

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0147

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ALEXANDER GARRETT LAFORGE III,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Donald Harris, Presiding

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STATEMENT OF THE ISSUES

Whether the district court abused its discretion when it did not assign new counsel after conducting a hearing to consider LaForge's complaints and the attorney's responses.

Whether the district court abused its discretion when it declined to give LaForge's instruction directing the jury to treat codefendant's testimony with "greater caution" than other witnesses when the court provided four pattern instructions concerning witness credibility.

Whether the district court erred when it ordered LaForge to pay restitution for loss of income to Ness's family's business based on Ness's mother's testimony.

STATEMENT OF THE CASE

The State charged Alexander Garrett LaForge, III, with deliberate homicide for shooting Brett Ness (Brett) on April 27, 2020. (Docs. 1-3.)

The district court permitted LaForge's first assigned public defender to withdraw, based on LaForge's complaints, and David Merchant was assigned to represent LaForge. (12/14/20 Tr.; Docs. 23-25.) After considering LaForge's displeasure with Merchant's representation a few days before his trial, the court concluded that LaForge's complaints did not create a substantial basis upon which to assign different defense counsel. (10/1/21 Tr.)

LaForge's jury trial lasted four days. (10/4/21 Tr.; 10/5/21 Tr.; 10/6/21 Tr.; 10/7/21 Tr. (herein after, JT-1, JT-2, JT-3 and JT-4 respectively).) LaForge proposed a jury instruction directing the jurors to treat the testimony of codefendants with greater caution than other witnesses. (JT-3 at 129-32; Docs. 55, 57.) The court sustained the State's objection to the instruction. (*Id.*) The jury found LaForge guilty of deliberate homicide with the use of a weapon. (JT-4; Doc. 65.01.)

On May 23, 2022, the district court sentenced LaForge to the Montana State Prison (MSP) for a term of 110 years with a 50-year parole restriction. (5/23/22 Tr. at 74-79; Doc. 98.) The court ordered LaForge to pay restitution for Brett's funeral and internment (\$3,500 to Crime Victim's Fund; \$4,861 to the Ness family) and \$72,000 in lost revenue to the Ness family business. (*Id.*)

On March 2, 2023, LaForge filed a *pro se* Petition for an Out-of-Time Appeal with this Court. LaForge claimed that he had discussed filing an appeal with his trial counsel and that his attorney had advised LaForge's sister that he was filing an appeal. LaForge further asserted that he had been trying to get in touch with his trial counsel. On March 7, 2023, this Court granted LaForge's petition. LaForge's Opening Brief was filed on October 18, 2024.

STATEMENT OF THE FACTS

I. Offense and investigation

On April 23, 2020, Jaqueline Medicine Horse (Jackie) asked her friend, Dana Bastian (Dana), where she could buy some methamphetamine. (JT-1 at 126-32, 146-49; JT-3 at 54- 68; Exs. 67, 68, 68A, 69, 69A.) Dana had recently purchased methamphetamine from Brett, so she arranged to meet him that evening. (*Id.*) Both Dana and Jackie wanted to buy drugs, so they drove to the Bubble Bath Car Wash where they met with Brett. (*Id.*) Jackie had changed her mind about how much methamphetamine she wanted, so Brett did not have enough. (*Id.*) Dana and Jackie followed Brett back to his trailer on Florine Lane. (*Id.*) They parked behind Brett's SUV in his driveway and Brett went inside. (*Id.*) A short time later, Brett returned with multiple baggies of methamphetamine, which he gave Dana and Jackie in exchange for money. (*Id.*) Joseph Miller (Joseph), Brett's roommate, was inside the workshop next door to Brett's trailer and saw parts of the transaction. (JT-2 at 6-30.)

The next day, Jackie messaged Dana that she had been shorted in the transaction. (JT-1 at 132-35, 146-49; Exs. 17-20.) Jackie believed she did not receive all the baggies she paid for and threatened to call Dana's probation officer. (*Id.*) Dana disagreed and replied Jackie got the correct amount. (*Id.*) Jackie accused Dana of planning to rip her off and texted, "Collector is going to see your

dude.” (*Id.*) Dana contacted Brett to let him know Jackie did not think the drug transaction had been fair. (*Id.*)

On the evening of April, 26, 2020, Kristy Alden (Kristy) was driving her car in Billings with Jackie, LaForge, and LaForge’s girlfriend, Kassie Bird In the Ground (Kassie), as passengers. (JT-2 at 160-66, 200-13.) Jackie and LaForge directed Kristy to a trailer on Florine Lane and told her to pull into the driveway. (*Id.*) Jackie told Kristy that Dana lived there and owed her money. (*Id.*)

Brett and his girlfriend, Malea Orser (Malea), were about to leave when Kristy’s dark colored Camry pulled in and blocked their way. (JT-2 at 33-50, 160-66, 200-13; JT-3 at 70-71; Exs. 70, 70-A.) Jackie and LaForge got out of the vehicle and confronted Brett, asking where Dana was and that she had ripped them off for \$400. (*Id.*) Brett explained Dana did not live there and told them to get off his property. (*Id.*) This made LaForge angry, and he became more aggressive and agitated and stepped towards Brett. (*Id.*) Brett told Malea to get in their car and lock the door and he went inside. (*Id.*) While Brett was inside, Malea got out of the car and tried to talk to LaForge and Jackie and deescalate the situation. (*Id.*) Jackie identified herself and told Malea if she figured out where Dana was to message her on Facebook. (*Id.*)

About this time, Brett came out with an assault rifle, pointed it at LaForge and told him to “Get the fuck off my property.” (JT-2 at 38-43.) LaForge looked

at Malea and said, “You better move, bitch because I’m going to be back here and it ain’t going to be fucking pretty.” (*Id.* at 39.) LaForge then turned to Brett and said, “You don’t aim a gun at somebody you don’t fucking intend to kill!” (*Id.*) LaForge and the women then left. (*Id.*)

Brett called Dana about LaForge and Jackie coming to his house looking for Dana and demanding money. (JT-2 at 42-50.) Brett told Dana she had to fix this problem and asked for her number and address. (*Id.*; JT-1 at 135-36.) Brett and Malea sent Dana’s information to Jackie through Facebook Messenger. (*Id.*)

At about 4 a.m. on April 27th, Kristy drove LaForge and Jackie to Dana’s apartment. (JT-1 at 136-46, 149-51; JT-2 at 166-71; JT-3 at 71-113; Exs. 71, 72.) When LaForge and Jackie pounded on her door, Dana was scared and did not answer. (*Id.*) The pair returned four hours later, and Dana came out and talked to them. (*Id.*) Dana described LaForge’s role as “mediator” between her and Jackie. (*Id.*) Dana told Jackie she had treated her fairly and Dana believed Jackie was at fault for creating a conflict because she was greedy. (*Id.*) Dana testified that the pair did not act aggressively, and the conversation ended amicably. (*Id.*)

