

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.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it limited the cross examination of the victim to exclude irrelevant post-assault statements and specific instances of conduct that were not probative of untruthfulness.
2. Whether the district court abused its discretion when it determined that the Gallatin County Clerk's Office (Clerk's Office) and Gallatin County Sheriff's Office (GCSO) substantially complied with the mandates of Mont. Code Ann. § 3-15-405.

STATEMENT OF THE CASE

On December 9, 2021, the State charged Appellant Ryan Patrick Donahue (Donahue) with assault with a weapon under Mont. Code Ann. § 45-5-213 and carrying a concealed weapon while under the influence in violation of Mont. Code Ann. § 45-8-327. (Doc. 3.)

The State alleged that on November 22, 2021, Bozeman police responded to a call of a man pulling a gun on another person at the Haufbrau Bar. (Doc. 1.) Officers encountered Donahue at the scene and observed that his speech was slurred, he smelled strongly of an alcoholic beverage, and that he had difficulty maintaining his balance. (*Id.* at 2.) Donahue informed officers that he was an agent with the Drug Enforcement Administration (DEA). (*Id.*)

Police learned that Donahue had pulled a firearm on Marcus Joshlin (Joshlin). (*Id.* at 4.) The bartender/owner of the Haufbrau, William Frye (Frye), was able to forcibly disarm Donahue and remove him from the bar. (*Id.* at 5-6.)

On June 21, 2022, Donahue asserted the affirmative defense of justifiable use of force in the omnibus memorandum. (Doc. 34 at 3.)

On August 15, 2023, the district court ordered a jury panel for a trial set to begin on September 6, 2023. (Doc. 80.) The order stated:

Jurors' names shall be drawn from the computerized database by use of a computerized random selection process as authorized by Section 3-15-503(1)(b), MCA. The Clerk of District Court shall notify jurors by mail of their selection. Any juror indicating unwillingness to serve shall be informed that should they fail to appear they might be taken into custody by the Gallatin County Sheriff and delivered to court. The Gallatin County Sheriff shall personally notify any person not responding to the jury notice.

(*Id.* at 1.)

On August 25, 2023, Donahue filed a motion in limine to admit evidence pertaining to the victim. (Doc. 84, available at Appellant's App. A.) Donahue moved to be allowed to present evidence of statements that Joshlin made to the police after the assault, in which he described himself as a fighter and indicated he would fight with Donahue "right now." (*Id.* at 1-2.)

Further, Joshlin had been involved in a bar fight on September 13, 2021, and had lied to the police during the investigation of that incident. (*Id.* at 2.) Donahue

did not assert that he was aware of any of this information at the time of this offense.

Prior to trial, the district court made the following rulings with respect to Donahue's motion in limine:

Initially, there's a bunch of comments that Mr. Joshlin allegedly made to law enforcement after the fact, and the Court finds that those would not be admissible. They're after the fact. There's nothing that he said that he threatened Mr. Donahue, or that he started the fight, or anything like that.

(9/06/23 Transcript [Tr.] at 8.)

But the Court does agree that instances of truthfulness or untruthfulness, with respect to lying about his identity, lying about being at the scene of the prior assault can come in under Rule 608. The Court finds that that would be a specific instance of conduct that could be probative of truthfulness or untruthfulness and can inquire to under cross-examination of the witness.

(*Id.* at 10.)

On September 8, 2023, a jury convicted Donahue of both charges. (Doc. 99.)

On October 10, 2023, Donahue filed a motion for a new trial under Mont. Code Ann. § 46-16-702, alleging "material deviation from the jury selection process including notification, non-response, and requests for excusal." (Doc. 100 at 1.)

On December 22, 2023, the district court held an evidentiary hearing on Donahue's motion. (12/22/23 Hearing Transcript [Hr'g] at 1.)

On February 1, 2024, the district court denied Donahue's motion for a new trial. (Doc. 117.) The district court found that

There were no facts presented to the Court demonstrating that jury duty was unfairly allocated among the Montana citizenry through the process utilized by the Clerk's Office. There were no facts presented to the Court that the jury selection process was not random or objective.

(*Id.* at 11.)

The district court concluded,

There is *no evidence* that the 85 jurors randomly selected to report to the Court for the jury trial in this case do not represent a fair cross section of the citizens of Gallatin County, Montana. The Court concludes that the manner in which the Clerk's Office and the GCSO acted with respect to the drawing/empaneling of the jury substantially complied with the mandates of § 3-15-405, MCA. The Court further concludes Defendant has not established he was deprived of a fair and impartial jury in this case and, as a result, any error in the drawing/empaneling of the jury was harmless.

(*Id.* at 19 (emphasis added).)

STATEMENT OF THE FACTS

I. Relevant trial testimony

Officer Kyle Hodges (Officer Hodges) was a four-year veteran of the Bozeman Police Department (BPD). (Tr. at 158.) On November 22, 2021, Officer Hodges responded to a call that a male had pointed a handgun at another

patron at the Haufbrau Bar. (*Id.* at 159-60.) This occurred “just after 2:00 a.m.” (*Id.* at 161.)

