IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0284

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RYAN PATRICK DONAHUE,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

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

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Respectfully submitted this 27 day of January, 2025.

ARGUMENT

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

A. Character for Violence is Admissible Absent Defendant's Knowledge

Joshlin's self-admitted character as a violent individual is admissible. Mont. R. Evid. 404(a)(2).

The State, as did the district court, conflates the rules related to a witness' general pertinent character trait with those rules related to admissibility of specific instances of conduct which may or may not represent a person's general character.

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except … [e]vidence of a pertinent trait of character of the victim of the crime offered by an accused." Mont. R. Evid. 404(a)(2) (emphasis supplied).

In other words, Rule 404 states that if a character trait of the victim is pertinent, it is directly admissible to show the person acted in conformity with that trait of character. Rule 405 then goes on to address the *methods* of proof. *State v. Montgomery*, 2005 MT 120, ¶ 16, 327 Mont. 138, 112 P.3d 1014. The second half of that rule pertains to use of specific instances of conduct, and cases interpreting this rule have indeed held that a defendant must be aware of prior instances of

conduct if he is trying to use those instances to say *why* he reacted with a certain level of force. *See*, Mont. R. Evid. 405(b); Appellee br. at 23.

To the contrary, at issue in the underlying trial was the victim Marcus Joshlin's self-admitted reputation for being a violent person who likes to fight. There is no such restriction in the first prong of Rule 405, where general character may be proven by "testimony as to reputation or by testimony in the form of an opinion." Mont. R. Evid. 405(a). Joshlin's admitted reputation, and his opinion of himself was admissible.

The reasons underlying this rule are common sense, as explained by this Court over a century ago:

> While there is some diversity in the opinions of the courts as to whether evidence of the reputation of the deceased is competent for any purpose unless it is known to the defendant at the time of the homicide (and evidence of such knowledge was not introduced at the trial of this case), the weight of authority, we think, gives support to the rule that when, as in this case, the issue is self–defense, and there is doubt as to who was the aggressor, such evidence is admissible in order to enable the jury to resolve the doubt; for <u>it is entirely in accord with everyday experience that a turbulent, violent man is more aggressive and will more readily bring on an encounter, than one who is of the contrary disposition</u>.

State v. Jones, 48 Mont. 505, 139 P. 441, 446–47 (1914)(emphasis supplied; holding the violent character evidence of the victim improperly excluded).

This concept is presently codified under Rules 404(a)(2) and 405(a), where an alleged victim's "character for violence [is] admissible … as a 'pertinent' character trait vis-a-vis [a] justifiable use of force defense." *State v. Sattler*, 1998 MT 57, ¶ 43, 288 Mont. 79, 95, 956 P.2d 54, 64. *Compare; State v. Cartwright*, 200 Mont. 91, 104, 650 P.2d 758, 764 (1982)(noting the admissibility of violent character upon a properly raised self defense claim), with *State v. Logan*, 156 Mont. 48, 65, 473 P.2d 833, 842 (1970)(distinguishing violent character generally, with those things known to the defendant that affected his state of mind).

Joshlin repeatedly stated he had a violent tendency, that he fought a lot, and that indeed he enjoyed fighting. This violent character was pertinent and admissible under *Sattler* and Mont. R. Evid. 404(a)(2).

The central issue for the jury to resolve was the conflicting testimony of Joshlin and Donahue as to what happened leading up to the altercation. Was it Donahue feeling excluded from an after-party, or was it a violent threat from Joshlin that necessitated a use of force. By excluding the character evidence, the jury was unable to rely on its "everyday experience that a turbulent, violent man is more aggressive and will more readily bring on an encounter." *Jones*, *supra*.

B. Credibility of Witness Joshlin and his Testimonial Biases are Relevant and were Raised to the District Court

The State argues that Donahue raises Joshlin's various possible testimonial biases – the prior Bozeman investigation, missed court dates, warrants, etc. – for the first time on appeal. Donahue directly raised all of these issues to the District Court at trial. Appx. A, Doc. 84, Motion *in Limine* at pp. 4-7.

The State further attempts to minimize the relevance of the evidence, and to cast doubt on the logical inferences that could be drawn from it. Appellee Br. at p. 15 n. 5, pp. 24-25.

Joshlin had a pending criminal matter related to an assault investigation in Bozeman. He had indisputably missed his court date in that case. He was also a probation absconder from the state of Hawaii related to felony assault offenses. Appx. A, Exhibits A-C.