At 8:22 a.m., Dana texted Brett the following message: “Hey I squashed that problem with Crazy Native lady and her muscle.” (JT-1 at 1472-43; Ex. 20.) A few minutes later, Dana texted: “I apologize for that I hope that didn’t do

anything too fucked up they came and talked to me..basically he agreed with [sic] everything I had to say and fist bumped the end of the conversation. . . .” (*Id.*)

That same morning, Raisha Blacksmith (Raisha) and her friend, K.E. (a minor), agreed to give James Fisher (James) and Brian Prettyweasel (known as “H.P.”) a ride from Billings to Hardin. (JT-2 at 50-62, 86-96, 125-30, 132-60; JT-3 at 4-43, 75-79; Exs. 73, 74.) K.E. did not know either James or H.P. (*Id.*) Raisha picked the two men up at the Lazy KT motel in her green Chrysler Sebring. (*Id.*) Both men were carrying a semiautomatic gun; James had a .40 caliber Springfield and H.P. had a .45 caliber Smith and Wesson. (*Id.*) The men asked Raisha to take them to the Vegas Hotel to find someone who owed H.P. money and buy drugs. (*Id.*) The person was not there so Raisha drove them all back to the Lazy KT so James could get his bag. (*Id.*)

LaForge was in the Lazy KT parking lot with his brother, Sheldon, Garrett Door (Garrett), and Kristy. (JT-2 at 50-60, 97-100, 127-50, 170-213; JT-3 at 4-40.) While H.P. talked to LaForge, James went inside. (*Id.*) LaForge asked H.P. to be backup with him when he went to get money from someone who owed him. (*Id.*) James did not trust LaForge, but agreed they could follow LaForge. (*Id.*)

Kristy drove the vehicle with LaForge, Garrett, and Sheldon as passengers while Raisha followed in her vehicle with K.E., James, and H.P. (JT-2 at 58-70,

99-104, 130-60, 172-213; JT-3 at 4-40, 79-113; Ex. 75.) LaForge told Kristy to drive to the trailer they were at before, explaining the men with him were going to “collect for me.” (*Id.* at 174-75.) When the two vehicles arrived at Brett’s trailer, Joseph was just pulling away, so they kept driving. (*Id.*) Raisha followed Kristy’s vehicle to the end of the street where both vehicles stopped. (*Id.*) H.P., who still had his .45 caliber gun, got out of Raisha’s vehicle and into Kristy’s vehicle with LaForge. (*Id.*)

Joseph took notice of the two cars because Brett and Malea had told him about LaForge threatening them the day before. (JT-2 at 11-30; Ex. 75.) Joseph watched the vehicles stop at the end of the road and saw one male get into the other car. (*Id.*) Joseph called Brett to warn him that the people may be back and told Brett to lock the door. (*Id.*) As Joseph pulled away, he saw the two vehicles returning to the trailer so he drove around the block. (*Id.*)

Kristy parked on the street in front of Brett’s trailer and Sheldon and Garrett got out and walked to the driveway, while LaForge and H.P. went to the side door nearest to the driveway. (JT-2 at 62-80, 101-24, 130-60, 165-213; JT-3 at 8-40, 75-113; Ex. 75.) LaForge was carrying H.P.’s gun. (*Id.*) Raisha parked in front of the workshop next to the trailer. (*Id.*) James walked up behind LaForge and H.P. as LaForge was kicking the trailer door. (*Id.*) Kristy, K.E., and Raisha stayed in the vehicles. (*Id.*) Krista heard them pounding on the door. (*Id.*) Joseph also

heard pounding on the door through Brett's phone that he had left in the bathroom. (JT-2 at 19-30, 178.)

Brett opened the door while holding a bat and stood on the steps. (JT-2 at 67-86, 101-15, 124, 154-60; JT-3 at 8-40; Exs. 75, 75A.) Brett looked at James who had stepped straight back from the door near the SUV parked in the driveway. (*Id.*) James thought Brett was going to swing the bat at him, so he pulled out his gun and pointed it at Brett. (*Id.*) James believed Brett then saw LaForge and H.P. in his peripheral vision when H.P. and LaForge stepped back from the steps. (*Id.*) James then watched LaForge pull out H.P.'s .45 caliber gun and shoot Brett in the head. (*Id.*) James did not see H.P. with anything in his hands. (*Id.*) Raisha saw that H.P. was behind LaForge when Brett was shot and, while she did not see who fired, she knew the only two men holding guns were LaForge and James. (*Id.*) K.E. saw the three men at Brett's door and watched LaForge shoot Brett. (JT-2. at 132-60.) The video surveillance showed that James and H.P. ran back to the cars first, followed by LaForge. (JT-3 at 85-86.)

When LaForge got into Kristy's car, he said, "Did you see that? He's dead. I fucking killed him." (JT-2 at 180-81, 205-13.) LaForge yelled at Kristy to drive away. (*Id.*) Kristy was so upset by the shooting that she almost hit another car. (*Id.*) She stopped the car and Sheldon then drove. (*Id.* at 181-213.) James told

Raisha to drive in a different direction and when they got to a stop sign James and Garrett got out of the car. (JT-3 at 13-40.)

Justin George (Justin) had a business on Florine Lane about 50 yards away from Brett's trailer and was closing up around 5 p.m. when he heard a gunshot coming from Brett's trailer. (JT-1 at 121-26.) Justin ran towards Brett's trailer and saw a Pontiac Grand Prix speeding away. (*Id.*) Justin found Brett had fallen onto a milk crate at the bottom of the steps and he laid Brett on the ground. (*Id.*) Justin felt Brett had a pulse and told his business partner to call 911. (*Id.*)

By the time Joseph got back to the trailer, the other cars were gone, and he saw Brett lying on the ground and two neighbors were standing near him. (JT-2 at 19-30.) Joseph started to call 911, but stopped when he heard sirens heading towards them. (*Id.*) Joseph did not stay at the scene because he was in possession of drugs and paraphernalia, but he later returned and gave a statement to the officers. (*Id.*)

Billings Police Department (BPD) was dispatched at approximately 5:22 p.m., to a reported shooting on Florine Lane. (JT-1 at 109-20; Exs. 9-14, 33-35.) BPD Officer Mackenzie Unruh discovered Brett lying on his back with a large pool of blood surrounding his head. (*Id.*) There was also a baseball bat on the ground and a black SUV parked in the driveway with its driver's side door open. (*Id.*) Officer Unruh noted Brett had been shot once in the head, but he had a radial pulse, so the officer administered first aid until the paramedics arrived. (*Id.*) Paramedics

took Brett to the hospital, but he later died from the gunshot. (*Id.*) Officer Unruh found a .45 caliber shell casing near Brett's left leg and secured it as evidence. (JT-1 at 109-20; Exs. 15-16.)

