

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0597

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CAVEY LITTLE ROSSBACH,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twentieth Judicial District Court,
Sanders County, The Honorable Leslie Halligan, Presiding

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STATEMENT OF THE ISSUES

1. Whether Appellant has met his heavy burden of proving that this Court should invoke plain error to review his unpreserved claim that the district court did not fully and fairly instruct the jury on justifiable use of force in defense of another when the district court instructed the jury that a person is justified in the use of force intended to cause death or serious bodily harm to prevent a forcible felony against another person.

2. Whether Appellant has met his heavy burden of proving that defense counsel provided ineffective assistance of counsel by not requesting a jury instruction that Appellant's use of deadly force was justified to protect family members when the district court instructed the jury that a person is justified in the use of force intended to cause death or serious bodily harm to prevent a forcible felony against another person.

STATEMENT OF THE CASE

On October 26, 2020, the State charged Appellant Cavey Rossbach (Rossbach) with deliberate homicide for purposely or knowingly causing the death of William (Bill) Conko-Camel by repeatedly shooting him with a firearm. (D.C. Doc. 3.) Rossbach provided notice that he intended to rely on the affirmative defense of justifiable use of force. (D.C. Doc. 28 at 4.)

The State submitted 27 proposed jury instructions and a proposed verdict form. (D.C. Doc. 123.) The State submitted 5 proposed justifiable use of force instructions. (*Id.*, Proposed Instrs. 23-27.) Attorneys Nick Brooke and Colin Stephans represented Rossbach. (D.C. Doc. 141.) Rossbach objected to the State’s proposed instruction 25, which instructed that the use of force in defense of a person is not available to a person who purposely or knowingly provokes the use of force against him, except in limited circumstances. (4/11/2022-4/19/2022 Transcript of Jury Trial [Tr.] at 1503-10, 1524-25.)

The district court instructed the jury that if a defendant has offered justifiable use of force, the State has the burden of proving beyond a reasonable doubt that the defendant’s actions were not justified. (D.C. Doc. 148, Instr. 22.)

The district court also instructed the jury:

A person is justified in the use of force or threat to use force when and to the extent he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.

However, a person is justified in the use of force which is intended to likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious harm to himself *or commission of a forcible felony*.

(D.C. Doc. 148, Instr. 23 (emphasis added), attached to Appellant’s Br. as App. C.)

The district court further instructed the jury that “forcible felony” means “a felony

that involves the use or threat of physical force or violence *against any individual.*”

(*Id.*, Instr. 26 (emphasis added).)

The district court further instructed the jury:

The Defendant has offered evidence of justifiable use of force in this case. You are to consider the following requirements of the law in determining whether the use of force claimed by Defendant was justified:

[1] The danger of harm to the Defendant must be a present one and not threatened at a future time, and not made by a person without the present ability to carry out the threat;

[2] The force threatened against the Defendant must be unlawful;

[3] The Defendant must actually believe that the danger exists, that is, use of force is necessary to avert the danger and that the kind and amount of force which defendant uses is necessary;

[4] The Defendant’s belief, in each of the aspects described, must be reasonable even if it is mistaken.

[5] A person who is lawfully in a place or location and who is threatened with bodily injury or loss of life has no duty to retreat from a threat, or summon law enforcement assistance prior to using force.

Even if you determine the use of force by Defendant was not justified, the state still has the duty to prove each of the elements of the crime charged beyond a reasonable doubt.

(*Id.*, Instr. 25.)

During the jury trial, the parties submitted the following stipulation, and the court presented it to the jury:

Based on agreement of the parties, the Court orders that the following facts be considered true by the jury:

The jury in this matter shall take as true facts in this case, and no additional proof[] is needed that at the time of the shooting of William Conko-Camel, the Defendant's children, Nateesha Rossbach, Snchle Rossbach, and Sharae Rossbach were not present.

(D.C. Doc. 142.)

The jury found Rossbach guilty of deliberate homicide and found that he had used a firearm to commit the deliberate homicide. (D.C. Doc. 143, attached to Appellant's Br. as App. A.)

Adult Probation and Parole Officer Lynn Bierwagen completed and submitted a Presentence Investigation (PSI). (D.C. Doc. 154 (confidential).) At the conclusion of the PSI, Officer Bierwagen recommended that the district court sentence Rossbach to prison for 100 years with a parole restriction. (*Id.* at 13.) Officer Bierwagen also recommended that if Rossbach is ever paroled, he should be required to wear a GPS device for the duration of his supervision. (*Id.*)

The district court held a sentencing hearing on June 16, 2022, after which the court sentenced Rossbach to Montana State Prison for 90 years with no time suspended and a consecutive 10-year sentence for committing deliberate homicide with a dangerous weapon. (D.C. Doc. 156, attached to Appellant's Br. as App. B.)

STATEMENT OF THE FACTS

In October 2018, Bill Conko-Camel was 49 years old. (Tr. at 278-79.) He had a college degree in business, had worked for Hewlett-Packard, and then had gotten his real estate license and sold houses so he could be available for his children; he was self-taught in welding, construction work, and mechanics. (Tr. at 283-85.) Bill was also passionate about and an avid fan of basketball. (Tr. at 282.) Rossbach cut Bill's life short on October 5, 2018, when he shot him repeatedly with a hunting rifle after having twice knocked him unconscious. (Tr. at 722-24, 1247-48, 1391-93.)

That October, Abilene Matt (Abby) lived with Rossbach, her common law husband, in Dixon Agency, on Frank McClure Street, with their 5 children. (Tr. at 463-65.) Abby had known Rossbach since she was 13 years old. Rossbach had a history of using methamphetamine. (Tr. at 465.) Abby's and Rossbach's oldest son, Preston, worked with Rossbach in Lolo for Kelly Tree Service. (Tr. at 467.) Preston's friend, Ty Butler, also worked for Kelly Tree Service. (Tr. at 468.)

Abby had had a good day on October 5, 2018.¹ She had been home with her daughter, gone to the store, and cooked dinner for her family. (Tr. at 466-67.)

