

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0369

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

ERIN ELLIOT HOLCOMB,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Ninth Judicial District Court,  
Teton County, The Honorable Robert Olson, Presiding

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APPEARANCES:

AUSTIN KNUDSEN  
Montana Attorney General  
MARDELL PLOYHAR  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401  
Phone: 406-444-2026  
mployhar@mt.gov

JOE COBLE  
Teton County Attorney  
DAVID BUCHLER  
MEGHANN PADDOCK  
Special Deputy County Attorneys  
P.O. Box 201401  
Helena, MT 59620-1401

ATTORNEYS FOR PLAINTIFF  
AND APPELLEE

TAMMY A. HINDERMAN  
Division Administrator  
GREGORY HOOD  
Assistant Appellate Defender  
Office of State Public Defender  
Appellate Defender Division  
P.O. Box 200147  
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT  
AND APPELLANT

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## **STATEMENT OF THE ISSUE**

Whether the court abused its discretion when it determined that the evidence did not support a justifiable use of force instruction, and it refused to give the instruction.

## **STATEMENT OF THE CASE**

Appellant Erin Elliot Holcomb was charged with deliberate homicide after he shot and killed Trysten Fellers. (Docs. 1, 3.) At trial, he requested a justifiable use of force instruction. (Doc. 110; 3/7/22 Tr. at 72.) The court concluded that he did not present evidence to support the theory and refused the instruction. (3/7/22 Tr. at 72.) The jury found Holcomb guilty of deliberate homicide. (*Id.* at 161; Doc. 171.)

On appeal, Holcomb challenges the court's refusal to give the justifiable use of force instruction.

## **STATEMENT OF THE FACTS**

### **I. The dinner party**

Trysten and his fiancée Josie Moline lived on his family's farm near his father, Sonny and Rory Fellers, and his grandparents, Mark and Karen Hansen. (3/1/22 Tr. at 40, 44, 258.) On May 13, 2021, Trysten and Josie invited their friend Grayce Hayden and her boyfriend Nate Jenkin over for dinner. (*Id.* at 44-

46, 108.) The four friends had dinner at Trysten and Josie's home. (*Id.* at 47-48, 112, 157.)

After dinner, they decided to drive around the mountains. (*Id.* at 48-52, 112, 158.) When they were returning to Trysten and Josie's home, Grayce invited Teigan Kelly and his friends to Trysten and Josie's house. (*Id.* at 58, 115, 167.) Josie did not want more people to come over because she and Trysten had to work the next day, and she told Trysten that. (*Id.* at 58, 60-62.)

Trysten invited Grayce and Nate to spend the night at the house because they had been drinking, but he told them he and Josie did not want more guests because they wanted to go to bed. (*Id.* at 62-63, 74.)

## **II. Additional guests**

Teigan, Blake, and Holcomb came to the house between 11:30 p.m. and midnight. (3/1/22 Tr. at 62-63, 74, 122.) Although Trysten and Josie had not wanted additional guests, Trysten drank with the guests and appeared to be having a good time. (*Id.* at 77, 132.)

Holcomb had a pistol, which he repeatedly moved around. (*Id.* at 75, 123-25, 169, 221.) Josie was uncomfortable because Holcomb kept fidgeting with the gun and, at one point, he held the gun up to his head, dropped the clip, and pulled the trigger. (*Id.* at 75-76, 81.) Nate began talking to Holcomb about

Holcomb's gun, and then Nate retrieved his gun from his vehicle so they could compare their guns. (*Id.* at 76-78, 80, 124-27.) They also discussed ammunition and traded bullets. (*Id.* at 80.) After they were done, Grayce returned Nate's pistol to his vehicle. (*Id.* at 130.) People asked Holcomb to put his gun in a truck, but he just put it in his waistband. (*Id.* at 133-34, 216-17.) Unlike Holcomb, Trysten never had a gun in his possession after he returned to his house from the drive in the mountains. (*Id.* at 98, 186-87, 232.)

After a while, Josie decided to go to bed, and Trysten tried to get everyone out of the house so they could go to bed. (*Id.* at 82, 134, 177.) Trysten seemed frustrated and upset. (*Id.* at 230-32.) By that time, Holcomb was very intoxicated and was loud, rowdy, belligerent, and "reckless almost." (*Id.* at 176.) Teigan was so intoxicated that he could not stand up, and Trysten had to put his shoes on for him. (*Id.* at 83.)