An alert went out to find Raisha's vehicle. (JT-2 at 132-35, 142-60.) Officers stopped the vehicle near Toluca and detained Raisha and K.E. (*Id.*) K.E. gave a statement to BPD Detective Bethany Schwartz, explaining that she was sure neither H.P. nor James shot Brett, but that it was another man who they met at the Lazy KT. (*Id.*) Someone told K.E. LaForge's name and when she looked up his Facebook account, K.E. recognized him as the man who shot Brett. (*Id.*)

Sheldon, who was driving Kristy's vehicle with LaForge in the front seat and Kristy in the back, drove past the officers surrounding Raisha's vehicle. (JT-2 at 181-213.) They continued driving on remote roads, eventually stopping at a Cenex. (*Id.*) LaForge told Kristy and Sheldon that he would kill them if they said anything about what had happened. (*Id.*) LaForge also wanted to have Kristy's car crushed, so it could not be later identified, but Kristy refused. (*Id.*)

Malea spoke to the officers at the scene and described what had happened the day before when Jackie and two others confronted Brett outside his trailer. (JT-2 at 44-50.) Later, Malea reviewed a photo-lineup with Detective Schwartz and identified LaForge as the man who had threatened to return. (*Id.*; Exs. 64-66; JT-3 at 47-52.)

A few days later, after hearing Brett had been shot and believing she may be in danger, Dana came to the police. (JT-1 at 143-46.) Dana described the drug transaction with Jackie and Brett and described how LaForge and Jackie had confronted her early on April 27th. (*Id.*)

When Detective Schwartz interviewed Sheldon, he declined to provide any information about what happened on April 27th. (JT-3 at 98.) BPD Detectives' attempts to locate H.P. through his probation officer were unsuccessful and they were unable to obtain a statement from him. (JT-2 at 244-45; JT-3 at 100-01.)

Detective Schwartz reviewed surveillance footage that overlooked Florine Lane and part of Brett's driveway. (JT-3 at 52-80; Exs. 67-76A.) The surveillance footage showed two vehicles parking, and five individuals got out and headed toward the trailer. (*Id.*) Less than one minute later, the five individuals were observed running back to the vehicles with two getting into one vehicle and three getting into the other vehicle. (*Id.*) Both vehicles sped off. (*Id.*)

Dr. Robert Kurtzman from the Montana State Crime Lab performed the autopsy and documented Brett's injuries. (Ex. 55; Exs. 1-5.) Brett had been shot in the right upper forehead. (*Id.*) Based on the stippling on Brett's skin, the doctor determined he had been shot at close range, likely within two feet. (*Id.*) The bullet exited the back of Brett's head. (*Id.*) The trajectory of the bullet was front to back, right to left, and downward. (*Id.*)

Detective Schwartz agreed that Dr. Kurtzman did not determine what caliber of bullet killed Brett and she could not say with certainty that the shell casing at the scene had held the bullet that killed Brett. (JT-3 at 103-06, 113-15.) The shell casing had not been tested for fingerprints. (*Id.*) The casing was tested for DNA and, although four profiles were noted, the sample was too contaminated to provide an identity. (*Id.*)

BPD Detective David Raschow testified that a 45-caliber bullet could not be fired from a .40-caliber gun. (JT-2 at 213-27.) The detective agreed, however, that they had not determined what type of .45 caliber gun ejected the casing or when it landed there. (*Id.*)

II. Charges

LaForge was charged with deliberate homicide. (Docs. 1-3.) After LaForge was arrested in June 2020, Detective Schwartz tried to interview him, but he declined to provide a statement. (JT-3 at 115.)

James was charged with felony murder (assault with a weapon as the underlying felony). (Doc. 60; JT-2 at 76-80, 116-24.) During a jail call, James said he wanted to cooperate with the State because he did not think what LaForge did was right and believed he had acted out of pride and ignorance. (*Id.*) James eventually entered an agreement with the State to plead guilty to assault with a

weapon and testify truthfully at LaForge's trial with the State agreeing to recommend a 20-year sentence with 10 years suspended. (*Id.*)

Raisha and Kristy were charged with felony obstructing justice for driving the cars the day Brett was shot. (JT-2 at 188-89, 199-13; JT-3 at 16-40.) Both women eventually entered plea agreements in which the State agreed to recommend a 10-year sentence with 5 years suspended in exchange for the women testifying truthfully at LaForge's trial. (*Id.*) Prior to LaForge's trial, both women had pled guilty, but only Raisha had been sentenced. (*Id.*)

III. Jail calls

During several of his recorded calls from the jail, LaForge made incriminating statements. (JT-2 at 237-46; Exs. 57-62.) For instance, when LaForge spoke to his sister, Susan, on June 23, 2020, he told her he would write her a letter about Jackie and asked Susan to talk to her because Jackie was "the root of all his stuff." (Ex. 57.) When LaForge spoke to his sister again on July 9 and 10, 2020, he asked if she had shown his letter to Jackie because Jackie needed to say exactly what he told her to say and told Susan to then throw the letter away. (Exs. 60, 61.)

LaForge also spoke to Kassie several times and during their conversations he told her to tell everyone what had happened when they confronted Brett on

April 26th. On July 1, 2020, LaForge called Kassie and read a letter he had written her, asking whether she would be a witness for him about the “first time we went to that trailer,” adding that “We gotta all have the same stories.” (Ex. 58.) The next day, when Kassie said she did not want to be involved, LaForge responded, “What the fuck then? But, but, you, you, you, gotta realize that there’s there’s fucking the first, the first time I went over there. What happened. Remember what I told you? Fuck that needs to be out there for the people to know.” (Ex. 59.) LaForge also told Kassie, “You fucking were . . . there you know what the fuck that dude did.” (Ex. 59A.)

Then on September 19, 2021, shortly before the trial, LaForge had a video call with Kassie when he again told her she needed to back him up because Brett “fucking came out with a gun the day before. He’s not no fucking decent dude that’s fucking selling candy bars on the side of the street. He’s a fucking hustler beatin’ down on people [inaudible].” (Ex. 62 at 1:50-2:13.)