¹ At trial, some witnesses testified that Rossbach shot and killed Bill on October 5, 2018, and others testified that the shooting occurred on October 4, 2018. The Information alleged the deliberate homicide occurred on October 5, 2018 (D.C. Doc. 1), so the State has used October 5, 2018, to limit confusion.

Abby did not consume alcohol or use methamphetamine that day. Rossbach had been in Lolo, working, and had come home from Lolo that evening. He was intoxicated and angry. Abby was unaware of anything happening that would have made him so angry. (Tr. at 467-68.) Rossbach then left the house, drunk and angry. Abby had no idea where he was going. (Tr. at 469.) When Rossbach left the house, only Abby and her son Donald were home. (Tr. at 479.)

Abby's mom lived nearby, so, after Rossbach left, Abby went to her mom's house. Abby's mom had a police scanner on. Abby later learned through the scanner that Rossbach had gotten himself into some trouble. Abby went home and went downstairs to check her laundry. While she was downstairs, she found some marijuana plants that she believed Rossbach's brother, William (Dunie) Rossbach had placed there. (Tr. at 472-73.) Abby anticipated that law enforcement might come looking for Rossbach, so she wanted to get rid of the plants before that happened. Abby and Donald wrapped the plants up in a blanket. (*Id.*) Donald intended to get rid them. Abby followed him outside. (Tr. at 474.)

As Abby stepped outside, she could hear Rossbach yelling. She then saw Rossbach pointing a gun at someone, who she later discovered was Bill. Preston and Ty were behind Bill. (Tr. at 475.) Abby later explained that there is a tree stump and a speed bump that coincide with their property line. Rossbach was standing near the stump and speed bump with the gun. Abby explained there are at

least two other speed bumps farther up the street. (Tr. at 477-78.) She recalled Rossbach shooting the rifle three times but was not positive on the number of shots she heard. Abby knew Bill was hit because he spun around and fell. (Tr. at 480.) Rossbach had fired at Bill again after Bill spun around. (Tr. at 483.) Abby began yelling at Rossbach. When Rossbach looked at her, he had a blank look on his face, like he did not realize what he was doing. (*Id.*)

Abby repeatedly stated that Preston and Ty had been behind Bill, farther away from her house. (Tr. at 483-84.) Abby could not be certain if Bill had anything in his hand as he was coming down the street because it had been dark, but she did not think he did, and she had not felt like she was in any danger. (Tr. at 485-86.) Abby had not heard any yelling right before Rossbach shot Bill. (Tr. at 503.) She explained that it was difficult testifying in front of her husband, but stated, “I mean it shouldn’t have happened, that’s all I know.” (Tr. at 486.)

Abby bought the rifle Rossbach used to shoot Bill as a birthday gift for Donald. (Tr. at 487-88; State’s Exs. 117, A-C.) The gun was a .243 hunting rifle. (Tr. at 488.) This was the only gun Abby had in her residence. After Rossbach shot Bill, the gun was no longer in the residence and Abby had no idea what happened to it. (Tr. at 489.)

Abby acknowledged that when she initially spoke with tribal investigators, she told them she was at her mom’s house and did not see anything. She was

scared and shocked about what had happened. (Tr. at 490.) After Rossbach shot Bill, he left, and Abby did not see him for several days. She had no idea where he had gone. (Tr. at 495.)

In 2018, Kayla Campos-Courchane (Kayla) also lived in Dixon Agency, on Frank McClure Street, with her boyfriend Ty and their son and daughter. Ty worked for Kelly Tree Service with Preston and Rossbach. (Tr. at 304-05.) On October 4, 2018, Kayla's nephew was visiting, so she arranged a ride for Ty to come home. (Tr. at 307.) Ty arrived at the house with Preston, and they were intoxicated. (*Id.*) They left the house after 20 or 30 minutes. (Tr. at 308-09.)

Later that evening, Kayla's son and nephew were playing when her nephew called out: "gunshots, gunshots!" (Tr. at 309.) Kayla realized that her nephew was right. She told her son and nephew to stay put and not open the door for anyone. She went outside, feeling nervous since she did not know where the shots had come from. She wanted to make certain that Ty was okay. (Tr. at 310.)

As Kayla was walking towards Rossbach's house, she saw a body near Katie and George (George) Coffey's house, by a speed bump. (Tr. at 311-12.) After seeing the body, Kayla turned around and headed back towards her house. She stopped at a neighbor's house and told him about the body and then went to her house and checked on the children. (Tr. at 316.) She then left the house again. This time, she saw Abby's and Rossbach's son Donald walking outside the Rossbach

house with a blanket. (Tr. at 318.) Kayla did not see Ty until about 7:30 the next morning. (Tr. at 319.)

Casey Couture has been an officer with the Flathead Tribal Place on the Flathead Indian Reservation for 16 years. (Tr. at 339.) On October 5, 2018, at about 11:16 p.m., Officer Couture learned through Sanders County Dispatch of shots being fired in Dixon Agency. Officer Couture heard there was a body on Frank McClure Street. (Tr. at 341.) Upon arriving in Dixon Agency, Officer Couture saw a prone body in the street, with a female seated next to the body. (Tr. at 348.) Officer Couture determined that it was Bill's body lying in the street, and his girlfriend Cora Thurman who was seated next to Bill with her hand on his torso. There was blood around Bill's nose and mouth and a puddle of blood underneath the back of his head. (Tr. at 349-50.) Bill's right arm was outstretched and bent at a 90-degree angle, with more blood under Bill's right wrist. His eyes were open, he was not breathing, and he did not have a pulse. (Tr. at 350.)

Officer Couture photographed Cora and Bill as he found them. (Tr. at 352-53; State's Exs. 65-66.) Based on initial interviews with numerous people, Officer Couture identified Rossbach, Preston, and Ty as potential suspects. (Tr. at 357.) During Officer Couture's investigation, he determined that the distance between Rossbach's house and where he found Bill's body was approximately

55 yards. (Tr. at 361.) Officer Couture used a range finder to measure the distance. (Tr. at 363-65.)