Upon arrival, Officer Hodges was directed to Donahue, who fit the suspect’s description. (*Id.* at 162.) Officer Hodges observed that Donahue appeared to be intoxicated and was unsteady on his feet. (*Id.* at 164.)

Officer Hodges entered the bar and observed Joshlin sitting on the floor. (*Id.* at 165, 166.) Bar staff showed Officer Hodges the 9mm Glock handgun that had been taken from Donahue. (*Id.* at 166.) The magazine had been removed, and Officer Hodges cleared the remaining round from the chamber and secured the weapon in his pocket. (*Id.* at 167.) The State introduced a photograph of the handgun into evidence as State’s Exhibit 1. (*Id.* at 167-68.) The State introduced a photograph of the magazine and ammunition from the handgun into evidence as State’s Exhibit 2. (*Id.* at 170.)

Officer Hodges spoke with Joshlin and noted that he appeared upset and was occasionally sobbing. (*Id.* at 171.) Officer Hodges observed a red mark on Joshlin’s neck, a photograph of which was introduced into evidence as State’s Exhibit 3. (*Id.* at 172-73.)

Joshlin was 30 years old and living in Washington State at the time of trial. (*Id.* at 186.) Joshlin first encountered Donahue on November 21, 2021, at the

Squire House Bar. (*Id.* at 187) They were seated close to each other, engaged in “normal conversation,” and they were buying each other drinks. (*Id.* at 191-92.)

At some point, a reference was made to Donahue being in the DEA, and Joshlin had observed his badge. (*Id.* at 192-93.) Joshlin initially thought that the badge was fake. (*Id.* at 194.) Joshlin indicated they were laughing and joking around, and he and Donahue agreed to go out with Joshlin’s girlfriend and her friends. (*Id.*) Joshlin and Donahue left the Squire House together, intending to meet Joshlin’s friends at the Haufbrau. (*Id.* at 197-98.)

Joshlin testified that during the walk to the Haufbrau, Donahue accused him of carrying drugs in his bag of leftover food. (*Id.* at 200.) Joshlin stated,

I was, kind of, freaked out. He stopped me and—he didn’t put his—bring his gun out, but put his hand on his gun and showed me his badge, and then, I could realize he’d had some. Like, I could smell the whiskey on his breath, and he was, like, “Give me the bag.” He said, “You’re under federal seizure. Give me the bag.” And I was, kind of—I was freaked out and scared, first of all, and then, I was worried that—and I was like, “Hmph.” Then—yeah—then he—I gave him the bag, and, kind of, calmed him down. And I was, like, “Hey, man, it’s just leftovers in here.” Yeah. And I just, kind of—yeah, that calmed him down.

(*Id.*)

When they arrived at the Haufbrau, they began drinking “quite a bit more.” (*Id.* at 202.) Joshlin testified that Donahue’s behavior “got more intense by the minute.” (*Id.* at 203.) As Joshlin and his friends were leaving the bar to go to a residence at around 2 a.m., Joshlin informed Donahue that he was not invited to

come with them. (*Id.* at 206.) As Joshlin was walking towards the door, he described:

Well, he grabs me with his left arm and pulls me into him, and then, puts the gun—it was, kind of, one sweeping motion. It seemed, kind of—it seemed like he done it before, and—but grabbed me from this side, and then, the gun right here, and it was—scared me because my body was being pushed into the gun, so it was—yeah—and then boom right here.

(*Id.* at 207.)

Donahue pointed his handgun against Joshlin’s neck. (*Id.* at 209.) This took place within the foyer area of the bar, as depicted in a photograph admitted into evidence as State’s Exhibit 7. (*Id.* at 213.) Donahue was demanding that he be allowed to accompany Joshlin and his friends. (*Id.* at 214.) Joshlin thought he was going to die, and yelled, “gun, gun, gun.” (*Id.* at 215.) After the gun was pulled away, Joshlin ran behind the bar, where he thought it was safe. (*Id.* at 217.)

On cross-examination, Joshlin admitted that he consumed “various” drugs. (*Id.* at 223.) Joshlin admitted he was high on cocaine when he was having “interactions” with Donahue, and that he had been drinking. (*Id.* at 224.) Further, Joshlin admitted telling the responding officers that he wanted to “go beat up Mr. Donahue right then and there.”¹ (*Id.* at 247.)

¹ While there was no objection, the district court had previously ruled that statements made “after the fact,” outside the presence of Donahue, were not admissible. (*See* Tr. at 8.)

Joshlin admitted that he had lied to police officers on previous occasions. (*Id.* at 248.) Joshlin admitted to lying about his identity to an officer two months prior to this incident. (*Id.*) Further, he admitted lying about being at the scene of a fight police were investigating. (*Id.* at 249.)

Officer Dante Dimercurio (Officer Dimercurio) had been with BPD for two years, with just under nine years of total law enforcement experience. (*Id.* at 259.) He responded to this incident. (*Id.* at 262-63.)