IV. Trial and sentencing

In December 2020, following LaForge’s complaints about his assigned counsel, Merchant was assigned to represent LaForge. (12/14/20 Tr; Docs. 23-25.) Two days before the jury trial, the court considered LaForge’s complaints about

Merchant and determined they did not create a substantial basis upon which to assign different defense counsel. (10/1/21 Tr.)¹

At trial, Dr. Kurtzman and several law enforcement officers testified as well as Justin, Joseph, Malea, Dana, James, K.E., Kristy, and Raisha. Although Detective Schwartz had obtained a statement from Garrett, officers were unable to locate or serve him with a subpoena to testify at trial. (JT-3 at 88-89.) Detective Schwartz had also interviewed Jackie and despite the fact she was served with a subpoena to testify at the trial, Jackie did not appear. (*Id.*)

At the conclusion of the State's case in chief, LaForge moved to dismiss the case for insufficient evidence. (JT-3 at 117-19.) Following argument, the court denied the motion. (*Id.*) LaForge chose not to testify, which the district court confirmed following an individual colloquy. (*Id.* at 120-21.)

When settling the jury instructions, the State opposed Defense Proposed Jury Instruction No. 2 (DPJI-2) which advised the jury to consider testimony from codefendants, Kristy, Raisha, and James, who had entered into plea agreements with the State with "greater caution than other witnesses." (Docs. 55, 57; JT-3 at 127-30.) Following open-court discussion and argument, the court sustained the State's objection. (*Id.*)²

¹See Section I for additional facts.

²See Section II for additional facts.

Following his conviction, LaForge filed a motion for a new trial arguing that the court erred by: (1) not giving DPJI-2; and (2) sustaining the State’s objection to LaForge trying to elicit testimony from Detective Schwartz about H.P.’s revocation of his parole for possessing a handgun and additional charge for possessing a firearm. (Doc. 73.) The State filed its response in opposition. (Doc. 88.) The district court denied LaForge’s motion for a new trial. (Doc. 91.)

When the court sentenced LaForge to MSP for a term of 110 years with a 50-year parole restriction, the court also ordered LaForge to pay restitution for Brett’s funeral and internment (\$3,500 to Crime Victim’s Fund; \$4,861 to the Ness family) and \$72,000 in lost revenue to the Ness family business. (5/23/22 Tr. at 74-79; Doc. 98.)³

STANDARD OF REVIEW

“A request to substitute counsel rests within the sound discretion of the district court and is reviewed for an abuse of that discretion.” *State v. DeWise*, 2022 MT 145, ¶ 23, 409 Mont. 284, 513 P.3d 1249 (citing *State v. Johnson*, 2019 MT 34, ¶ 13, 394 Mont. 245, 435 P.3d 64). A district court’s determination of whether a defendant’s claims are seemingly substantial and necessitate a further hearing is also reviewed for an abuse of discretion. *Id.* “A district court abuses

³See Section III for additional facts.

its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *Id.* (citation omitted).

This Court reviews a trial court’s decisions regarding jury instructions for an abuse of discretion. *State v. Wienke*, 2022 MT 116, ¶ 16, 409 Mont. 52, 511 P.3d 990 (citation omitted). To constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant’s substantial rights. *Id.*

This Court reviews orders imposing restitution de novo as they are mixed questions of law and fact. *State v. Holmes*, 2024 MT 57, ¶ 6, 415 Mont. 528, 545 P.3d 57 (citation omitted). Thus, this Court determines if the decision to award restitution was correct and based on findings that were not clearly erroneous. *Id.* “A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the lower court has misapprehended the effect of the evidence, or if our review of the record leaves us with the firm conviction that a mistake has been made.” *Id.* “Evidence is deemed substantial if ‘a reasonable mind might accept [it] as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance.’” *Id.* (citation omitted).

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it did not assign new counsel following LaForge's complaint about his second appointed counsel. The court conducted a hearing where LaForge voiced all of his concerns. Merchant provided thorough responses and assured the court and LaForge that despite recently receiving witness interviews, he was confident he could provide effective representation. Neither LaForge nor Merchant described a complete breakdown in their ability to communicate. The court correctly determined that none of LaForge's complaints met any of the threshold grounds establishing a substantial complaint for appointment of new counsel.

The district court did not abuse its discretion when it provided the pattern instructions on credibility and declined to give LaForge's instruction directing jurors to view codefendants' witness testimony with "greater caution" than other witnesses. This proposed instruction was unnecessary, and in some ways contrary to the other instructions. The jury was provided with the general witness credibility instructions that direct jurors to carefully consider all witness testimony, including any possible motive they may have had to testify. They were further instructed to view James's testimony with distrust if they determined he was legally accountable and directed to view Kristy's testimony about LaForge's unrecorded admissions/confessions "with caution." The jury was fully and fairly

instructed on the applicable law. Yet, even if the court erred by rejecting LaForge's cautionary instruction, it was not reversible error since, given the breadth of strength of the evidence supporting the jury's verdict, LaForge's substantial rights were not prejudiced.

Finally, the district court did not err when it ordered LaForge to pay restitution for lost income suffered by the victim's family business. The district court's findings that relied upon the victim's mother's testimony were not clearly erroneous as she had firsthand knowledge about the work Brett had done for the family business and the jobs that had to be canceled when he was killed. Regardless, even if this Court finds there was insufficient evidence to support the court's restitution award, the remedy is to remand this matter to the district court to determine the proper amount of restitution.

ARGUMENT

I. The district court did not abuse its discretion by not assigning new counsel after considering LaForge's complaints about Merchant.

A. Relevant facts

On September 30, 2021, during a recorded jail call, LaForge said he wanted Merchant off the case and that on the first day of his trial, he planned to tell the court that Merchant was not prepared for trial. (10/1/21 Tr.) The State brought this issue to Merchant's attention and the court conducted an emergency hearing

the next day. (*Id.*) LaForge eventually replied “yes” to the court’s repeated direct question of whether he was requesting new counsel. (*Id.* at 4-5.) The court cleared the courtroom and conducted a thorough inquiry into LaForge’s grievances. (*Id.* at 7-12.)