The logical relevance of these pending criminal proceedings, and how they might affect Joshlin's truthfulness in this case, was laid out as a matter of federal constitutional importance by the Supreme Court in the cases previously cited: *Alford v. United States*, 282 U.S. 687, 693, 51 S. Ct. 218, 220 (1931); *Davis v. Alaska*, 415 U.S. 308, 316–17, 94 S. Ct. 1105, 1110 (1974). The State's attempt to trivialize the "rational theory" of this evidence's relevance is belied by the

thorough explanation given by the Court in those cases of how it can bear on a person's motivations to be truthful, all addressed in the Opening Brief of Donahue.

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

A. Donahue's Motion for a New Trial was Timely

The State argues that the trial court erred in not finding Donahue's motion for a new trial untimely.

On September 15, 2023, Donahue became aware that certain potential errors in the jury summoning process had impacted Gallatin County when the trial court held status hearings in various cases that were approaching trial, vacating those trials at the request of counsel. Doc. 100, at 1. Donahue then filed his motion for a new trial on October 10, 2023. Doc. 100. The State argued the motion was untimely for the same reasons as argued here. Doc. 108 at 4-7. Ultimately the Court did not find Donahue's motion untimely, and did not decide that issue. Doc. 117.

Donahue moved for a new trial under §46-16-702 M.C.A, the appropriate mechanism where this Court has recognized that "counsel ha[s] a right to rely on the judge and clerk to follow their statutory duties" in the process of summoning juries. *Dvorak v. Huntley Project Irr. District*, 196 Mont 167, 172, 639 P.2d 62, 64-65 (1981). "[I]f counsel does not have knowledge, or means of knowledge, of

the irregularity in the drawing of the jury, or the panel from which it is selected until after the verdict, the question may be raised for the first time on motion for a new trial." *Id*., at 171-72. (quoting *Ledger v. McKenzie*, 107 Mont. 335, 85 P.2d 352 (1938)).

As such, Donahue's motion was timely. The defects in the formation of the annual jury pool were unknown to Donahue prior to, or at the time of trial. Indeed, the revelation created substantial disruption in the trial courts in Gallatin County. As noted the underlying trial court held a status hearing on September 15, 2023, vacating all approaching jury trials at the option of defendants.[1]

The Clerk's office acknowledged that even it had been unaware of the problem until it heard of similar deficiencies in other counties. Tr. 12/22/23, at 42, 48, 50. The State has an obligation to ensure a fair trial and compliance with the laws, and yet the State also made no pre-trial motion to discharge the jury panel in this case. In arguing that Donahue's motion is untimely, the State would fault Donahue for not acting on what the State, the Clerk, and the district court also did not … despite being in an arguably better position to be aware of the problem and correct it.

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[1] At least as known to Donahue and cited in his motion, these included Eighteenth Judicial District Court cause numbers DC-22-245, 268, 322, DJ-23-1, and DC-23-156.

B. No Reason for Delay of Certification of the List to the Sheriff

The State next relies on the district court's conclusion that an earlier certification date of non-responding jurors to the Sheriff is not required by statute, would have been a waste of resources, and that an earlier date would not have been reasonable or even possible. Appellant brief at 21, 27. The district court found that responses to jury postcards were still coming in through Donahue's trial date. *Id.*

These arguments are inconsistent with the evidence presented. A brief mathematical breakdown:

The jury-summoning postcards were mailed out the first week of May, 2023, for the relevant jury term in this case which started July 1, 2023. Tr. 12/22/23, at 18. Jurors were given ten days to respond. Tr. 12/22/23, at 21.

The start of the jury term that encompassed Donahue's trial was July 1, 2023, and as of that date 3,522 jurors had responded as being available. Tr. 12/22/23, at 26. Testimony indicated that generally the size of the pool decreases due to trial juries being drawn. Tr. 12/22/23, at 29.

From July 1, 2023 through August 15, the date on which Donahue's trial jury was drawn, 575 names had been taken out of the pool due to having been drawn for seven previous trials. Tr. 12/22/23, at 33. So when the names were drawn on August 15, 2023 for Donahue's trial, only 2,935 juror names remained available due to those prior trials as well as additional excusals or other reasons.

Tr. 12/22/23, at 30-32. Subtracting the 575 "used" names from the original list yields:

3,522
- 575
2,947

There was no testimony as to the additional 12 missing people, other than they may have been subsequently excused for other reasons. *Id*. The point, however, is that if responses continued to roll in during the weeks and months after July 1, 2023, they were *extraordinarily* few in comparison to the 3,522 who responded before July 1, 2023.