Officer Dimercurio noticed an empty concealed carry holster on Donahue's right hip area. (*Id.* at 267.) A photograph and a close-up photograph of the holster were admitted into evidence as State's Exhibits 8 and 9, respectively. (*Id.* at 269-70.) State's Exhibit 10 was a photograph of the wallet and DEA credential holder that was taken from Donahue. (*Id.* at 271.)

Donahue's firearm was admitted into evidence as State's Exhibit 11. (*Id.* at 274.) The magazine from the firearm was admitted as State's Exhibit 12, and 18 live rounds were recovered, which was consistent with the weapon having a fully loaded magazine and one round in the chamber. (*Id.* at 277-78.)

At the scene, Donahue asked police officers if they were letting him go, and Officer Dimercurio told him to "sit down." (*Id.* at 280.) Donahue responded "What? Just fucking throw me in jail. I didn't fucking do shit." (*Id.*)

Donahue did not claim that he had been defending himself, and Officer Dimercurio described his demeanor as “agitated.” (*Id.* at 281.) Officer Dimercurio observed that Donahue had slurred speech, could not follow directions, and was unsteady on his feet. (*Id.* at 282.)

Frye was a bartender at the Haufbrau, which had been owned by his family for over 50 years. (9/07/23 Tr. at 9.) On November 21, 2021, Frye started his shift at 7 p.m. (*Id.* at 11.) Prior to this incident, Frye was not familiar with Donahue or Joshlin. (*Id.* at 12.)

At around 2 a.m., on November 22, 2021, Frye began asking people to leave the bar. (*Id.* at 16.) Joshlin and Donahue appeared to be headed towards the door. (*Id.* at 18.) Frye’s attention was drawn towards them when he observed Donahue shove Joshlin. (*Id.*) This occurred in the bar’s breezeway/foyer. (*Id.*)

Frye approached them, thinking he would probably be breaking up a fight. (*Id.* at 22.) Frye saw Donahue pull a gun “from his holster or somewhere in the back, kind of, behind him.” (*Id.* at 23.) Frye was concerned that someone was going to get shot in his bar. (*Id.* at 24.) Frye approached Donahue from behind, put him in a headlock with his left arm, and forced the gun towards the ground. (*Id.* at 25.) When asked where the weapon had been pointed, Frye responded, “Yeah, it was in [Joshlin’s] face.” (*Id.*)

Donahue resisted Frye's efforts to disarm him. (*Id.* at 26.) Frye physically moved Donahue towards the bar and repeated for him to put the gun down. (*Id.*) With the assistance of another employee, they forced Donahue to release his gun on the bar, then, "promptly threw him out." (*Id.* at 27.)

Frye removed the magazine from Donahue's gun. (*Id.* at 29.) He left the gun and the magazine on the bar until law enforcement arrived. (*Id.* at 30.)

Gregory Roberts (Roberts) was a patron at the Haufbrau into the early morning hours of November 22, 2021. (*Id.* at 65.) At closing time, he was outside the Haufbrau and observed Donahue being pushed out the door. (*Id.* at 67.) He described Donahue's demeanor as "pretty incoherent and drunk." (*Id.*) Roberts elaborated that Donahue had slurred speech, was "swaying around," and "seemed aggressive." (*Id.* at 68.) Roberts and others were trying to keep Donahue from going back into the bar. (*Id.*) Prior to this incident, Roberts was not familiar with Donahue or Joshlin. (*Id.* at 71.)

During his cross examination, Donahue's attorney asked Roberts to elaborate on what he meant when he described Donahue as being "incoherent." (*Id.* at 72.) Roberts responded "I would say just, kind of, swaying around, not really—didn't have a direction. Just trying to get him to go home. *He didn't know where that was.*" (*Id.* at 72-73 (emphasis added).)

Officer Pete Tartaglia (Officer Tartaglia) had been with BPD for about three and a half years and had eight years of total law enforcement experience. (*Id.* at 75.) On November 22, 2021, Officer Tartaglia transported Donahue to the jail. (*Id.* at 82.) Officer Tartaglia testified:

I recall when we arrived at the jail, and I opened the door to let him out, I could smell a strong odor of alcoholic beverage coming from his breath. As he stepped and we walked inside the jail, I noted that he had difficulty maintaining his balance. While inside the jail, during the booking process, I asked him to spell his name. I had him repeat himself several times because his speech was slurred.

(*Id.* at 83.)

During cross-examination, Donahue’s attorney asked “And so you had, in fact, been present in September of 2021 in that incident when Mr. Joshlin was untruthful with you and other officers?” (*Id.* at 88.) Officer Tartaglia responded “Yes, correct.” (*Id.*)

On his redirect, Officer Tartaglia testified that with respect to the September incident, Joshlin was “compliant” with police and was given a citation for disorderly conduct. (*Id.* at 90.) On recross, Donahue’s attorney clarified that during that incident, Officer Tartaglia was “investigating an allegation of violence against others in the context of a bar fight.” (*Id.* at 91.)

After Officer Tartaglia’s testimony, the State rested. (*Id.* at 92.)