On October 5, 2018, at about 11:20 p.m., Deputy April Phillips of the Sanders County Sheriff's Office was dispatched to Dixon Agency. She arrived at 11:42 p.m. (Tr. at 520, 526-28.) She found crime scene tape around the perimeter of where a body was lying in the street. (Tr. at 532.) There were already evidence markers at the crime scene, and Deputy Phillips photographed everything marked as potential evidence. She took 63 photographs. (Tr. at 537, 542.) Near the body, Deputy Phillips observed a discharged bullet casing, a tooth, and tissue from the victim, Bill. (Tr. at 538; *see also* State's Ex. 119.) Deputy Phillips did not see anything that could be characterized as a steel pipe. (*Id.*) She also did not find a firearm or any other weapon near Bill's body. (Tr. at 565.) Deputy Phillips estimated that Bill's body was between 30 and 50 yards from Rossbach's house. (Tr. at 572.)

Deputy Phillips took more photographs at George's house. She photographed a regular hammer on the floor. (Tr. at 560; State's Ex. 31.) She photographed an earring lying on the floor that appeared to match the earring Bill was wearing in one ear when officers found his body in the street. (Tr. at 561-62; State's Ex. 34.) Deputy Phillips also observed signs of an altercation in George's

house. For example, a kitchen chair was tipped over, the trash can was tipped over, and something had been spilled onto the floor. (Tr. at 586.)

Louis Fiddler has worked for the Flathead Tribal Police for 26 years. At the time of Rossbach's trial, he served as the police captain. A few days after Bill's homicide, Captain Fiddler spoke with Abby at her mom's house. He gave Abby his business card and told her that he was looking for Rossbach to have a conversation with him. (Tr. at 721.) Rossbach called Captain Fiddler the next day, and Captain Fiddler instructed him to contact the Sanders County Sheriff's Office. (Tr. at 722.)

Rossbach did so, but he gave a false statement to the detective. Rossbach told the detective that he was not present when Bill was shot and offered that perhaps the Mexican Mafia was involved. (Tr. at 1315-16.)

In 2020, Rossbach gave a statement to Investigator William Mesteth. (Tr. at 677.) Rossbach told Investigator Mesteth that on October 5, 2018, he had gone to George's house to check on him and found Bill there using meth. Rossbach said that Bill had clubbed him in the shoulder and hit him in the head with a ball-peen hammer. Rossbach claimed that he then ran to the river and stayed in the woods for about a week. Rossbach stated he had been badly hurt. (Tr. 679.) He claimed that George's daughter Rainey had also been there, and she had swung something at him. (Tr. at 682-83.) Rossbach said that "they" had hit him with something on his way out of the house. (Tr. at 684.)

Rossbach complained to Investigator Mesteth that law enforcement did not do enough about the drug problem in Dixon Agency, so he took it upon himself to “ke[ep] it in order.” (Tr. at 681.) Rossbach said he “didn’t fucking kill anybody.” (*Id.*) He said he was the one who got hurt and no one had investigated it. (*Id.*) Rossbach denied shooting Bill and claimed that his shoulder was so badly injured he would not have been able to hold a rifle. (Tr. at 685.)

Also in 2020, Captain Fiddler reached out to the Sanders County Sherriff’s Office to offer assistance because the investigation appeared to be at a standstill. (Tr. at 725.) Captain Fiddler interviewed Rossbach on October 22, 2022. (Tr. at 731.) During the interview Rossbach admitted that he had killed Bill. (Tr. at 733; *see also* State’s Exs. 124-A and 124-B.) Rossbach explained how angry he had been after learning his brother Dunie had placed marijuana plants in his basement. Rossbach had yelled at his brother and then had physically assaulted him. (Tr. at 741.)

Afterwards, Rossbach said, he went to George’s house to check on him. (Tr. at 742.) George was known to local law enforcement officers as a methamphetamine user, and his house was associated with drug use. (Tr. at 628.) George was not home but his daughter Rainey and Bill were in the kitchen using methamphetamine. This made Rossbach angry because George had just gotten out of prison and would get into trouble if law enforcement discovered meth in his

house. Rossbach confronted Rainey. He claimed that Bill had chimed in, so he punched him and knocked him out. (Tr. at 742-43.)

Rossbach said he had waited for Bill to revive so he could assault him again. When Bill did regain consciousness, Rossbach said, Bill grabbed a hammer and struck Rossbach in the face. Rossbach said the two began scuffling, but then Rossbach picked Bill up by the shirt, slammed him down on the chair, and “stomped him out”—meaning that he knocked him unconscious again. (Tr. at 744.) Rossbach said that when Bill woke up a second time, he decided to leave. By then, Preston and Ty were at the house. Rossbach claimed that Bill had been coming at him with something, and he had been trying to get Preston and Ty out the door. Rossbach said that Bill had used something to hit him on the shoulder, after which Preston got whatever was in Bill’s hand and “donkey kicked” Bill. The three took off running toward Rossbach’s house. (Tr. at 745-46.)

Rossbach claimed that he shot Bill from his porch and that Bill was right on his property line. (Tr. at 749.) Rossbach also claimed that where Bill fell to the ground was where he was when Rossbach shot him. (*Id.*) However, Captain Fiddler explained that Bill’s body was not found right on Rossbach’s property line. (*Id.*) Rossbach further claimed that all his children were outside near him when he shot Bill. (Tr. at 750.) But the parties’ written stipulation, which the district court

read to the jury, established that Rossbach's statement about his children was not accurate. (*See* D.C. Doc. 124.)

On October 9, 2018, forensic pathologist Dr. Aldo Fusaro of the Montana State Crime Lab performed an autopsy on Bill. (Tr. at 868.) Bill was 5'9 and weighed 189 pounds. (Tr. at 869.) Dr. Fusaro took photographs of the autopsy, some of which were admitted at trial to assist in his testimony. (Tr. at 871; State's Exs. 36-44, 46-47, 56-57.) Dr. Fusaro quickly observed that Bill had some injuries to his central face. (Tr. at 873; State's Ex. 37.)

