosen by Scott.

Because there are plausible strategic reasons for counsel's failure to pursue a justifiable use of force defense or a mitigated deliberate homicide instruction, Arvidson's ineffective assistance of counsel claim should not be reviewed on direct appeal.

C. If this Court reviews Arvidson's claim that his counsel was ineffective for failing to pursue a justifiable use of force defense, the claim should be rejected because Arvidson has not demonstrated that his counsel was ineffective for failing to pursue that defense.

Even though Arvidson's ineffective assistance of counsel claims are not record-based, this Court can deny the claims because he has failed to demonstrate that counsel was ineffective. *See State v. Mitchell*, 2017 MT 215, ¶ 9, 388 Mont. 415, 404 P.3d 388 (denying the defendant's claim that counsel was ineffective for

failing to request a bystander justifiable use of force instruction, even though it was not record-based, because the claim could be denied on the merits).

Scott's failure to pursue a justifiable use of force defense was not deficient. To do so would have required Scott to argue, at least in the alternative, that Arvidson attempted to kill a law enforcement officer, but he was justified in doing so. *See King*, ¶ 26; *State v. Daniels*, 2011 MT 278, ¶ 15, 362 Mont. 426, 265 P.3d 623 (explaining that justifiable use of force is an affirmative defense that requires a defendant to admit doing an act); *State v. Marquez*, 2021 MT 263, ¶ 19, 406 Mont. 9, 496 P.3d 963. A defendant requesting a justifiable use of force defense has an initial burden to offer evidence of justifiable use of force. *Daniels*, ¶ 15. Pursuing the justifiable use of force defense carried considerable risk because it conflicted with his defense that he did not knowingly shoot at law enforcement officers.

And the justifiable use of force theory did not have a plausible chance of being accepted by a jury. "A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the conduct is necessary for self-defense or the defense of another against the other person's imminent use of unlawful force." Mont. Code Ann. § 45-3-102. But a "person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person or another or to prevent the

commission of a forcible felony." Mont. Code Ann. § 45-3-102. The justifiable use of force defense places the burden on the State to "prov[e] beyond a reasonable doubt that the defendant's actions were not justified." Mont. Code Ann. § 46-16-131; *accord Marquez*, ¶ 17.

Arvidson used potentially deadly force against law enforcement after he repeatedly endangered his neighbors by firing toward their property, he became hostile and combative with law enforcement over the phone, and he refused to follow law enforcement's commands to disarm and comply with his arrest. Law enforcement shot Arvidson in the leg or torso with a less lethal round, and he then retreated into his home. He then shot directly at officers while he was sheltered in his home. Under these facts, there was no plausible argument that firing at law enforcement officers was "necessary to prevent imminent death or serious bodily harm" to somebody. *See* Mont. Code Ann. § 45-3-102. All that Arvidson had to do to prevent death or serious bodily harm was to comply with officers' commands. And he was not under any threat while he was in his home. No reasonable jury would have found that Arvidson reasonably acted in self-defense.

Arvidson asserts, without citing to any authority, that law enforcement's use of less lethal force was "unlawful." (Appellant's Br. at 24.) The legality of the officers' force against Arvidson is immaterial because he was not justified in using deadly force unless he believed that firing at law enforcement officers was necessary

to prevent death or serious bodily harm. There is no evidence that it was necessary for Arvidson to fire at law enforcement.

Further, the use of force by officers was lawful under the circumstances. Use of force by law enforcement is lawful if the force is objectively reasonable under the circumstances. *Scott v. Harris*, 550 U.S. 372 (2007); *Graham v. Connor*, 490 U.S. 386 (1989). An officer fired two foam rounds that are designed not to be lethal at Arvidson in an attempt to end the dispute after Arvidson repeatedly endangered his neighbors by shooting into their property, he failed to stop shooting when requested, he refused to disarm, and he refused to comply with the commands of officers who were attempting to arrest him. Under these circumstances, where Arvidson continued to pose a threat to the safety of anyone in the area, the officers' use of force was objectively reasonable.

Scott was not deficient for failing to request a justifiable use of force instruction that carried substantial risk and was not likely to succeed. "Jury instructions are generally considered to be within the province of an attorney's trial tactics or strategies[,]" and this Court "will not second guess a calculated trial tactic." *State v. Hagen*, 273 Mont. 432, 442, 903 P.3d 1381, 1387 (1995). Scott's decision not to pursue a justifiable use of force defense was a reasonable strategic decision.