After Donahue called a blind expert, whose testimony is irrelevant to this appeal (*id.* at 93), Donahue took the stand. (*Id.* at 119.) He testified that on

November 21, 2021, he was in Bozeman to meet his fiancé, who was on assignment in Helena. (*Id.* at 119.) He had flown into Bozeman from Denver. (*Id.* at 120.) At the time of the assault, Donahue was a special agent with the DEA.² (*Id.* at 121.)

Asked to estimate his alcohol consumption over the 12-hour period prior to the assault, Donahue stated “Conservatively, I would say probably about 13 drinks over that 12-hour period.”³ (*Id.* at 126.)

After having a “real serious relationship defining talk” with his fiancé, she returned to their hotel to sleep. (*Id.* at 136.) Donahue continued bar hopping, and he eventually met Joshlin at the Squire House Bar. (*Id.* at 138, 141.) The two engaged in “general small talk.” (*Id.* at 139.)

Joshlin had indicated he was meeting some friends at the Haufbrau, and asked Donahue if he wanted to go with him. (*Id.* at 145.) Donahue agreed to go with Joshlin and claimed that “[n]othing noteworthy” occurred during their walk to the bar. (*Id.* at 147.)

Based on a conversation he had with an unnamed individual, as well as further conversation with Joshlin, Donahue testified that “I told [Joshlin] to have a

² During his cross examination, Donahue clarified that he was currently on unpaid administrative leave. (9/07/23 Tr. at 187.)

³ Donahue would add that he had not eaten anything after a 2 p.m. lunch on November 21, 2021. (9/07/23 Tr. at 134.)

good night, after I told him who I worked for, and I separated myself from him.”
(*Id.* at 152.)

Donahue described leaving the bar, and stated “As I’m, essentially, exiting the first door of the bar—the establishment—I get to that breezeway, and [Joshlin] is in front of me. He, subsequently, stops, turns around, and then, in a very stern and serious voice, says, “I’m going to fucking kill you.” (*Id.* at 154.) Donahue testified “I feared that he could easily take my life.” (*Id.* at 155.)

Donahue grabbed his firearm and placed it “on the threat,” which meant Joshlin’s “upper chest area.” (*Id.* at 157-58.) Donahue claimed “I was just simply addressing the threat that was placed in front of me and that I didn’t have an opportunity to avoid.” (*Id.* at 158.)

Donahue did not have a “good memory” of how Frye was able to get his handgun away from him, which he attributed to being placed in a chokehold. (*Id.* at 161.) Donahue had a “spotty” memory of being thrown out of the bar, did not recall trying to get back into the bar, and claimed that he “stood by” for police to arrive.⁴ (*Id.*)

Donahue alleged that when he told the police he “didn’t do shit,” he was “alluding to the fact that [he] simply defended [him]self.” (*Id.* at 162.)

⁴ Donahue later testified he remained on the scene because he “[f]elt it was the right thing to do.” (9/07/23 Tr. at 187.)

Based on two sustained objections during his testimony (*id.* at 150, 151), Donahue made an offer of proof outside the presence of the jury (*id.* at 164). Donahue claimed that Joshlin had told him he was on probation for assault, and had also stated “I’m involved with the sale of cocaine, and I sell cocaine.” (*Id.*) The district court recognized this as hearsay if it came from Donahue (*id.* at 165), but determined that he could recall Joshlin to inquire about these statements (*id.* at 166).

During his cross-examination, Donahue admitted visiting six different bars leading up to this incident and that he consumed alcoholic beverages at each of those bars. (*Id.* at 170.) Donahue admitted it was a “bad decision” to be in possession of his firearm when he was at the Squire House because he was under the influence of alcohol at that time. (*Id.* at 179.) When asked if he was guilty of possessing a concealed weapon while under the influence, Donahue stated “Yes, I’m not here to dispute that charge.” (*Id.*)

When asked if the alcohol was affecting his judgment in a negative way, Donahue responded, “Absolutely, yes.” (*Id.* at 183-84.) Donahue described his behavior towards the responding officers as, “rude, abrupt, maybe even characterize it as unprofessional.” (*Id.* at 185.)

Donahue admitted using profanity, but did not know if he directed profanity towards the officers. (*Id.* at 186.) He did recall telling one of the officers he was “a fucking joke.” (*Id.* at 186.)

The defense recalled Joshlin and asked if he had told Donahue that he was on probation for assault. (*Id.* at 202.) Joshlin responded, “No, I talked about my history with my charges and stuff, but no probation.”⁵ (*Id.*) When asked if he told Donahue he was involved in the sale of cocaine, Joshlin responded, “I talked about my history, my past, yup, selling some drugs when I was younger—yup, definitely.” (*Id.* at 203.)

Donahue testified to rebut Joshlin’s testimony and claimed that Joshlin had informed him that he was on probation for assault, and stated he was currently involved in selling cocaine. (*Id.* at 205.)

On September 8, 2023, the jury convicted Donahue of both counts. (Doc. 99.) The district court ordered a presentence investigation, and set sentencing for November 14, 2023, at 10 a.m. (9/08/23 Tr. at 51.)

⁵ Notably, there is no record evidence that indicates Joshlin was on probation for assault.