Dr. Fusaro grouped Bill's wounds into complexes. (Tr. at 879.) For wound complex number 1, Dr. Fusaro explained that Bill had a large, star-shaped tear that went through his upper lip, took out some teeth, and then broke the maxilla on the side of his face. (Tr. at 879-80; *see also* State's Exs. 54-55, 58.) That wound was produced by a high-powered weapon, which caused the large defect. Dr. Fusaro could not determine the directionality of the wound, but the projectile had gone laterally across Bill's face and broken a lot of structures on its way through. (Tr. at 880.) There was no evidence of close-range fire associated with the wound. (*Id.*) This gunshot wound would have started to bleed right away. (Tr. at 888.)

In addition to the gunshot wound to Bill's face, Dr. Fusaro documented that Bill's nose was displaced, he had sustained a nasal bone fracture at the bridge of his nose and bruising to the lower left eyelid. (Tr. at 882-83.)

Wound complex number 2 was located on Bill's right upper arm, below the shoulder, 11 inches from the top of his head. It was a typical gunshot entry, with a small round hole. (Tr. at 886-87.) There was an abrasion around the entry from the bullet scraping the skin as it went in. (Tr. at 887.) This was not a close-range injury because there was no stippling or soot around the wound. (*Id.*) The bullet went through the outside part of Bill's upper arm, fragmented the humerus, and then exited through the inside of the arm. The exit wound was considerably larger than the entrance wound. (Tr. at 887-88; *see also* State's Ex. 61.) This gunshot wound impacted Bill's biceps and triceps. (Tr. at 891.) It would have been extremely painful, and, because it went through the muscle wall of Bill's arm, it very likely hampered his ability to use that arm. (Tr. at 892.)

Wound complex number 3 was located at the distal forearm of Bill's right arm, about three inches above the wrist crease. (Tr. at 892-93; *see also* State's Ex. 62.) The bullet went through Bill's radius and impacted the extensor tendon for his thumb. This would have made it difficult for Bill to move his thumb upward, and, in conjunction with the other wound to Bill's arm, would have greatly decreased the functionality of his arm. (Tr. at 894-96.)

Wound complex number 4 was on Bill's upper central left abdomen, slightly under his ribcage. This was a circular gunshot wound with a fine rim of abrasion around it. There was no evidence of close-range fire. (Tr. at 896-97.) This gunshot

wound impacted the abdominal wall musculature; it hit the small bowel and the small bowel mesentery, the lower pole of the left kidney, and the spine at L4-L5. The bullet with through the spine into the spinal canal and disrupted the spinal cord. As a result, this injury would have greatly impaired Bill's ability to stand. (Tr. at 897-98; *see also* State's Exs. 59-60, 63.) This injury most likely resulted from Bill facing square on with the muzzle fire. (Tr. at 899.) If Bill was upright when he sustained this gunshot injury, it was likely that he would have fallen to the ground immediately. (Tr. at 900-01.)

The wounds in wound complex number 5 did not result from a bullet entering the body. Rather the wounds consisted of pseudo-stippling. (Tr. at 901.) Pseudo-stippling happens when there is an intermediate target that fragments and is driven into the skin by a bullet. (Tr. 865.) Dr. Fusaro noted pseudo-stippling on Bill's upper back, central neck, back, and upper left shoulder. (Tr. at 901; *see also* State's Exs. 48-51.) Dr. Fusaro believed that a bullet must have struck somewhere above Bill's head to cause the pseudo-stippling injuries to Bill's left shoulder and neck. (Tr. at 905-06.) Dr. Fusaro believed that Bill had been on his back, near the ground when he sustained the injuries in wound complex number 5. (Tr. at 914.)

As Dr. Fusaro completed the internal examination of Bill's body, he observed wounds to the interior of his skull. There was bleeding inside the skull

around the brain. (Tr. at 908.) All of Bill's wounds were caused by separate projectiles, meaning there had been five different projectiles. (Tr. at 917.)

Dr. Fusaro explained that the abdominal wound would have been lethal, but it would have taken some time. He opined that it was the totality of the wounds that caused Bill's death. (Tr. at 921.) The five separate wounds that Bill sustained culminating in his death, were from five different gunshots. (Tr. at 923.)

Kevin Winer (Winer) is the director of the Kansas City Police Crime Laboratory, who, in his personal time, consults primarily on the topic of bloodstain pattern analysis. (Tr. at 953, 955.) After reviewing evidence from the crime scene documenting Bill's death, Winer concluded that when Bill's nose and mouth began bleeding, Bill was not upright, and, "[E]vidence lends support that decedent sustained at least one bleeding injury to the nose and mouth while supine—which is on [his] back, face up—at the location in which he was found.'" (Tr. at 990.)

In October 2018, Rossbach's and Abby's son Donald was 15 years old and lived with his parents and siblings on Frank McClure Road in Dixon Agency. (1019, 1021.) On October 5, 2018, Donald went to school, came home, and played basketball. (Tr. at 1021.) Both Rossbach and Preston were in Lolo working that day. Around 4:30 p.m., Donald's uncle Dunie came over with some marijuana plants and placed them in the basement on the floor. (Tr. at 1024.)

Afterwards, Donald fell asleep, but awoke to hear his mom tell his dad to leave. Donald explained that his dad was “buzzed up and drunk.” (Tr. at 1027.) Rossbach was “pretty intoxicated,” and he was angry, so Donald’s mom asked him to leave the house. (Tr. at 1053.) Donald said his dad left the house, but, before he did so, Donald told his dad about Dunie placing marijuana plants in the basement. His dad was angry and left the house. (*Id.*) Donald said he then ate dinner and went back to sleep. (Tr. at 1029.)