Further, Arvidson has not demonstrated that he was prejudiced by Scott's failure to pursue a justifiable use of force instruction because the instruction was not

supported by the evidence. There is not a reasonable probability that a jury would have found that Arvidson reasonably believed that the force he used—repeatedly shooting directly at law enforcement officers—was "necessary to prevent imminent death or serious bodily harm[,]" which is required for a finding that a defendant's use of deadly force was justified. *See* Mont. Code Ann. § 45-3-102. Because the evidence did not support that finding, there is not a reasonable probability that the jury would have reached a different outcome if it had been instructed on justifiable use of force.

D. If this Court reviews Arvidson's claim that Scott should have argued for the lesser-included offense of mitigated deliberate homicide, the claim should be rejected because Arvidson has not demonstrated that his counsel was ineffective for failing to request a mitigated deliberate homicide instruction.

Like Arvidson's claim about justifiable use of force, his claim that his counsel was deficient for failing to pursue a mitigated deliberate homicide defense can be denied on the merits, even though it is not record-based. "A person commits the offense of mitigated deliberate homicide when 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).[1] "The reasonableness of the explanation or excuse must be determined from the viewpoint of a reasonable person in the actor's situation." Mont. Code Ann. § 45-5-103(1).

Attempted mitigated deliberate homicide is a lesser-included offense of attempted deliberate homicide. *See* Mont. Code Ann. § 45-5-103(2); Mont. Code Ann. § 45-4-103. A party is entitled to an instruction on a lesser-included offense when (1) "the offense for which the instruction is requested is a lesser-included offense of the offense charged; and (2) the proposed lesser-included offense instruction is supported by the evidence." *Craft*, ¶ 13 (citation and quotation marks omitted). "The second factor is satisfied 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." *Id*. (citation and quotation marks omitted). To be sufficient to warrant a lesser-included offense instruction, "the evidence must provide some basis from which a jury could *rationally* conclude that the defendant is guilty of the lesser, but not the greater offense." *Id*. (citation and quotation marks omitted; emphasis in original). A lesser-included offense instruction is not warranted if the defendant's

[1] In *Craft*, ¶ 11, this Court misquoted Mont. Code Ann. § 45-5-103(1), stating that "A person is guilty of mitigated deliberate homicide when the person 'purposely or knowingly causes the death of another human being . . . under the influence of extreme mental or emotional stress for which there is **no** reasonable explanation or excuse.'" (Emphasis added.) The word "no" is not contained in the statute, and the statute explicitly requires a reasonable explanation or excuse. Mont. Code Ann. § 45-5-103(1).

entire defense is that the defendant did not commit the crime. *Craft*, ¶¶ 15-16. In *Craft*, this Court held that Craft was not entitled to an instruction on mitigated deliberate homicide where his sole theory at trial was that somebody else committed the homicide. *Craft*, ¶¶ 16-18.

An attorney may reasonably make a tactical decision to seek an absolute acquittal, rather than requesting an instruction on mitigated deliberate homicide. *Leyba*, 276 Mont. at 50, 915 P.2d at 796; *Bashor*, 730 F.2d at 1241. In *Leyba*, this Court stated that it would "not . . . second-guess trial tactics and strategy" when Leyba and his attorney had made a tactical decision to seek absolute acquittal on the theory of self-defense, rather than requesting a mitigated deliberate homicide instruction. 276 Mont. at 50, 915 P.2d at 796. This Court relied on *Bashor*, in which the Ninth Circuit held that defense counsel's tactical decision to force the jury to choose between finding the defendant guilty of deliberate homicide or acquitting him outright was not ineffective. *Leyba*, 276 Mont. at 50, 915 P.2d at 796 (quoting *Bashor*, 730 F.2d at 1241). In both cases, the courts found that counsel was not deficient for failing to request a mitigated deliberate homicide instruction. *Leyba*, 276 Mont. at 50, 915 P.2d at 796; *Bashor*, 730 F.2d at 1241.

Like counsel in *Leyba* and *Bashor*, Scott was not deficient for failing to request a mitigated deliberate homicide instruction. Scott may have reasonably decided that it was better to make the jury decide between deliberate homicide,

acquittal, or the alternative assault on a peace officer charges in hopes that the jury would acquit or find him guilty of assault on a peace officer. Also, Scott could not have obtained a mitigated deliberate homicide instruction without changing his theory of the case. He may have reasonably determined that it was better to pursue the theory that Arvidson did not knowingly shoot at law enforcement officers. It is also possible, as argued above, that Arvidson may have dictated the theory chosen.