II. Donahue’s motion for a new trial

On October 10, 2023, Donahue filed a motion for a new trial based on “material deviation from the jury selection process including notification, non-response, and requests for excusal.” (Doc. 100.)

On November 17, 2023, the State filed its response. (Doc. 108.) After summarizing the case history, which included zero objections to the jury panel or the random manner in which it was selected (Doc. 108 at 1-3), the State pointed out that under Mont. Code Ann. § 46-16-112, any objection to the jury panel “must be made at least 5 days prior to the term for which the jury is drawn” (Doc. 108 at 4).

The district court scheduled an evidentiary hearing for December 22, 2023. (Doc. 118.)

III. The evidentiary hearing

Sarah Johnson (Johnson) was the jury coordinator for the 18th Judicial District Court, Gallatin County, and also a deputy clerk with the Clerk’s Office. (Hr’g at 5.) Part of Johnson’s duties included creating lists of people who would be called as potential jurors for trials. (*Id.* at 6.)

Johnson was familiar with the statutory provisions related to jury formation. (*Id.* at 8.) Johnson testified that the process of forming jury panels began in April

of each year, with her contacting various courts to inquire how many jurors they would need for their pool for the upcoming trial term. (*Id.*)

Upon making that inquiry, Johnson received lists of potential jurors for Gallatin County courts from the Office of the Court Administrator (OCA). (*Id.* at 9.) These lists were generated from registered voters and people who hold Montana driver's licenses and identification cards. (*Id.* at 9-10.)

There were 179,995 names on the OCA list for Gallatin County. (*Id.* at 10.) The OCA randomly selected individuals from that list for jury formation. (*Id.*) For the relevant jury trial term, from July 1, 2023, through June 30, 2024, Gallatin County randomly selected 10,000 individuals from the OCA list. (*Id.* at 11.)

The list of 10,000 potential jurors was placed into a computer program called "Full Court Jury." (*Id.* at 13.) Use of this software for randomized juror selection had been approved by the OCA since "the early 2000's." (*Id.* at 13-14.)

Johnson then downloaded the 10,000 names and forwarded them to "Executive Services" for purposes of mailing out postcards to potential jurors.⁶ (*Id.* at 12.) The postcards informed the potential jurors that their name had been drawn and instructed them to submit a juror questionnaire, either online or to contact the

⁶ Executive Services is a local business that contracts with the Clerk's Office to provide mass mailing services. (Hr'g at 17.)

Clerk's Office to receive a paper copy. (*Id.* at 20-21.) Both the online and paper questionnaire contained the same information. (*Id.* at 22.)

For the relevant trial term, Executive Services sent out postcards during the first week of May 2023. (*Id.* at 18.) This gave the Clerk's Office two months to begin compiling jury panels, as jury pull orders began arriving in mid-June. (*Id.*)

Johnson testified that as jurors responded, the clerk's office manually updated that information into the Full Court Jury program. (*Id.* at 24.) As of the first day of the term, 3,522 potential jurors were determined to be available and had filled out questionnaires. (*Id.* at 26.) Of that number, 325 jurors had requested hardcopy paper questionnaires. (*Id.*)

Johnson explained how jury panels were selected from the initial group of 3,522 people:

I receive an order to pull jury from the individual judges saying, please pull a certain amount of jurors to appear on this date by this time for jury duty. I will, then, go to my—the Full Court Jury, and go to the panel, and say for this date range, I need X amount of jurors' names randomly selected, and then, I will send notices out to those individual jurors in the subpool notifying them that they have been selected for a specific trial.

(*Id.* at 28.)

The number of jurors selected for any case is determined by the individual judge, with input from the attorneys. (*Id.* at 29.) Over the course of a jury term, the

number of available jurors naturally decreases, as jurors who complete their service will be removed from the list. (*Id.*)

The order to pull jurors for this case was filed on August 15, 2023, which was a little over one month into the start of the term. (*Id.* at 30.) 85 names were pulled at the request of the judge with input from the attorneys. (*Id.* at 30-31.) At that time, there were 2,935 remaining jurors, as 7 prior juror pulls had occurred in Gallatin County during that term. (*Id.* at 32.)

On September 8, 2023, the Clerk's Office sent a list of 3,759 nonresponsive jurors to GCSO for service. (*Id.* at 35.) As of December 20, 2023, GCSO had removed 1,223 names from that list. (*Id.* at 37.) That figure reflected individuals who had been contacted by GCSO, as well as others who had been removed from the list for other reasons, such as being deceased. (*Id.* at 38.) GCSO had actually made "returns" on 573 of those nonresponsive jurors. (*Id.* at 41.)

Johnson confirmed that the 85 potential jurors pulled for this case were randomly selected. (*Id.* at 45.)

Christine Koosman (Koosman) was the civil clerk for GCSO. (*Id.* at 68.) GCSO's role in the process of assembling a jury included receiving a list of nonresponsive jurors, then prioritizing that list to serve potential jurors for the earliest scheduled trial. (*Id.* at 69.) Koosman received a list of 3,759 nonresponsive jurors from the Clerk's Office on September 8, 2023. (*Id.* at 70.)