LaForge expressed vague displeasure with Merchant concerning the following topics: (1) failure to assert a jurisdictional claim related to his arrest; (2) failing to prepare for witnesses (*i.e.*, getting witness statements shortly before trial, not doing adequate witness interviews, not calling witnesses on his behalf); (3) alleged incomplete discovery of LaForge’s Facebook records; and (4) lacking communication and missed appointments. (10/1/21 Tr. at 7-12.) At no time did LaForge assert a complete breakdown in communication with Merchant. (*Id.*)

The court then asked Merchant to address each of LaForge’s issues. (*Id.* at 12-17.) Merchant explained that: (1) there was no meritorious jurisdictional claim to raise; (2)(a) he had deposed Dr. Kurtzman, tried to get a statement from H.P. (but he invoked the Fifth Amendment), and had just received copies of Kristy’s statement because she only recently pled guilty; (2)(b) Merchant was confident there were no material witnesses whom he did not interview; (2)(c) other than the defendant, there were no additional favorable witnesses for the defense; (3) he was confident all relevant records had been disclosed in discovery and copies of all the Facebook records were provided to LaForge; and (4) he disagreed that he had

missed appointments with LaForge and believed he had “met sufficiently with Mr. LaForge to be able to provide effective assistance of counsel,” although LaForge may not have “complete faith” in him. (*Id.*) Merchant explained that he had recently been “inundated” with new interview transcripts which was “fairly overwhelming” and would require him to read them over the weekend. (*Id.* at 16.) Merchant candidly stated that LaForge would not have time to read all the transcripts, but Merchant did not, as LaForge argues on appeal (*see* Opening Brief (Br.) at 18), state he did not have time to read the material. (*Id.*) After responding to LaForge’s complaints, Merchant assured the court that he was confident he could provide effective assistance of counsel. (*Id.* at 17.)

The court gave LaForge an opportunity to respond to Merchant’s explanations, but he only complained again about getting long witness statements late. (*Id.* at 17-18.) The court concluded that, following its inquiry, LaForge had not demonstrated any substantial basis for a new attorney to be appointed. (*Id.*)

The court addressed LaForge and explained that if after reading the recently received materials Merchant determined that he needed more time, he would file a motion to continue. (*Id.*) The court added that Merchant was “very experienced [and] a very, very good lawyer,” and if Merchant brought a motion to continue, the court would consider it “very carefully.” (*Id.* at 19.) Merchant again addressed the transcripts they just received and explained that he did not think LaForge was

“necessarily unhappy with me,” but opined he may be asking for additional time to review the materials. (*Id.* at 20.) The court reiterated that it would entertain a motion to continue from Merchant, but not LaForge. (*Id.* at 21.) Merchant did not seek a continuance and was prepared for trial on October 4. (JT-1.)

B. The district court engaged in meaningful consideration of LaForge’s concerns and did not abuse its discretion when it concluded LaForge had not raised “seemingly substantial complaints” about Merchant.

Criminal defendants have a fundamental right to effective assistance of counsel. U.S. Const. amend. VI; Mont. Const. art. II, § 24; *Johnson*, ¶ 17; *State v. Dillingham*, 2020 MT 310, ¶ 14, 402 Mont. 239, 477 P.3d 328. However, a defendant is not entitled to counsel of his choice or to a meaningful relationship with counsel, but is entitled to counsel that mounts an adequate defense. *State v. Khongwiset*, 2020 MT 215, ¶ 26, 401 Mont. 142, 471 P.3d 51.

When a defendant asks the court for new counsel, the court must first conduct “an adequate initial inquiry to determine whether the defendant’s complaints are seemingly substantial.” *DeWise*, ¶ 26.

LaForge does not assert the district court’s inquiry was inadequate. (Br. at 13-19.) LaForge argues that the district court abused its discretion when it concluded he had not raised seemingly substantial concerns to warrant new counsel being assigned.

“A defendant may not demand substitute counsel simply because he lacks confidence in, or does not approve of, his counsel; he only has the right to substitute counsel in a few instances.” *Johnson*, ¶ 14 (citations omitted). A defendant may be entitled to new counsel “only when a breakdown of the attorney-client relationship becomes of such a nature that the principal purpose of the appointment—to provide effective assistance—is frustrated.” *Khongwiset*, ¶ 26 (citing *Johnson*, ¶ 18). To demonstrate such a state of frustration, the defendant must “present[] material facts showing good cause for the substitution, demonstrating either (1) an actual conflict of interest; (2) an irreconcilable conflict between counsel and the defendant; or (3) a complete breakdown in communication between counsel and the defendant.” *Khongwiset*, ¶ 26 (citing *Johnson*, ¶ 19).

LaForge does not argue that he and Merchant had an irreconcilable conflict or actual conflict of interest. Thus, LaForge must show that the district court abused its discretion by not finding he and Merchant had a complete breakdown in communication. That is, that their communication was so compromised that mounting a defense was impossible. LaForge did not meet this burden.

The record does not at all support that he and Merchant suffered a complete breakdown in communication. At most, the concerns LaForge voiced amounted to his lack of confidence in Merchant being able to review the evidence and prepare

for trial. However, despite the recent discovery coming in, Merchant assured the court he was confident he could effectively represent LaForge. LaForge offered no evidence to the contrary and simply pointed to his concern with the recently received transcripts. “[A]s long as appointed counsel is rendering effective assistance, a defendant may not demand dismissal or substitution of counsel simply because he or she lacks confidence in, or does not approve of, his or her appointed counsel.” *State v. Dethman*, 2010 MT 268, ¶ 15, 358 Mont. 384, 245 P.3d 30. *See also Dillingham, supra* (defendant’s expressed lack of confidence in counsel insufficient to constitute substantial complaint).

The circumstances presented here are similar to *DeWise*, where the defendant expressed a “general belief that counsel provided ineffective assistance” based on questioning counsel’s strategy, a belief they had not spent enough time with him, and did not “develop[] a satisfactory defense.” *DeWise*, ¶ 29. This Court reiterated that “a general dissatisfaction with counsel” is insufficient to warrant appointment of new counsel. *Id.* Noting defense counsels’ satisfactory responses to DeWise’s complaints and lack evidence of a breakdown in communication or any conflict, this Court affirmed the district court’s conclusion that DeWise failed to raise a seemingly substantial concern to warrant new counsel being assigned. *DeWise*, ¶ 30.

Regarding LaForge's statements about Merchant not being ready for trial, the district court more than adequately addressed that issue with Merchant and LaForge and explained that it would consider a motion to continue if it was filed. LaForge's argument that Merchant "thwarted Mr. LaForge's obvious need for a continuance," is not supported by the record. (Br. at 19.) Notably, LaForge does not assert Merchant was ineffective for not filing a motion to continue.

The district court employed the correct procedures when it inquired into LaForge's complaints and did not abuse its discretion when it determined those claims were not substantial. *Khongwiset*, ¶ 23.