Further, Scott may have reasonably determined that there was no reasonable probability that the jury would find that Arvidson committed attempted mitigated deliberate homicide because there was not a "reasonable explanation or excuse," as required by Mont. Code Ann. § 45-5-103(1), for his mental or emotional stress. Arvidson became angry and antagonistic with law enforcement simply because they were investigating reports that he was shooting into his neighbors' yards. He then became irate that an officer who responded to his call was not a supervisor. Arvidson then refused to comply with law enforcement's commands when deputies attempted to arrest him for criminal endangerment. Instead, Arvidson mocked law enforcement, refused to comply, and continued to carry a firearm. When officers shot at Arvidson with a less lethal round to attempt to get him to comply, he responded by repeatedly shooting at officers. Arvidson's anger and opposition to complying with law enforcement did not establish a "reasonable explanation or excuse" for his stress. The lack of evidentiary support for a mitigated attempted

deliberate homicide defense provided another good reason for Scott to not pursue that theory.

Regardless of the reason for Scott's decision, this Court should not second-guess Scott's trial strategy when it was a reasonable strategy. Arvidson has failed to demonstrate that Scott's failure to pursue a mitigated attempted deliberate homicide defense was deficient.

Arvidson has also failed to demonstrate that he was prejudiced by Scott's failure to pursue a mitigated deliberate homicide defense because there is not a reasonable probability that it would have resulted in a different outcome. As explained above, there is not a reasonable probability that a jury would have found that Arvidson's conduct was mitigated because there was not a reasonable explanation or excuse for his emotional stress. Arvidson became unreasonably irate and confrontational when law enforcement investigated after Arvidson endangered his neighbors lives by shooting into their yards. Arvidson asserted that he was being racially profiled, but there is no support for that claim. Law enforcement was legitimately investigating Arvidson because he was repeatedly shooting into his neighbors' yards, endangering their lives. Arvidson created the conflict with law enforcement and then responded to the investigation in an irrational manner. Nothing about his conduct was reasonable, so there is not a reasonable probability that the jury would have found him guilty of mitigated deliberate homicide if given the option.

E. Arvidson has not demonstrated that his counsel was ineffective for failing to offer any other defense.

It is unclear why Scott shifted his argument from the opening statement, where he stated that Arvidson believed he was shooting at his neighbors, to the closing argument, where he stated that the State could not prove that he shot at the BEAR. The change in the argument does not necessarily demonstrate that Scott was deficient.

Scott was in a difficult position because the evidence did not support any defense. Scott could not contest the clear evidence that Arvidson had fired shots from his home when law enforcement officers and the BEAR were outside of his home. Arvidson had also made inconsistent statements. He told a 911 dispatcher that law enforcement had shot at him, and he had to fire back. (State's Ex. 5, Track 15 at 3:05-3:14.) But in other statements he suggested that he did not know that it was law enforcement that had shot at him, and he claimed it could have been gang members trying to harm his family. (4/6/22 Tr. at 568.) Based on the latter statements, Scott may have reasonably argued in his opening statement that Arvidson did not believe he was shooting at law enforcement. That would be consistent with Arvidson's post-trial assertions that law enforcement did not announce themselves, and he was "set up." (Doc. 81 at 1; 6/30/22 Tr. at 7.) And Scott may have reasonably changed his argument during the closing argument because the evidence presented at trial overwhelmingly demonstrated that Arvidson knew he was firing at law enforcement officers.

More importantly, Arvidson has not demonstrated a reasonable probability that the result would have been different if Scott had pursued a different defense or consistently pursued either of the defenses he argued. As explained above, the evidence did not support a justifiable use of force or attempted mitigated deliberate homicide defense. That left Scott with few options for a defense, given that Arvidson undisputably fired shots from his home. Regardless of what Scott would have argued, he could not overcome the evidence that Arvidson knew law enforcement was at his home, and he chose to shoot at officers, rather than negotiating with them. The evidence demonstrated that he committed attempted deliberate homicide by shooting at officers, and no argument by defense counsel could prevent the jury from finding him guilty of that offense.

F. Scott's failure to object to the prosecution's misstatement about the mental state was not ineffective.

The State agrees that the prosecution mistakenly listed the mental state for criminal endangerment along with the mental state for deliberate homicide when discussing the mental state for deliberate homicide, but defense counsel was not deficient for failing to object given the similarity to the correct standard. During the State's closing argument, the prosecution explained that if the jury believed that Arvidson had tried to kill one officer, or multiple, he could be convicted of Count I, attempted deliberate homicide. (4/7/22 Tr. at 701.) The State then explained the alternative assault on a peace officer charges. (*Id*.) Next, the prosecution stated,

> So deliberate homicide, he purposely or knowingly—which you're going back to the mental state. Was it his purpose to cause the death of another human being or did he knowingly engage in conduct that he realized created a substantial risk that that result would occur?