Koosman testified that GCSO first attempts to contact nonresponsive jurors by phone, and if that is unsuccessful, they attempt personal service “at least three” times. (*Id.* at 73.) Of the 3,759 potential jurors given to GCSO on September 8, 2023, they had managed to contact or made “returns” on 573 individuals. (*Id.* at 74-75.)

IV. The district court’s order denying the motion for a new trial

On February 1, 2024, the district court filed findings of fact and conclusions of law and denied Donahue’s motion for a new trial. (Doc. 117.) Citing Johnson’s testimony that potential jurors continued to respond over weeks and months, the district court noted that “1) juror responses continued to be submitted to the Clerk’s office in August of 2023; and 2) responses continued to arrive during the period when the jury was called on August 15, 2023, and when the trial commenced on September 6, 2023.” (*Id.* at 8.)

The district court concluded,

The Clerk’s decision to send the certified list of nonresponsive jurors to the GCSO on September 8, 2023, was in substantial compliance with § 3-15-405, MCA. Had the Clerk sent the list earlier it would have resulted in a waste of resources because responses were still being received through early August and up until the Defendant’s trial. It makes no sense for the GCSO to expend limited resources tracking down jurors who were in the process of or who had already returned responses.

The absence in § 3-15-405, MCA, of a specific time for when a clerk must certify a list to the Sheriff's office is also reasonable, as it is likely different offices employ different processes and get different results when calling jurors. The record in this case demonstrates time needs to be given for responses to be returned before sending officers out to track down non-responsive jurors. Defendant presented no evidence that a shorter time would have been more reasonable, or even possible.

(*Id.* at 19.)

SUMMARY OF THE ARGUMENT

The district court correctly ruled that Joshlin's "after the fact" statements to police that Donahue was not aware of at the time he assaulted Joshlin were not admissible. Further, Joshlin's citation for disorderly conduct two months prior to this offense was not probative of untruthfulness. The district court did not abuse its discretion when it limited Donahue's cross-examination of Joshlin to statements about his character that Donahue was aware of and specific instances of conduct that were probative of untruthfulness.

The district court did not abuse its discretion when it determined that the Clerk's Office and GCSO substantially complied with Mont. Code Ann. § 3-15-405, and that the 85 jurors drawn for Donahue's trial were randomly drawn and there was "no evidence" that they did not represent a fair cross-section of potential jurors in Gallatin County.

ARGUMENT

I. Standard of review

This Court reviews evidentiary rulings for an abuse of discretion. *State v. Hoff*, 2016 MT 244, ¶ 11, 385 Mont. 85, 385 P.3d 945 (citing *State v. MacKinnon*, 1998 MT 78, ¶ 12, 288 Mont. 329, 957 P.2d 23). A court abuses its discretion if it “acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *Hoff*, ¶ 11 (quoting *State v. Henson*, 2010 MT 136, ¶ 19, 356 Mont. 458, 235 P.3d 1274).

This Court reviews a district court’s denial of a motion for a new trial for an abuse of discretion. *State v. Gomez*, 2020 MT 73, ¶ 40, 399 Mont. 376, 460 P.3d 926.

II. The district court correctly limited the cross-examination of Joshlin to exclude post-assault statements and specific instances of conduct that were not probative of truthfulness.

A. Joshlin’s post-assault statements were not admissible character evidence.

The district court correctly limited evidence of Joshlin’s statements to what Donahue had knowledge of at the time of the offense. “Evidence of a pertinent trait of character of the victim” is admissible. Mont. R. Evid. 404(a)(2). Evidence of the victim’s character may be presented under either of two methods: (1) reputation or

opinion evidence, or (2) specific instances of conduct. Mont. R. Evid. 405; *State v. Sattler*, 1998 MT 57, ¶ 44, 288 Mont. 79, 956 P.2d 54.

However, “[e]vidence of the character of a victim of an assault is limited to what the defendant knew at the time [he] used force, and the defendant must show that this knowledge led to the use of force.” *Henson*, ¶ 27 (citing *Deschon v. State*, 2008 MT 380, ¶ 24, 347 Mont. 30, 197 P.3d 476; *City of Red Lodge v. Nelson*, 1999 MT 246, ¶ 19, 296 Mont. 190, 989 P.3d 300).

Donahue’s attorney acknowledged as much, stating:

These specific instances can only be probed into upon Mr. Donahue’s claim that this instance made me react the way I did. That’s not his claim, but I do believe it’s fair game, at this point, to ask Mr. Joshlin about his character for violence, which he repeatedly states to the officers, based on Rule 404(a)(2) and [the] *State v. Sattler* case.

(9/07/23 Tr. at 198 (emphasis added).)

Simply put, it was not possible for Donahue to show that his knowledge of Joshlin’s statements, which had not yet been made, caused him to become highly intoxicated and point his handgun in Joshlin’s face. Therefore, the district court correctly excluded those post-assault statements as improper evidence of the victim’s character.