II. The district court did not abuse its discretion when it declined to give a proposed defense jury instruction directing the jury to treat codefendants' testimony with "greater caution" than other witnesses.⁴

The district court provided the jury with several pattern jury instructions that concerned its role in assessing the evidence presented. The court gave Jury

⁴The propriety of PDJI-2 was considered twice: jury instruction settlement and LaForge's motion for a new trial. LaForge has not challenged the court's order denying his motion for a new trial pursuant to Mont. Code Ann. § 46-16-702. Thus, the applicable standard of review for this claim is abuse of discretion and whether "the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case." *Wienke*, ¶ 16.

Instruction No. 5 (JI-5)⁵ and Jury Instruction No. 13 (JI-13), Montana Criminal Pattern Jury Instructions (MCPJI) Nos. 1-103 and 1-118 respectively, which explain the jury’s responsibility as the sole judge of credibility and determiners of what weight to give evidence. (Apps. 1-2.) The court also gave Jury Instruction No. 16 (JI-15), MCPJI No. 1-112, that provided guidance on considering Fisher’s testimony as a person who may be legally accountable for Brett’s death. (App. 4.) Additionally, Jury Instruction No. 14 (JI-14), MCPJI No. 1-119, advised the jury that “[e]vidence of an unrecorded oral admission or oral confession of the Defendant should be viewed with caution.” (App. 3.)

LaForge proposed the following instruction (as amended):

You have heard testimony from Kristy Alden, Raisha Blacksmith and James Fisher who are co-defendants. Their testimony was given in exchange for promises by the government that they either would not be prosecuted or would receive favorable treatment in their individual cases. Their guilty plea is not evidence against Mr. LaForge and you may consider it only in determining that witness’s believability.

For those reasons, in evaluating the testimony of Kristy Alden, Raisha Blacksmith, and James Fisher, you should consider the extent to which their testimony may have been influenced by this factor. In addition, you should examine the testimony of Kristy Alden, Raisha

⁵JI-5 does not appear in Doc. 65.03 (“Given Jury Instructions”). However, when settling the jury instructions (*see* JT-3 at 125), the court explained that JI-5 was State’s Proposed JI No. 4 (*see* Doc. 48) and had been given with other preliminary instructions prior to opening statements (*see* JT-1 at 96).

Blacksmith, and James Fisher with greater caution than that of other witnesses.

(Docs. 55, 57, 65.02; JT-3 at 128-130.) LaForge adopted this instruction from a Federal Criminal Jury Instruction that had been used in *United States v. Tirouda*, 394 F.3d 383, 687-88 (9th Cir. 2005).⁶

The State opposed the instruction, arguing that: (1) it improperly designated three witnesses as legally accountable, which is a question for the jury; (2) Kristy and Raisha were not accomplices since the actions they were criminally culpable for occurred after the shooting; and (3) the other instructions addressing how to assess the credibility of a witness sufficiently covered possible motives or incentives to testify. (JT-3 at 128-31.)

The district court sustained the State's objection, explaining that

[T]he [c]ourt finds that the concerns expressed in this instruction are already covered by other instructions that pretty thoroughly tell the jury what they are to look at and consider in weighing the testimony of witnesses.

The [c]ourt is also concerned that it would be improper for the Judge to invade the province of the jury by instructing them to view certain witness testimony with greater caution, given that they are, under Montana law, the sole judges of witness credibility.

(JT-3 at 131-32.)

⁶On appeal, LaForge abandoned reliance upon *Tirouda*. (Br. at 20-23.)

LaForge argues that the court’s ruling was contrary to *State v. Grimes*, 1999 MT 145, 295 Mont. 22, 982 P.2d 1037. (Br. at 20-23.) In *Grimes*, this Court held that “when a government informant motivated by personal gain rather than some independent law enforcement purpose provides testimony, a cautionary instruction is the more prudent course of action.” *Grimes*, ¶ 45 (relying upon *Guam v. Dela Rosa*, 644 F.2d 1257 (9th Cir. 1980)). This Court explained that if a trial court refuses to give such a cautionary instruction, “the standard of prejudice is whether the testimony was crucial to the State’s case in light of other evidence.” *Grimes*, ¶ 46. Although this Court determined that there was no evidence that the witness “was motivated to testify by any ‘independent law enforcement purpose,’” it nonetheless evaluated potential prejudice and found failure to give the preferred instruction was harmless because the witness’ “testimony was not crucial to the State’s case, and that there was strong evidence from which the jury could have convicted Grimes without it.” *Grimes*, ¶¶ 48-49.

LaForge’s reliance on *Grimes* is not compelling in light of this Court’s subsequent decisions in *State v. DuBray*, 2003 MT 255, ¶¶ 90-93, 317 Mont. 377, 77 P.3d 247, and *State v. Hardy*, 2023 MT 110, ¶¶ 40-47, 412 Mont. 383, 530 P.3d 814. In those cases, the trial courts did not abuse their discretion by refusing proposed defense instructions directing the jury to examine informant testimony “with greater care” when the courts provided pattern witness credibility

instructions that fully and fairly informed the jury on the law. *Id.* As this Court explained, the general credibility instruction instructing jurors to consider “[w]hether the witness has an interest in the outcome of the case or any motive, bias, or prejudice[,]” fully and fairly instructed the jury on witness credibility. *DuBray*, ¶¶ 90-93.

In *Dubray*, this Court acknowledged that in *Grimes*, it had mistakenly stated there were no prior decisions concerning cautionary instructions for informants by failing to reference *State v. Long*, 274 Mont. 228, 907 P.2d 945, 947-49 (1995). *Dubray*, ¶ 92. In *Long*, this Court concluded that the general instructions regarding assessment of witness credibility adequately addressed motive, bias and prejudice, so the court did not err by refusing an instruction specific to informants. *Long*, 274 Mont. at 234, 907 P.2d at 947-49 (noting that while courts have “broad discretion in instructing the jury and . . . the defendant is entitled to have instructions on her theory of the case, she is not entitled to an instruction concerning every nuance of her argument.”).

DuBray reaffirmed *Long*, concluding that a court does not abuse its discretion by declining to give an instruction directing the jury to evaluate the testimony of a paid informant with caution when the general credibility instruction is given. *Dubray*, ¶ 93 (referring to MCPJI 1-103). This Court further concluded

that the pattern witness credibility instructions included sufficient direction for addressing the credibility of informants as called for in *Grimes*. *Id.*

In *Hardy*, just like *DuBray*, this Court observed that the trial court had given the general pattern jury instructions that addressed assessing witness credibility.