### **III. The attempt to get everyone to go home**

Everyone went outside. (*Id.* at 84.) Trysten struggled to get Teigan into the passenger side of Tiegan's truck. (*Id.* at 84-85.) Eventually, Teigan and Blake got into the truck. (*Id.* at 135.) Trysten made plans to drive Teigan, Holcomb, and Blake home in Teigan's truck, and to get a ride back from Josie, because Teigan was extremely intoxicated, and they had all had a lot to drink. (*Id.* at 82-84, 177.)

A dispute developed about who was driving home. (*Id.* at 177-78.) Grayce testified that there were not any threats or argument, “[i]t was just trying to get [Holcomb] out of the front seat, out of the drivers seat.” (*Id.* at 140.)

Trysten called Sonny at 12:29 a.m. and asked him to come help Trysten get people into vehicles so he could give them a ride home. (3/1/22 Tr. at 87, 135, 139.) He said people were drunk, he was trying to give them a ride home, and they were fighting with him. (3/2/22 Tr. at 30.) Trysten was frustrated, but he did not have a physical reaction. (3/1/22 Tr. at 99, 136, 261.) He was just trying to get people home safely. (3/7/22 Tr. at 41.)

Witnesses provided inconsistent testimony about Holcomb’s actions. Josie testified that she talked to Holcomb while he was standing behind the truck. (3/1/22 Tr. at 85.) Josie asked him to get in the truck and told him Trysten was trying to help get everyone home safely. (*Id.* at 85-87.) Holcomb appeared to be panicking. (*Id.* at 86.) He was pacing and had his hands above his head and did not talk. (*Id.* at 86-87.)

Multiple people testified that Holcomb got into the driver’s seat of Teigen’s truck at some point, and he eventually ran away from the truck. (3/1/22 Tr. at 135, 268; 3/2/22 Tr. at 8; 3/7/22 Tr. at 37.) Grayce said Holcomb got into the driver’s seat with the door open. (3/1/22 Tr. at 135.) She and Trysten tried to convince him to get out so everyone could go home, but he did not move. (*Id.*) Blake



testified that Holcomb got into the front seat, then the back seat, and then ran into a field. (*Id.* at 233-34.) Sonny, the only witness who had not been drinking at Trysten's house that evening, testified that Holcomb jumped out of Teigan's truck and ran between two buildings when Sonny approached the truck. (*Id.* at 268; 3/2/22 Tr. at 8.)

Grayce, Nate, and Josie all went back to the house. (3/1/22 Tr. at 90, 140.) People helped Teigan, who was too intoxicated to stand on his own, get back to the house. (*Id.* at 88-89, 137.)

#### **IV. The shooting**

Trysten went back outside, where Holcomb had remained. (3/1/22 Tr. at 91.) When Holcomb ran off, Sonny tried to see where Holcomb had gone between the buildings, but could not see him. (*Id.* at 272-73.) Sonny then saw an old farm truck, which he later learned was being driven by Trysten, pass by slowly. (*Id.* at 273-75; 3/2/22 Tr. at 9-11.) The truck stopped by the road, and the headlights shined into the field. (3/1/22 Tr. at 275.) Sonny then saw Holcomb in the field, illuminated by the headlights from Trysten's truck. (*Id.*)

Trysten drove out to Holcomb slowly because he had to travel through a ditch. (3/1/22 Tr. at 276-77.) Trysten drove out and around Holcomb, and then pointed the truck back toward the house. (*Id.* at 278.) Sonny heard the door of the

truck open and then immediately heard a gunshot. (*Id.* at 278; 3/2/22 Tr. at 17-18.)

He began running toward the farm truck. (3/1/22 Tr. at 278.) Sonny heard

Holcom tell someone on the phone that he had just shot someone. (*Id.* at 279.)

Sonny found Trysten lying on the ground just outside of his truck. (3/1/22 Tr. at 279-80.) Trysten had been shot in the chest. (*Id.* at 280.) Sonny put Trysten in the truck and drove it to his house. (*Id.* at 280-81.) When he got there, he told Rory to call 911, which she did. (*Id.* at 281; 3/2/22 Tr. at 40.) Rory also called Josie and informed her Trysten had been shot. (3/2/22 Tr. at 41.)

Family members performed CPR on Trysten, but he was declared dead when ambulance personnel evaluated him. (3/1/22 Tr. at 283-84; 3/2/22 Tr. at 45-46, 97-98.) The medical examiner determined that he had been within two feet of the shooter when he was shot. (3/4/22 Tr. at 225.)