Donald stated he woke up again when his brother Preston ran into the house and asked Donald where his gun was located. Preston grabbed Donald’s .243 rifle and ran back outside. Donald and his mom then went outside. (Tr. at 1032-33.) Donald claimed that when he went outside, he saw his dad “trying to make his way down the road” with Ty’s help. Bill was running down the road screaming. (Tr. at 1034.) Donald said Preston ran to his dad and gave him the gun. Donald claimed he tried to tell Bill that there was a gun. (Tr. at 1035.) Donald said “they” were all trying to tell Bill to get behind a tree because there was a gun and he was going to get shot. (Tr. at 1038.)

Donald claimed that Bill did not heed the warning, and his dad “started shooting.” (Tr. at 1038-39.) Donald estimated that he and his mom were about 10 to 15 yards behind his dad, who was closer to Bill. (Tr. at 1039.) After the first shot, Donald said his dad “just kept shooting.” (Tr. at 1041.) Donald did not see

anything in Bill's hand, but said he was "far back." (Tr. at 1043.) Donald explained that his rifle is a bolt-action rifle. (Tr. at 1041.)

Donald saw Bill fall. He thought maybe Bill fell after the third shot. (Tr. at 1042-43.) When his dad stopped shooting, he put the gun on the ground and started picking up the shell casings. (Tr. at 1041.) Donald said Ty picked up the gun and they both headed quickly down the road. (Tr. at 1043-44.) Donald said he suddenly remembered the marijuana plants in the basement. He ran to the house, threw the marijuana plants in a blanket and disposed of them outside of the house. (Tr. at 1044.)

Donald claimed that Bill had been running down the road yelling he was going to kill his dad and his dad's whole family. (Tr. at 1047.) Donald stated that only he and his mom were outside when his dad shot Bill. (Tr. at 1063.) Donald estimated that Bill was about 25 yards away when his dad shot him. (Tr. at 1072.)

Donald acknowledged at trial that he had previously spoken to law enforcement officers and stated that he did not see any shots fired. Instead, he had claimed that he and his mom were at his grandma's and grandpa's house and did not see what happened. (Tr. at 1052.) Donald told law enforcement that he did not even see a gun on October 5, 2018. (Tr. at 1056.)

At trial, Preston testified that after work on October 5, 2018, neither he nor his dad were "drinking too much." (Tr. at 1104.) After returning to Dixon Agency,

Preston went straight to Ty's house to play video games. Preston and Ty drank Twisted Tea and Fireball. (Tr. at 1105.) Preston claimed he stepped outside and heard a commotion coming from George's house and it sounded like his dad's voice. Preston and Ty headed to George's house. Preston claimed that from the porch of George's house he saw his dad and Bill having an "argumental, physical fight." (Tr. at 1106.) Preston stated that Bill threw the first punch and he never saw his dad throw a punch. Preston said that Rainey called the cops. (Tr. at 1107.)

According to Preston, he got between his dad and Bill because his dad was losing the fight. (*Id.*) Preston thought that Bill had hit his dad in the face with something that looked like a hammer, although he did not see this happen. (Tr. at 1108.) Preston said he left George's house, thinking everything was over. But he also claimed that he immediately ran to his house, went inside, and retrieved his brother's rifle because he felt threatened and thought his dad's life was in jeopardy. (Tr. at 1113-14.)

Preston stated that when he came back outside with the rifle, Bill was "speed-walking" down the street yelling that he was going to kill Preston's entire family. Preston claimed that Bill had something "really large" in his hand like "a club or something." (Tr. at 1115, 1124.) Later in his testimony, Preston specifically identified the object in Bill's hand as a big pipe but also stated that he had very bad distance eyesight. (Tr. at 1119, 1184-85.) Rossbach met Preston on the porch,

grabbed the rifle from him and told him “no.” From the porch, Rossbach told Bill to stop. Rossbach then left the porch with the rifle and headed towards Bill.

Preston said he heard Bill state, “[Y]ou won’t use that,” and then his dad started shooting. Preston estimated his dad fired four shots and claimed that Bill fell on the third shot. (Tr. at 1121-23.)

According to Preston, after his dad shot Bill, Preston, Rossbach, and Ty all took off running. Preston said his dad was carrying the rifle. The three all ended up near the river. (Tr. at 1126-27.) Preston claimed that the three of them never discussed what had happened. (Tr. at 1145.) Preston also maintained that law enforcement should have found a big pipe by Bill’s body, which Preston claimed Bill was carrying as a weapon. (Tr. at 1146.)

Preston acknowledged that he had gone inside the house and grabbed the rifle without hearing or seeing Bill, and further admitted that when he was inside the house, he had been safe. (Tr. at 1173, 1193.) Preston asserted that, even though it was obvious that his dad repeatedly shot Bill in self-defense, he never volunteered this information to law enforcement, and instead ran, because he viewed law enforcement as the “biggest gang in the United States.” (Tr. at 1147, 1187.)

At trial, Ty testified that after arriving home from Lolo on October 5, 2018, he and Preston played video games at his house. Preston went out to smoke. He

came back inside and said that he thought his dad was in a fight. (Tr. at 1443-44.) The two ran to George's house. Ty recalled that Rossbach was on the ground and Bill was standing over him. Ty claimed he saw Rossbach getting struck with a hammer, but then said he did not see Bill physically strike Rossbach, he just saw motions. Ty believed that Rossbach had hurt his shoulder in George's kitchen while he was struggling with Bill. (Tr. at 1446-47.)

Ty claimed he put himself in the middle of everything so he could get Preston and Rossbach out of the house, and had been somewhat successful. (Tr. at 1447-48.) Ty recalled that Bill had been fighting all of them. He did not recall seeing Rainey. (Tr. at 1449.) Ty stated that Rossbach was the first one out the door. Ty was next and Preston was behind him. According to Ty, Bill kicked Preston off the porch. (Tr. at 1450.) Ty claimed that at the bottom of the porch, Bill picked up a big, old water pipe and started swinging it at all three of them. (Tr. at 1451.)