Hardy, ¶ 44 (citing to MCPJI 1-103, 1-119). This Court concluded that based on the directives in those instructions, the jury had been:

instructed to determine the credibility of each informant, including their knowledge, how they gained that knowledge, their self-interest, criminal records, the extent to which each witness was “supported or contradicted by other evidence,” and to view testimony about Hardy’s unrecorded confessions and admissions with caution. Therefore, the jury was specifically directed to subject critical portions of [the jailhouse informants’] testimony to greater scrutiny.

Hardy, ¶ 44; *see also DuBray*, ¶ 92.

The same occurred here. Jury Instruction No. 5 directed jurors to “carefully consider all the testimony given, the circumstances under which each witness has testified, and every matter in evidence that tends to indicate whether a witness is worthy of belief.” (App. 1.) That instruction further advised the jury to consider a witness’ apparent candor, fairness, and intelligence as well as “their knowledge and means of knowledge on the subject upon which they have testified.” (*Id.*) That instruction also directed jurors to consider if a witness had “an interest in the outcome of the case or any motive, bias or prejudice,” as well as “[t]he extent to which the witnesses are either supported or contradicted by other evidence in the

case.” (*Id.*) Additionally, JI-13 instructed the jury on determining the believability of a witness and assessing weight to witness testimony. (App. 2.)

Just as in *DuBray* and *Hardy*, because the general credibility instruction sufficiently instructed the jury, the court did not abuse its discretion when it declined to give the specific informant instruction. In addition to those general instructions, here the jury was given JI-14 (testimony relating to LaForge’s oral admissions/confessions “should be viewed with caution”) and JI-15 (if they determined James was legally accountable for Brett’s death along with LaForge, his testimony “ought to be viewed with distrust”). (Apps. 3, 4.) The jury was fully and fairly instructed on all relevant issues of law. *Wienke*, ¶ 16.

On appeal, LaForge concentrates on Kristy’s testimony about what LaForge said to her after shooting Brett. (Br. at 20-23.) LaForge argues that his proposed instruction was necessary because Kristy’s testimony was “incentivized.” (*Id.*) However, any possible motive or “incentive” that Kristy may have had was covered by the general credibility instructions. Moreover, her testimony about LaForge’s alleged confessions fell under JI-14, which the jury was advised to view with caution.

Here, “the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case” and, as such, the district court did abuse its discretion in instructing the jury. *Wienke*, ¶ 16; *Hardy*, ¶ 46; *DuBray*, ¶ 93.

Nonetheless, even if this Court finds the trial court should have given DPJI-2, LaForge's conviction should be affirmed because he was not prejudiced by that ruling. LaForge was able to cross-examine witnesses about any motives they had to testify or possible bias towards LaForge, and the jury was adequately instructed to consider witnesses' self-interest. The jury was fully apprised about the plea agreements the State made with Kristy, Raisha, and James.

Contrary to LaForge's claim on appeal—that Kristy's testimony was the “only compelling evidence” establishing LaForge shot Brett—the jury also heard James and K.E. testify that LaForge was the person who shot Brett. Notably, unlike James, Kristy, and Raisha, K.E. was not charged with any offense and there was no evidence of any agreement for her testimony. K.E. testified that she watched the group approach Brett's door and bang on it and saw Brett come out. (JT-2 at 84-85.) K.E. told the jury that “they barely gave [Brett] a chance to talk. He had a bat in his hand; and Alex put up his gun and shot him right in the head” (*Id.*)

Additionally, there was significant circumstantial evidence that further supported the jury's verdict (*i.e.*, LaForge's and Jackie's confrontation at Brett's the day before when LaForge threatened to return and said it “ain't gonna be pretty;” LaForge asking H.P. for backup to confront Brett; LaForge's access to H.P.'s gun when H.P. got into Krista's vehicle right before they confronted Brett; LaForge's comments on recorded jail calls that established his continued focus on

the incident the day before when Brett told him to get off his property, thus establishing LaForge's motive).

Given the strength of the evidence, the court's decision not to give LaForge's proposed instruction did not "prejudicially affect the defendant's substantial rights," and the court did not commit reversible error when it sustained the State's objection to giving the instruction. *Wienke*, ¶ 16; *DuBray*, ¶ 92.

III. The district court did not err when it ordered LaForge to pay restitution for lost revenue suffered by the victim's parents.

A. Relevant facts

Pursuant to Mont. Code Ann. §§ 46-18-242 and -243, the State submitted a Restitution Recap that was accompanied by victim impact statements. (Doc. 71.) Anita Ness, Brett's mother, reported financial losses related to Brett's funeral and internment (which are not at issue on appeal) and \$72,000 in lost income because Brett supervised the log home restoration aspect of the family's business. (*Id.*) As Mrs. Ness explained:

Brett's murder has not only affected us personally, but it has also affected our business. Both of our sons work for us and while C.J. is the Leadman for the construction part Brett was the Leadman for the log home restoration part of it. Log home restoration is seasonal and so [i]n the late spring through summer we run two crews so we can do both kinds of work. Brett was the one that knew how to do the log home restoration. He absolutely loved doing it and was incredibly good at it. We had to turn many jobs down and train C.J. how to do this aspect of the business. We lost revenue from the [j]obs we turned

down and lost money having to retrain the other employees. There were some aspects of the construction side that only Brett knew how to do also so again we had to retrain the other employees. We have had to adjust a lot of different things to try to make the day-to-day operations of the business work without Brett.

(*Id.* at 23.)

In its sentencing memorandum, the State advised that the sentencing for LaForge's codefendants included joint and several liability for \$80,361 (which included lost income to the Ness family business). (Doc. 92; 5/23/22 Tr. at 5.)

At the sentencing hearing, relative to the restitution request, LaForge opposed only the \$72,000 of lost income. (5/23/22 Tr. at 6.) Mrs. Ness gave a victim impact statement and further explained the request for lost income to the Ness family business. (*Id.* at 15-33.) Mrs. Ness testified that their company had to cancel or reschedule four log home restoration jobs because Brett had been the foreman for the restoration job crews and brought a specific skill set to the projects and they now only had three employees. (*Id.* at 15-16, 20.) Mrs. Ness explained:

Well, he was the foreman for the log home restoration, and the lead man for our construction part. He—log home restoration is a very specialized endeavor, and so he was the one that was trained on how to do each step of that process; and when he was murdered, then we had to look into hiring another person to replace him, which we have not yet, and also teaching my other son that aspect of the business as well as the construction aspect.

[Brett also met with the clients] to help answer their questions and ease any kind of anxiety that they might have over the job. He—at the end of the job he would have to collect the fees for the job.

And the construction aspect, he was responsible for a lot of things. He knew how to do all aspects of the job; and so again, that's something That's hard to find, and people with the knowledge of that kind of work, all comprehensive; so it's a matter of training people and to be able to do the job accurately.