B. Joshlin’s citation for disorderly conduct was not probative of truthfulness or untruthfulness

Montana Rule of Evidence 608(b) provides that, “[s]pecific instances of conduct of a witness, for the purpose of attacking or supporting the witness’

credibility, may not be proved by extrinsic evidence,’ but they may, ‘in the discretion of the court, *if probative of truthfulness or untruthfulness*, be inquired into on cross examination of the witness concerning the witness’ character for truthfulness or untruthfulness.” *State v. Quinlan*, 2021 MT 15, ¶ 19, 403 Mont. 91, 479 P.3d 982 (emphasis added).

This Court has explained, “‘by definition, specific instances of prior conduct probative of a witness’s character for untruthfulness narrowly include prior instances where the witness lied, made false reports or accusations, or otherwise acted dishonestly, untruthfully, deceitfully, or fraudulently.’” *Quinlan*, ¶ 19 (quoting *State v. Pelletier*, 2020 MT 249, ¶ 17, 401 Mont. 454, 473 P.3d 991 (collecting cases)) (emphasis added).

Donahue alleges “[a]lthough 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 [BPD], who also investigated the current incident.” (Appellant’s Br. at 15-16.)

In other words, Donahue contends that further inquiry into a citation for disorderly conduct might have demonstrated that Joshlin wished to endear himself to BPD by accusing an off-duty DEA agent of assault two months later. Donahue

does not present a rational theory on how this might have occurred because one does not exist.

Furthermore, this was not an argument that was presented to the district court. “We additionally have been clear that ‘a party may not raise new arguments or change his legal theory on appeal.’” *State v. Strizich*, 2021 MT 306, ¶ 28, 406 Mont. 391, 499 P.3d 575 (quoting *State v. Bar-Jonah*, 2004 MT 344, ¶ 93, 324 Mont. 278, 103 P.3d 1229).

III. The district court correctly denied Donahue’s motion for a new trial

A. Standard for a new trial

Montana Code Annotated § 46-16-702(1) provides trial courts the authority to “grant the defendant a new trial if required in the interests of justice.” The court may order a new trial “without a motion or . . . after motion and hearing.”

Mont. Code Ann. § 46-16-702(1). “A district court’s ruling on a motion for a new trial and its decision as to the impartiality of a jury should not be set aside unless there is an abuse of discretion.” *State v. Dunfee*, 2005 MT 147, ¶ 14, 327 Mont. 335, 114 P.3d 217 (citing *State v. Azure*, 2002 MT 22, ¶ 30, 308 Mont. 201, 41 P.3d 899; *State v. McMahon*, 271 Mont. 75, 78, 894 P.2d 313 (1995)).

B. Donahue's challenge to the manner in which the jury panel was selected or drawn was untimely.

The procedure for challenging the manner in which a jury panel is drawn or selected is as follows:

- (1) Any objection to the manner in which a jury panel has been selected or drawn must be raised by a motion to discharge the jury panel. *Except for good cause shown, the motion must be made at least 5 days prior to the term for which the jury is drawn.*
- (2) The motion must be in writing supported by affidavit and must state facts that show that the jury panel was improperly selected or drawn.
- (3) If the motion states facts that show that the jury panel has been improperly selected or drawn, it is the duty of the court to conduct a hearing. The burden of proof is on the movant.
- (4) If the court finds that the jury panel was improperly selected or drawn, the court shall order the jury panel discharged and the selection or drawing of a new panel in the manner provided by law.

Mont. Code Ann. § 46-16-112 (emphasis added).

Here, the beginning of the relevant trial term was on July 1, 2023. (Hr'g at 11.) Orders for jury panels were issued for this case on April 27, 2023, and August 15, 2023. (Docs. 65 and 80, respectfully.) Both orders contained the identical language that

Jurors' names shall be drawn from the computerized database by use of a computerized random selection process as authorized by Section 3-15-503(1)(b), MCA. The Clerk of District Court shall notify jurors by mail of their selection. Any juror indicating unwillingness to serve shall be informed that should they fail to appear they might be taken into custody by the Gallatin County Sheriff and delivered to the court. The Gallatin County Sheriff shall notify any person not responding to the jury notice.

(Doc. 65 at 2-3; Doc. 80 at 1.)

Despite his attorney having input in the number of 85 potential jurors, and being notified how they would be randomly selected, Donahue did not complain about the jury panel until a month after his conviction, on October 10, 2023. (*See* Doc. 100.) Therefore, as the State pointed out, this motion was untimely and should be deemed waived. (*See* Doc. 108 at 4-7.)

C. The Clerk’s Office substantially complied with the jury formation statutes.

The district court correctly concluded that the clerk’s decision to send the certified list of nonresponsive jurors to the GCSO on September 8, 2023, was in “substantial compliance” with Mont. Code Ann. § 3-15-405. (Doc. 117 at 19.) As the district court pointed out, Mont. Code Ann. § 3-15-405 “contains no time requirement with respect to when the certified list [of non-responsive jurors] must be submitted to a sheriff’s office.” (*Id.* at 15.) Further,

Had the Clerk sent the list [of non-responsive jurors] earlier it would have resulted in a waste of resources because responses were still being received through early August and up until the Defendant’s trial. It makes no sense for the GCSO to expend limited resources tracking down jurors who were in the process of or who had already returned responses.