As such, the State's argument that it would have been a waste of resources to try to find the non-responding jurors before September 8, 2023 (the date that certification actually occurred), because responses were still being received, is disingenuous to the facts presented to the district court.

The only reasonable reading of the statute is that it requires certification to the Sheriff before juries are being drawn from the pool. The Clerk testified that nothing would have prevented the list from being certified on or about July 1, 2023. Tr. 12/22/23, at 51.

The State offers no other, more reasonable time or date, and its argument implies that compliance with the law should simply be optional. Indeed, there had

been no plan to certify a list of non-respondents to the Sheriff in the works for any date within the year-long jury term. Tr. 12/22/23, at 50. The only reason it was done is because the Clerk became aware of similar problems in other counties. Tr. 12/22/23, at 42, 48, 50. The Clerk took remedial action "to come in compliance with the statute." Tr. 12/22/23, at 35.

Additionally, the claim that certification is a fool's errand, which will not meaningfully impact the jury pool, is undermined by the success that the Sheriff demonstrated once the list of non-responders was certified. As noted in Donahue's Opening Brief, the Sheriff's Office subsequently attempted to serve 573 people from the list of non-responders as of the December 22, 2023 hearing on the motion. Tr. 12/22/23, at 83. Only 20 were unable to be served, while some were determined ineligible (deceased, moved, or excused). Tr. 12/22/23, at 38-41, 57; App. C, at 17. There were 68 who were served but did not respond (curiously 2 of those apparently affirmatively refused to respond). *Id*. However 322 people of the 573 names attempted were placed in trial jury pools. *Id*.

This demonstrates that the Clerk's prior method, which essentially allowed potential jurors to opt-out, could be very effectively remedied by the personal service efforts of the Sheriff's Office.

C. Prejudice is Presumed, but also Evident

At its core, this case is on all fours with *LaMere* – the Clerk used a jury summoning process that did not comply with the statute by requiring a phone or internet response, and compounded that noncompliance by failing to serve non-responsive juror names to the Sheriff for personal service.

In *LaMere*, telephone calls were similarly noncompliant with the statute, resulting in a similar self-exclusion possibility. *State v. LaMere*, 2000 MT 45, ¶ 10, 298 Mont. 358, 364, 2 P.3d 204, 208. Even the rates of exclusion for non-responders is similar where 70 out of 200, or 35% were excluded from the possible jury pool in *LaMere*, *Id*., and here 3,759 non-responders were excluded out of 10,000 names for the annual pool, or 37.5%. Tr. 12/22/23, at 64-65.

The State nonetheless argues that excluding over one-third of names that were randomly generated could have no effect on the random and diverse nature of the jury pool.

Donahue presented argument to the district court that the Clerk's primary requested method of response – filling out a questionnaire online – would have had a disproportionate effect based on age, income, and ethnicity each of which can be linked to the likelihood to have internet access. Doc. 111, at 5. Additionally, he presented argument that housing stability which could have had an effect on receipt of the Clerk's mailing is highly affected by income. *Id*., at 7. The State

elicited testimony at the hearing that age had a disproportionate effect on the likelihood to call and request a physical mailing where 275 of 325 paper questionnaire copies were sent to those aged 60 or older. Tr. 12/22/23, at 28.

Certainly, several of these potential effects on the actual makeup of the jury panel are speculative. It is for this very reason that this Court noted that structural errors that precede trial itself "'cannot be discerned from the record' and [are] so 'purely speculative' that a presumption of prejudice obtains." *LaMere*, at ¶ 41. Where, as here, material noncompliance with the jury summoning statutes has been shown, prejudice is presumed and reversal required.

The process used by the Clerk's office prior to September 8, 2023 was a material deviation from the jury selection statutes in Gallatin County, having unknown disproportionate exclusionary effects on groups of people unable, unwilling, or unlikely to use a phone or internet response - the only methods offered, even if a paper form were desired. Further, non-responders were not pursued, despite a statutory mechanism and mandate, resulting in a system of voluntary jury service as condemned in *LaMere*, at ¶73.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quotes and indented mater, and the word count calculated by Microsoft Word for Windows is 2,551 words, excluding certificates of service and compliance.

By: /s/ Nicholas Miller
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I, Nicholas Miller, hereby certify that I have served a true and accurate copy of Appellant's Reply Brief on January 27, 2025 to the following:

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