(*Id.* at 16-17.)

During cross-examination, Mrs. Ness explained she did not bring paperwork proving the jobs had been canceled and agreed they did not have to refund any down payments for canceled jobs. (5/23/22 Tr. at 20-22.) However, the loss of Brett resulted in more than a 50 percent reduction in business because they were not able to take on as many projects. (*Id.*) Mrs. Ness explained that she had not brought additional paperwork (*i.e.*, tax returns) because she had not been asked to. (*Id.*)

LaForge asserted there was no verification or proximate cause to support the \$72,000 figure and asked the court to deny it outright or continue the hearing so Mrs. Ness could provide more verification. (5/23/22 Tr. at 26.) The State asserted that Mrs. Ness' testimony was sufficient to support the requested restitution. (*Id.* 59.) LaForge disagreed, but asserted it could be supported with additional evidence. (*Id.* at 63.)

The court imposed the full restitution request, explaining,

I believe that there was sufficient evidence presented for the loss income of \$72,000. We had a representative of the company here. There was—it's pretty clear to the Court that she had sufficient

knowledge to talk about lost jobs and lost income and what that would be. She had a basis of knowledge for that.

I note that this—according to the State’s sentencing memorandum, that this was the amount of restitution that was ordered in other cases involving the co-defendants; and I believe that under these circumstances, with the witness who was in a position to have personal knowledge of what these losses would be, and knowing that Mr. Ness, Brett Ness, was in a position of responsibility and had specialized knowledge in terms of log home restoration, that his sudden loss would be expected to result in a loss of income to the company. And I believe that Anita Ness is here, the representative of the company. I think that’s pretty clear.

(Id. at 77-78.)

B. The district court’s order awarding lost income to the victim’s family business was supported by substantial evidence and was correctly imposed.

Article II, section 28, of the Montana Constitution provides: “Laws for the punishment of crime shall be founded on the principles of prevention, reformation, public safety, and restitution for victims.” A sentencing court is required to impose a restitution obligation on a criminal defendant if the defendant's crime resulted in a pecuniary loss to a victim. Mont. Code Ann. § 46-18-201(5). A sentencing court must “require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss.” Mont. Code Ann. § 46-18-241(1).

Pecuniary loss includes “all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the

offender in a civil action arising out of the facts or events constituting the offender's criminal activities, including . . . loss of income [and] expenses reasonably incurred in obtaining ordinary and necessary services that the victim would have performed if not injured. . . ." Mont. Code Ann. § 46-18-243(1)(a). Since pecuniary loss is equated with the damages that would be recoverable in a civil action, restitution amounts must be supported by a preponderance of the evidence. *State v. Aragon*, 2014 MT 89, ¶ 16, 374 Mont. 391, 321 P.3d 841; Mont. Code Ann. § 26-1-403(1).

Notwithstanding a defendant's right to due process including the opportunity to "explain, argue, and rebut any information presented at sentencing," *Aragon*, ¶ 12, this Court has held that the controlling statutes do not "require[] a court or a victim to substantiate a restitution calculation with documentation," and ordinarily "a victim's sworn affidavit explaining the amount of loss is . . . sufficient to support an order of restitution." *Aragon*, ¶¶ 12, 20 (citations and internal quotations omitted). However, the victim's statement or affidavit must still provide sufficient evidence to support the restitution figure. *Aragon*, ¶ 20 (held, restitution erroneously awarded when court considered only two conflicting estimates for repairs and no other testimony or evidence was presented to address the discrepancy); *State v. Coluccio*, 2009 MT 273, ¶ 45, 352 Mont. 122, 214 P.3d 1282 (*overruled on other grounds by State v. Kirn*, 2012 MT 69, ¶ 8, 364 Mont. 356, 274 P.3d 746) (assumptions and

speculative calculations offered in victim's testimony were "insufficient information upon which" to base a restitution award).

Here, Mrs. Ness, a person with intimate knowledge of the family business, provided sworn testimony describing the lost income resulting from Brett's murder. Mrs. Ness did not rely on "[a]ssumptions, ballpark figures from friends, or purely speculative calculations" as occurred in *Coluccio*, ¶ 45. Mrs. Ness described the specialized skill and knowledge that Brett had accumulated as the Foreman for their log home restoration jobs and that he was the point man who met with clients. Notably, Mrs. Ness' testimony was further supported by impact statements submitted by Brett's friends/coworkers who described his skill as a carpenter. (Doc. 71.)

The district court gave Mrs. Ness' victim impact statement and testimony the weight it believed it deserved. It is not this Court's role to second guess that. When reviewing whether evidence supported a restitution amount, this Court must bear in mind that the trial court is in the best position to assess the credibility and demeanor of witnesses as it will not disturb a trial court's resolution of disputed questions of fact and credibility on appeal. *Aragon*, ¶ 17. "In reviewing findings of fact, the question is not whether there is evidence to support different findings, but whether substantial evidence supports the findings actually made." *Knowles v.*

State ex rel. Lindeen, 2009 MT 415, ¶ 21, 353 Mont. 507, 222 P.3d 595 (emphasis in original).

“Reasonable minds” would accept Mrs. Ness’ testimony as sufficient to support the court’s restitution order as it “consist[ed] of more than a mere scintilla of evidence.” *Holmes*, ¶ 6. The district court did not misapprehend the effect of Mrs. Ness’ testimony, its findings of fact concerning restitution were supported by substantial evidence, and review of the record does not create a “firm conviction that a mistake has been made.” *Holmes*, ¶ 6. The district court’s order jointly and severally awarding \$72,000 in lost revenue was correct. *Holmes*, ¶ 6.

Finally, even if this Court concludes the court erred by awarding restitution for lost income, the appropriate remedy is to remand the matter to the sentencing court for a determination of the proper amount of restitution. *Aragon*, ¶ 21; *Coluccio*, ¶ 46.

///

CONCLUSION

This Court should affirm the jury's guilty verdict and the district court's judgment and sentence.

Respectfully submitted this 7th day of March, 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 9,344 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Katie F. Schulz
KATIE F. SCHULZ

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0147

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ALEXANDER GARRETT LAFORGE III,

Defendant and Appellant.

STATE’S APPENDIX

Jury Instruction No. 5 (Doc. 48, State’s Proposed JI No. 4).....	App. 1
Jury Instruction No. 13 (Doc. 65.03)	App. 2
Jury Instruction No. 14 (Doc. 65.03)	App. 3
Jury Instruction No. 15 (Doc. 65.03)	App. 4

CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-07-2025:

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