## **V. The other people who had been at Trysten's house**

Josie, Nate, and Grayce drove down to Sonny and Rory's (the Fellers) house. (3/1/22 Tr. at 93-94, 144-45, 180-81.) When they got there, Trysten was lying in front of the house, and Trysten's aunt was performing CPR. (*Id.* at 94-95, 146.) Nate and Grayce waited in their vehicle. (*Id.* at 146-47.) Everyone who had been at Trysten's house, except for Holcomb and Blake, were present and secured

near the Fellers's house when law enforcement arrived. (3/2/22 Tr. at 153, 190, 235.)

Blake waited in Tiegen's truck when others drove down to the Fellers's house. (3/1/22 Tr. at 234-35.) When the ambulance went by, Blake approached the ambulance and told the driver he had heard five gunshots. (*Id.* at 235-36; 3/2/22 Tr. at 92-93.) At 1:18 a.m., Blake called his mother asking for a ride home because he was scared. (*Id.* at 236, 239, 253-55.) Blake's mother picked him up and drove him home. (*Id.* at 255.) Law enforcement determined the next day that he was at his home. (3/1/22 Tr. at 223; 3/2/22 Tr. at 254; 3/4/22 Tr. at 111.)

## **VI. Holcomb's attempted escape**

Holcomb attempted to drive away in a grain truck that had been parked in Mark's yard, but he got stuck in an irrigation ditch. (3/1/22 Tr. at 286-87; 3/2/22 Tr. at 73-77, 117-19.) Throughout the night, Holcomb periodically flashed the lights on the truck and revved the engine. (3/1/22 Tr. at 286; 3/2/22 Tr. at 192, 196, 238-39.)

When the sun began coming up, Holcomb got out of the truck, walked around the truck, and began walking away. (3/1/22 Tr. at 288; 3/2/22 Tr. at 197.) Law enforcement apprehended him in the field. (*Id.* at 288; 3/2/22 Tr. at 161-65, 198-99.) There was an extremely strong odor of alcohol coming from Holcomb,

and his speech was difficult to understand. (3/2/22 Tr. at 167, 200; 3/4/22 Tr. at 94.) It took him three tries to correctly state his name. (3/2/22 Tr. at 200.)

Holcomb claimed that there had been another person with him, but that person had taken off when the grain truck got stuck. (*Id.* at 202.) He did not identify that other person. (*Id.* at 202-03, 242.) Holcomb had some abrasions and scratches, but no significant injuries. (3/4/22 Tr. at 98-107.)

## **VII. Holcomb's phone calls**

Holcomb made 87 calls during the night before he was apprehended. (3/4/22 Tr. at 58.) He made his first call at 12:42 a.m. to Grayce, but she did not answer. (3/1/22 Tr. at 149; 3/4/22 Tr. at 61.) He then called his father, Jeffrey Holcomb, and told Jeffrey that he had shot someone and needed a ride. (3/1/22 Tr. at 245; 3/4/22 Tr. at 62.) Jeffrey testified that Holcomb told him he had shot somebody, and he was scared because people were trying to kill him. (3/1/22 Tr. at 245.) Jeffrey initially thought Holcomb was just looking for a ride, and had lied about having shot someone, because Holcomb had previously told him he had shot someone when he wanted a ride home late at night. (*Id.* at 246-47.) Jeffrey tried to find Holcomb to give him a ride home, but Holcomb did not know where he was and sent Jeffrey to the wrong location. (*Id.* at 247-49.) Jeffrey and Holcomb exchanged calls for the next several hours, while Jeffrey drove around

looking for Holcomb. (*Id.* at 248-50.) Early in the morning, Holcomb told Jeffrey that he was cold and just wanted to turn himself in. (*Id.* at 249.) Jeffrey heard officers apprehend Holcomb after that. (*Id.* at 249.)

Holcomb also called his friend Michael Siller that night. Holcomb told Siller he was stuck and asked Siller to help him. (3/2/22 Tr. at 136-37.) Siller went with a chain to try to locate Holcomb and help free his vehicle, but Siller was unable to locate Holcomb because Holcomb gave him the wrong location. (*Id.* at 137-38.) Siller testified that Holcomb sounded frightened, but Holcomb did not indicate that he was in any danger. (*Id.* at 139.)

During the night, Holcomb shared his location with people (3/4/22 Tr. at 66-67), but no one found him to pick him up.

Holcomb never called 911 during that time. (*Id.* at 63.)

### **VIII. Testimony concerning the gunshots**

While Sonny was performing CPR, he heard four or five more gunshots. (3/1/22 Tr. at 284.)