(*Id*.)

It appears the prosecutor was trying to discuss the purposely and knowingly mental states that apply to deliberate homicide. *See* Mont. Code Ann. § 45-5-102(1)(a). Further, it appears that the prosecutor was trying to incorporate the result-oriented definition of knowingly, which provides that a person acts knowingly when the person is aware there exists the high probability that the person's conduct will cause a specific result. Mont. Code Ann. § 45-2-101(35). Instead, the prosecutor referenced the language of the criminal endangerment statute, which provides that a person commits the offense of criminal endangerment if the person "knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another." Mont. Code Ann. § 45-5-207(1). While the use of the term "substantial risk" was incorrect, the prosecutor's statement would be correct if his use of "substantial risk" was replaced with "high probability."

Although the prosecutor used the incorrect language, Scott was not deficient for failing to object. The terms substantial risk and high probability are similar and consistent to each other. Further, the incorrect statement was quickly made in passing in a confusing manner. Under the circumstances, the failure to object did not fall below an objective standard of reasonableness.

Even if Scott was deficient for failing to object, Arvidson was not prejudiced by Scott's failure to object. As explained, the prosecutor's language is similar to the correct definition of knowingly. Further, the prosecutor listed the correct mental states shortly after the challenged statement. The prosecutor stated that Arvidson was guilty of attempted deliberate homicide if the jury agreed that he tried to take an officer's life and "he acted purposely and knowingly." And the jury was properly instructed by the court that to find Arvidson guilty of attempted deliberate homicide, the jury had to find that he purposely performed an act toward the commission of deliberate homicide. (Doc. 68, Instr. No. 12.) The jury was also instructed that a person commits deliberate homicide if he purposely or knowingly causes the death of another human being. (Doc. 68, Instr. No. 13.)

There is not a reasonable probability that the outcome would have been different if Scott had objected to the prosecutor's statement about a "substantial risk," when the jury was properly instructed and the evidence demonstrated that Arvidson purposely committed attempted deliberate homicide.

III. The State concedes that the written judgment does not conform to the oral pronouncement of the sentence.

The State concedes that this case should be remanded to allow the district court to correct the written judgment to reflect the sentence orally imposed. The court imposed a 40-year sentence for Count I, attempted deliberate homicide. The

court next sentenced Arvidson on Count III, obstructing a peace officer, to 6 months in jail, and ran that sentence concurrent to Count I. The court then sentenced Arvidson on Count II, criminal endangerment, to 6 years in prison, with 5 years suspended. The court ran that sentence consecutive to Counts I and III. Lastly, the Court sentenced Arvidson on count IV to 6 years in prison, with 5 years suspended. The court stated "[t]hat will run consecutive to Count 3." (9/19/22 Tr. at 56-57.)[2] The written judgment states that the sentence for Count IV shall run consecutively to the sentence imposed for Count II. (App. B.)

A written judgment may not increase a defendant's criminal sentence that was orally imposed. *State v. Johnston*, 2000 MT 290, ¶ 24, 302 Mont. 265, 14 P.3d 480. That State acknowledges that by stating that Count IV runs consecutively to Count II, which runs consecutively to Count I, rather than stating that Count IV runs consecutively to Count III, which runs concurrently to Count I, the written judgment improperly increased Arvidson's sentence. The State therefore concedes that the case should be remanded to the district court with instructions to issue a second amended judgment that conforms to the oral pronouncement of the sentence.

[2] Because Count III was a 6-month sentence that the court imposed concurrent to the 40-year sentence, it appears that the court intended to impose Count VI consecutive to Count II, rather than Count III. Regardless, that was not the sentence imposed.

CONCLUSION

Arvidson's ineffective assistance of counsel claim challenging his conviction for attempted deliberate homicide should not be reviewed on direct appeal because it is not record-based. In the alternative, this Court can deny the claim because he has not demonstrated that his counsel was deficient and that he was prejudiced by his counsel's performance. Accordingly, his conviction for attempted deliberate homicide should be affirmed, in addition to his other convictions that are not challenged.

This Court should remand this case with instructions to amend the judgment to make it conform to the orally pronounced sentence for Count IV.

Respectfully submitted this 25th 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 8,569 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-25-2024:

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