While the three were running away from George's house, Rossbach and Preston were ahead of Ty. Ty claimed that Bill was right behind him swinging the pipe at all of them. (Tr. at 1452.) Ty did not see or hear Bill stop at his truck. Ty never made it to Rossbach's house. (Tr. at 1454.) Ty also did not hear Bill yelling anything. (Tr. at 1456.) Rossbach came out with a gun and Bill kept walking forward. Ty told Bill, "[D]ude, he's got a gun, just—I mean stop, dude, he's got a gun, he's got a gun." (Tr. at 1457-58.)

Ty saw Rossbach shoot Bill. Ty heard five shots. (*Id.*) Ty thought that Bill fell after the second shot. (Tr. at 1459.) Ty did not see the pipe in Bill's hand when Rossbach shot him. (Tr. at 1460.) After Bill was on the ground, Ty recalled, Rossbach continued to shoot him, but he was not sure how many times. Ty was sure there was at least one more shot after Bill hit the ground. (Tr. at 1460-61.) When Rossbach shot Bill, Ty thought he was by the speed bump near Rossbach's house. (Tr. at 1472.) Ty said he was closer to Bill than Rossbach when Rossbach shot Bill. (Tr. at 1475.)

Ty acknowledged that he ran after Rossbach shot Bill. He explained he had been thinking, "I'm in the wrong because—I mean I was with them, you know, so, like, I figured, like, it was just—I felt just as guilty, you know." (Tr. at 1462.) Ty testified that he thought he might have thrown the gun Rossbach used to kill Bill in the river. (Tr. at 1463.) Ty spent the night with Rossbach and Preston down by the river. (Tr. at 1464.) He maintained that the three never discussed what had happened. (Tr. at 1465.) Ty admitted that the first time he spoke to law enforcement, he lied. He said he had no idea why he did so. (Tr. at 1466.)

Ty testified that if he had had a gun on October 5, 2018, he would not have used it to shoot Bill. (Tr. at 1493.) Ty did not feel like Bill needed to be shot. (Tr. at 1494-95.)

At trial, Rossbach testified that as soon as he got home on the evening of October 5, 2018, Abby told him that his brother had left marijuana plants in the basement. (Tr. at 1210.) Rossbach was angry at his brother, so he left the house to look for him. (Tr. at 1212.) Although Rossbach was upset about the weed in his house, he did not remove it. (Tr. at 1342.)

Rossbach found his brother at his girlfriend Chelsea's house and confronted him. Rossbach admitted he had yelled at his brother but his brother did not yell back. Rossbach claimed that Chelsea's dog began biting him, so he picked up the dog and threw it, causing the dog to yelp. Chelsea ordered him to leave. Before Rossbach left, he slapped his brother across the face. (Tr. at 1217-19.) His brother did not hit him back. (Tr. at 1221.)

Rossbach claimed he was going to head back home after leaving Chelsea's house, but then he ran into Preston and Ty. (Tr. at 1223.) Rossbach said Preston invited him to Ty's house to play video games and he accepted the offer. (Tr. at 1224-25.) On the way, Rossbach noticed lights on inside George's house, so he decided to go check on him. (Tr. at 1224, 1227.) Ty said he had to run to grab something at his house, so Preston waited for Ty. (Tr. at 1228.)

When Rossbach got to George's house, he saw George's daughter Rainey and Bill smoking meth. This made him upset, and he confronted Rainey. At some point, Bill told Rossbach that he was not getting any of his meth. Rossbach

responded that he did not want any of his “fuckin’ meth.” (Tr. at 1242-44.) Bill asked him why he was “talking shit.” (Tr. at 1246.) Rossbach responded, “I ain’t fuckin’ talkin’ shit,” and “blasted” Bill in the face. (Tr. at 1246-47.) Bill slumped over from the blow. (Tr. at 1247.)

Rossbach had no concerns about striking Bill without anyone to back him up because he carries himself well in a fight. (Tr. at 1370.) Bill had done nothing to Rossbach to justify Rossbach hitting him. (Tr. at 1381.) Rossbach admitted that during his interview with Captain Fiddler he had explained that instead of leaving, he waited for Bill to wake up so he could keep fighting him. (Tr. at 1387-88.)

Rossbach claimed Bill woke up and struck him with a ball-peen hammer. (Tr. at 1248.) Rossbach then clarified that he “assumed” Bill hit him with a ball-peen hammer. (Tr. at 1250.) Rossbach acknowledged that since he had knocked Bill out, Bill had every right to defend himself when he awakened. (Tr. at 1381.) Rossbach recalled that by this time Preston and Ty had arrived and were in the living room. (Tr. at 1253.)

According to Rossbach, Bill then grabbed him, and they scuffled in the kitchen. (Tr. at 1252.) Bill ended up on the floor and Rossbach struck him a couple of times. (Tr. at 1256.) Rossbach believed he had knocked Bill out a second time. (Tr. at 1391.) During his interview with Captain Fiddler, he described, “Boom, boom, stomped him out.” (Tr. at 1393.) At this point, Rainey said she was calling

the police. (Tr. at 1394.) Rossbach thought he had gotten the best of Bill and expected to have the upper hand in any fight. (Tr. at 1380.)

Rossbach recalled staggering towards the living room, where he ran into Preston and Ty. As he did so, he was struck by something on the shoulder. (Tr. at 1260.) Ty got outside first, and Rossbach was second. Preston was the last one out of the house. Rossbach claimed that Preston took something from Bill, threw the item back in the house, kicked Bill in the chest, and Bill fell backwards. Preston and Rossbach started running. (Tr. at 1261-63.)

Rossbach claimed he tripped and fell on the ground. He did not look back but could hear and feel something behind him. He could feel the “wind or something swinging.” (Tr. at 1264.) Rossbach said that Preston picked him up off the ground and then they took off. (*Id.*) Preston was much faster, so he sped off towards their house. Rossbach caught up to Ty, who helped him down the road. (Tr. at 1265.)