(*Id.* at 19; *see also* Hr’g at 65.)

D. Technical violations of the jury formation statutes are subject to harmless error analysis.

This Court has held that a substantial failure to comply with the jury statutes requires reversal of a conviction, but technical violations that do not threaten the

goals of random selection and objective disqualification are subject to the harmless error standard. *State v. Bearchild*, 2004 MT 355, ¶ 16, 324 Mont. 435, 103 P.3d 1006; *State v. LaMere*, 2000 MT 45, ¶¶ 56-61, 298 Mont. 358, 2 P.3d 204.

In *LaMere*, this Court took “guidance from federal case law developed under the Jury Selection and Service Act of 1968 (JSSA)” to clarify z’the substantial compliance standard.” *LaMere*, ¶ 56. To show a violation under the JSSA, “a defendant must show that the government substantially failed to comply with the methods set forth by statute for the selection of the jury.” *LaMere*, ¶ 56 (citing 28 U.S.C. § 1867(a) (1994)).

This Court adopted the standard from federal law, which construes a substantial failure to comply as “a violation that contravenes one of two basic principles under the JSSA: (1) random selection of jurors; and (2) determination of juror disqualification, excuses, exemptions, and exclusion on the basis of objective criteria.” *LaMere*, ¶ 57 (citing *United States v. Royal*, 174 F.3d 1, 11 (1st Cir. 1999)).

This Court explained that “[a] substantial failure to comply encompasses a statutory violation that affects the random nature or objectivity of the selection process.” *LaMere*, ¶ 57 (citation and quotation marks omitted).

However, “technical violations—even numerous such violations—that do not frustrate these goals or result in discrimination and arbitrariness do not

constitute a substantial failure to comply.” *LaMere*, ¶ 58. This Court observed that the Commission Comments to Mont. Code Ann. § 46-16-112 provided that “a successful challenge to the jury panel can be founded only upon a ‘*material departure* from the law’ with respect to the manner in which the jury was selected, drawn, or summoned.” *LaMere*, ¶ 59 (emphasis in original).

This Court held that summoning potential jurors by telephone materially undermined the goal of the jury selection statutes to provide for random selection of jurors on the basis of objective criteria, requiring reversal. *LaMere*, ¶¶ 17, 75-76. *LaMere* presented statistics demonstrating a significant percentage of residents in Cascade County were Native American and further, a significant percentage of Native Americans lacked a telephone. *LaMere*, ¶¶ 5-8.

Because *LaMere* demonstrated the error undermined the random selection of jurors and the removal of jurors based on objective criteria, this Court reversed his conviction based upon that substantial violation of Mont. Code Ann. § 3-15-505 (1997). *LaMere*, ¶¶ 62, 75.

This Court also reversed a conviction in *State v. Highpine*, 2000 MT 368, 303 Mont. 422, 15 P.3d 938, because the clerk served notice on potential jurors by telephone. Like *LaMere*, *Highpine* presented statistical analysis demonstrating that the clerk’s method of jury formation in that case excluded economically disadvantaged people from the jury. *Highpine*, ¶ 40.

By contrast, statutory violations that did not impact the random nature or objectivity of the jury selection process have been determined to be technical violations, which are not reversible absent a showing of prejudice. “Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded” and “[a] cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.” Mont. Code Ann. § 46-20-701(1)-(2).

For example, this Court found that a judge’s improper dismissal of a juror before trial was not a material failure to substantially comply and was harmless because the potential juror would not have served, and her dismissal did not affect the defendant’s right to an impartial jury. *Bearchild*, ¶¶ 19-23. Similarly, this Court held an error was harmless when the wrong alternate juror deliberated on the case. *State v. Oschmann*, 2019 MT 33, ¶ 19, 394 Mont. 237, 434 P.3d 280.

As Johnson from the Clerk’s Office confirmed, the panel of 85 potential jurors in this case was in fact randomly drawn. (Hr’g at 45.) If there was a technical violation of the statute in certifying the list of non-responsive jurors to GCSO on September 8, 2023, or in allowing potential jurors multiple ways to respond to their notice, there is no evidence that either action affected the random selection and objective disqualification of the potential jurors in this case.

As the district court concluded:

There is *no evidence* that the 85 jurors randomly selected to report to the Court for the jury trial in this case do not represent a fair cross section of the citizens of Gallatin County, Montana. The Court concludes that the manner in which the Clerk's Office and the GCSO acted with respect to the drawing/empaneling of the jury substantially complied with the mandates of § 3-15-405, MCA. The Court further concludes Defendant has not established he was deprived of a fair and impartial jury in this case and, as a result, any error in the drawing/empaneling of the jury was harmless.

(Doc. 117 at 19 (emphasis added).)

CONCLUSION

The district court did not abuse its discretion in limiting Donahue's cross-examination of the victim or denying Donahue's motion for a new trial. The conviction should be affirmed.

Respectfully submitted this 10th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,275 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, Thad Nathan Tudor, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-10-2024:

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