Rossbach claimed he could hear running and yelling, and he knew it was Bill. (Tr. at 1266-67.) According to Rossbach, Bill stopped at his truck and Rossbach could hear “jostling around in the truck.” (Tr. at 1268.) Rossbach stated that Bill was screaming that he was going to kill them. Preston had already made it to the house and run inside. (Tr. at 1270.) When Rossbach got to his property he

saw Abby and Donald outside and he told them to “get back in the fucking house.” (Tr. at 1271.)

According to Rossbach, Preston came out of the house with a rifle and said he would just “shoot this motherfucker.” (Tr. at 1272.) Rossbach was in the yard, as were Ty, Abby, and Donald. Rossbach went to Preston, said “no,” and grabbed the rifle out of his hands. (Tr. at 1273.) Rossbach said he told everyone to get back in the house. He yelled at Bill to “fucking stop right now.” (Tr. at 1274-75.) He warned Bill that he had a rifle and he would kill him. Rossbach said he had the rifle pointed toward the ground. (Tr. at 1275.) He claimed he started advancing towards Bill because he wanted to put himself between his family and the threat. (Tr. at 1276-77.)

Rossbach explained that it was too dark to see anything besides a silhouette, but he could “hear advancement.” (Tr. at 1277-78.) Based on what he heard, Rossbach fired repeatedly. (Tr. at 1278.) He shot the bolt action rifle until there was no more ammunition. (Tr. at 1280.) Rossbach admitted that he had been drunk. (Tr. at 1289.) After he stopped firing, Abby approached him and said, “[W]hat the fuck did you just do?” (Tr. at 1260.) He did not respond. Instead, he “started picking brass up” out of habit. (Tr. at 1288.)

After picking up the spent cartridges, Rossbach, Preston, and Ty fled. (Tr. at 1294.) Rossbach thought he was justified in killing Bill, but he did not stick around

to explain what happened because he knew he would not get a fair shake. (Tr. at 1298.) He concluded that he had no chance with the police. (Tr. at 1299.)

Rossbach recalled that he met up with Preston and Ty down by the river. Ty still had the rifle. (Tr. at 1300-01.) Rossbach took the bolt out of the rifle and threw that in the river. Ty threw the rifle in the river. (Tr. 1302-03.) Ty went home the next day, but Rossbach and Preston camped out in the woods for nine days. (Tr. at 1307-10.) Rossbach maintained that during the nine days he spent in the woods with Preston they never discussed Rossbach's shooting and killing Bill. (Tr. at 1327.)

When Rossbach shot Bill, he was at the edge of his property where it meets the pavement. (Tr. at 1291.) Rossbach admitted that he never saw anything like a weapon in Bill's hand. (Tr. at 1335.) Rossbach shot a person in the dark, who was likely unarmed, because Bill had yelled that he would kill him and his family. Rossbach said he repeatedly fired in the direction of the threat. (Tr. at 1336-37.)

SUMMARY OF THE ARGUMENT

Rossbach's unpreserved claim of instructional error and his record-based IAC claim both fail based on the weight of the record, which establishes that the district court instructed the jury that Rossbach was justified in using force sufficient to inflict death or serious bodily harm if he did so to protect himself or to

prevent a forcible felony against another. The district court instructed the jury that forcible felony means a felony that involves the use or threat of physical force or violence against any individual. Rossbach defended against the charge that he shot Bill five times without even knowing whether Bill was armed, and after he had knocked Bill out twice, by arguing that he had heard Bill yell that he intended to kill Rossbach and his family. Rossbach asserted he was defending his family and himself from this imminent harm. The jury instructions on justifiable use of force and the definition of forcible felony supported Rossbach's defense theory and allowed the jury to find Rossbach not guilty based on his defense theory if it chose to do so.

The jury's guilty verdict cannot be attributed to either the district court erroneously instructing the jury or to defense counsel failing to offer correct jury instructions because the district court fairly instructed the jury. The jury found Rossbach guilty based upon the overwhelming evidence the State presented of Rossbach's guilt and the weak evidence Rossbach presented that he was justified in using deadly force to protect himself and his family.

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ARGUMENT

I. The standard of review

This Court generally will not address issues raised for the first time on appeal. *State v. George*, 2020 MT 56, ¶ 4, 399 Mont. 173, 459 P.3d 854. This Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made, under plain error review. *State v. Palafox*, 2023 MT 26, ¶ 16, 411 Mont. 233, 524 P.3d 461, citing *State v. Lackman*, 2017 MT 127, ¶ 9, 387 Mont. 459, 395 P.3d 477. This Court exercises plain error review when failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *Id.* This Court exercises plain error review “sparingly, on a case-by-case basis, and only in this narrow class of cases.” *Id.*

When an issue concerning jury instructions in a criminal case has been preserved, this Court reviews the jury instructions to determine whether the instructions, as a whole, fully and fairly instructed the jury on the law applicable to the case. *State v. Daniels*, 2019 MT 214, ¶ 26, 397 Mont. 204, 448 P.3d 511. A district court has broad discretion in formulating jury instructions. This Court will not reverse on a claim of instructional error absent an abuse of discretion that

prejudicially affected a defendant's substantial rights. *State v. Kaarma*, 2017 MT 24, ¶ 7, 386 Mont. 243, 390 P.3d 609.

Ineffective assistance of counsel claims (IAC) are mixed questions of law and fact, which this Court reviews de novo. *Palafox*, ¶ 18. This Court reviews IAC claims on direct appeal if the claims are based solely on the record. *State v. Cheetham*, 2016 MT 151, ¶ 14, 384 Mont. 1, 373 P.3d 54.

II. Rossbach cannot meet his heavy burden of proving plain error review of his claim that the district court did not fully and fairly instruct the jury.

Rossbach asks this Court to conduct plain error review of his assertion that the district court plainly erred because it did not fully and fairly instruct the jury on justifiable use of force. This Court reviews for plain error sparingly, on a case-by-case basis. *State v. Clemans*, 2018 MT 187, ¶ 20, 392 Mont. 214, 422 P.3d 1210 (“A mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine.”); *State v. Gunderson*, 2010 MT 166, ¶ 100, 357 Mont. 142, 237 P.3d 74, quoting *State v. Whipple*, 2001 MT 16, ¶ 34, 304 Mont. 188, 19 P.3d 228. Rossbach must “firmly convince” this Court of plain error. *State v. Akers*, 2017 MT 311, ¶ 10, 389 Mont. 531, 408 P.3d 142, quoting

State v. Favel, 2015 MT 336, ¶ 23, 381 Mont. 472, 362 P.3d 1126. Rossbach cannot meet this burden.

District courts have broad discretion in formulating jury instructions. *State v. Daniels*, 2011 MT 278, ¶ 38, 362 Mont. 426, 265 P.3d 623. When a claim of instructional error has been preserved, this Court reviews the instructions as a whole to determine “whether they fully and fairly instruct the jury on the applicable law.” *State v. Iverson*, 2018 MT 27, ¶ 10, 390 Mont. 260, 411 P.3d 1284, quoting *State v. Sanchez*, 2017 MT 192, ¶ 7, 388 Mont. 262, 399 P.3d 886. If Rossbach had preserved his claim of instructional error, it would have been incumbent upon him to “show prejudice in order to prevail, and prejudice will not be found if the jury instructions in their entirety state the applicable law of the case.” *Iverson*, ¶ 10, quoting *Tarton v. Kaufman*, 2008 MT 462, ¶ 19, 348 Mont. 178, 199 P.3d 263.

Because Rossbach could not have established prejudicial error even if he had preserved his claim of instructional error, it is impossible for him to meet the heightened burden that plain error review is warranted. While Rossbach acknowledges that this Court must consider the district court’s jury instructions as a whole to determine if the instructions fully and fairly instructed the jury, he omits the most significant instruction relevant to the claim he raises—the definition of a forcible felony.

The district court instructed the jury that a person is justified in using force intended to or likely to cause death or serious bodily harm if the person reasonably believes the force is necessary to prevent the commission of a forcible felony. (Appellant's App. C, Instr. 23.) The district court instructed the jury that forcible felony means "a felony that involves the use or threat of physical force or violence against any individual." (*Id.*, Instr. 26.) Rossbach's defense theory was that his use of deadly force was justified because Bill had threatened to kill him and his entire family. A threat to kill Rossbach's family members meets the definition of a forcible felony. Consequently, the district court did instruct the jury on his second defense theory.

Rossbach argues, "The instructions, taken together, make no mention of any similar justification when that same person is acting to protect another." (Appellant's Br. at 18.) This assertion is the foundation for Rossbach's plain error argument. The assertion, however, is incorrect because the district court instructed the jury that Rossbach was justified in using force intended to or likely to cause death or serious bodily harm if he reasonably believed the force was necessary to prevent the commission of a forcible felony, defined as "a felony that involves the use or threat of physical force or violence against any individual." (Appellant's App. C, Instr. 26.)

Based on the jury instructions the district court provided to the jury, it had the ability to find Rossbach not guilty if it believed that he shot and killed Bill to prevent Bill from seriously harming or killing any member of his family or Ty. The jury did not believe that Rossbach's actions were justified. Notably, Abby testified that she did not feel like she was in danger. She also testified that Preston and Ty were both behind Bill, not in front of him. Ty testified that he was near Bill but, even so, if he had possessed a gun, he would not have shot him. The jury convicted Rossbach based on the overwhelming evidence that the State presented at trial proving beyond a reasonable doubt that his use of deadly force was not justified to protect either himself or others.

This Court should decline to review Rossbach's unpreserved claim of instructional error because the district court did fully and fairly instruct the jury on the applicable law, including Rossbach's ability to use deadly force to prevent a forcible felony against another person. Rossbach received a fundamentally fair trial, and failing to review his claim will not result in a manifest miscarriage of justice or compromise the integrity of the judicial process.

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III. Rossbach cannot meet his heavy burden of proving IAC because it is impossible for him to prove the prejudice prong of his IAC claim.

Rossbach is guaranteed the right to effective assistance of counsel under the United States and Montana constitutions. *Clemans*, ¶ 22. This Court analyzes IAC claims under the two-part test the United States Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *McGarvey v. State*, 2014 MT 189, ¶ 24, 375 Mont. 495, 329 P.3d 576. To prove ineffective assistance of counsel, Rossbach must show: (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced him. *Id.* ¶ 24. Because a defendant must prove both prongs of *Strickland*, if a defendant fails to prove either prong, this Court need not consider the other. *Rose v. State*, 2013 MT 161, ¶ 22, 370 Mont. 398, 304 P.3d 387. Because Rossbach cannot prove the prejudice prong of his IAC claim, his claim fails.

Under the prejudice prong of the *Strickland* test, Rossbach must establish that, but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *State v. Turnsplenty*, 2003 MT 159, ¶ 14, 316 Mont. 275, 70 P.3d 1234. Rossbach cannot meet that burden because, as set forth above, the district court afforded the jury instructions that allowed it to find Rossbach not guilty if his use of force was justified to prevent a forcible felony against another. Based upon the IAC claim Rossbach has raised on direct appeal,

the record conclusively establishes that he cannot meet his burden of proving that if his defense counsel had offered a different instruction there was a reasonable probability of a different outcome. The district court instructed the jury on the circumstances in which a person is justified in using deadly force to protect another person. Rossbach's counsel strenuously argued this theory to the jury. Notably, the only two witnesses who expressed that they had experienced fear of Bill, were Donald and Preston—Rossbach's two sons who both admitted that they had originally lied to law enforcement and whose testimony was rife with inconsistencies.

CONCLUSION

The district court's jury instructions fully and fairly instructed the jury on justifiable use of force, including Rossbach's ability to use deadly force to prevent a forcible felony against another. Consequently, Rossbach cannot meet his heavy burden of proving either that plain error review is warranted for his claim of instructional error or that his trial counsel was ineffective for not offering a

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different jury instruction. The State respectfully requests that this Court affirm Rossbach's conviction and judgment.

Respectfully submitted this 13th day of February, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,049 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-13-2025:

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