Other witnesses, who were all in a house or vehicle when the shots were fired, provided inconsistent information about the number of shots they heard. While Blake was waiting in Teigen's truck, he heard one gunshot, then a second shot a minute later, and then three consecutive shots a minute after that. (3/1/22

Tr. at 234.) Josie heard “two loud noises” when she was in the house. (*Id.* at 91.) Grayce heard six to eight sounds that she thought might have been gunshots, but she was unsure whether they were gunshots. (*Id.* at 142-43.) Grayce thought she heard two more gunshots come from the field while she was at the Fellers’ residence. (*Id.* at 147.)

## **IX. Location of weapons**

A pistol that Holcomb had purchased, and that matched the description of the pistol Holcomb had at Trysten’s house, was discovered the next day by a concrete irrigation headgate near Mark’s home, about 125 feet from where Mark’s grain truck had been parked. (3/2/22 Tr. at 123-24, 218-21, 220, 224; 3/3/22 Tr. at 97-98, 275; State’s Ex. 89.) The gun was tucked behind vegetation and fairly well hidden. (3/2/22 Tr. at 223-24.) Location data from Holcomb’s phone demonstrated that he traveled near that area. (3/4/22 Tr. at 73.)

Two cartridges, only one of which had been fired, were located in the field near where Holcomb shot Trysten, and four more fired cartridges were located near the road. (3/3/22 Tr. at 56-58, 65-69, 76-77; 3/4/22 Tr. at 130; 3/7/22 Tr. at 27-28.) A firearm and toolmark examiner determined that they had been fired from Holcomb’s pistol. (3/3/22 Tr. at 162, 167-68, 176-77, 185-87.) Holcomb’s hands also contained gunshot residue. (*Id.* at 262, 265.)

In addition, Trysten's AR and another rifle used for small animals on the farm were removed from the farm truck that Trysten had driven into the field. (3/2/22 Tr. at 125.) The rifles were located lying between the two front seats, with a safety vest lying over them. (3/3/22 Tr. at 16, 21.) Because Sonny had placed Trysten in the truck after he had been shot, the safety vest and rifles had blood on them. (*Id.* at 21-24; State's Exs. 109-17.) No blood was located under the safety vest, indicating that the vest and rifles were in the same place as they were later located when Trysten bled on them. (*Id.*; 3/4/22 Tr. at 157-58.) Neither of those rifles had a bullet in the chamber. (3/3/22 Tr. at 23-25.)

Trysten's pistol was removed from the console of his newer truck, which was located near his house. (*Id.* at 126-27.) Nate's gun was retrieved from his truck. (*Id.* at 151, 185-86.)

## **X. Holcomb's defense**

During Holcomb's opening statement, his counsel admitted that he discharged his firearm in the field, but his counsel asserted that Holcomb did that in self-defense because Trysten had jerked him out of the truck and thrown him on the ground, he did not want to get beat up, Trysten was shooting, and Trysten was chasing Holcomb with the truck. (3/1/22 Tr. at 32-35.)

During their presentation of the case, Holcomb's counsel attempted to discredit the quality of the investigation. They questioned why the guns located in the farm truck were returned to the family and why no one had originally noticed a bullet hole in the passenger door of the farm truck. (3/7/22 Tr. at 13, 19-20.)

Holcomb's counsel admitted photographs of him when he was arrested and presented testimony demonstrating that he had scratches and bruises on his elbows and knees and a tear in his pants. (3/7/22 Tr. at 24-26.) His counsel presented testimony from one witness that he did not remember Holcomb's pants being torn before he went out to the field and testimony from another witness that he did not remember Holcomb's pants being dirty earlier in the day. (*Id.* at 36, 46.)

Holcomb recalled Blake to testify about what happened when Holcomb was in the truck. (3/7/22 Tr. at 37-39.) Blake testified that Holcomb first sat "in the driver's seat and then he jumped back and got in the driver's backseat." (*Id.* at 37.) Blake did not remember whether Holcomb was fully in the truck, just that he was in the vehicle. (*Id.*) Blake testified that when Holcomb was in the driver's seat, "Trysten was coming, and he was going to pull him out and then Erin jumped in the back." (*Id.*) When Holcomb asked Blake whether Trysten ever pulled Blake out of Tiegen's truck, Blake replied, "I do not remember." (*Id.* at 38.) Counsel then had the following exchange:

Q. But you told—the day after you told Agent McDermott that that's what happened.



A. I got T-boned by a semi two Septembers ago. I don't have a very good memory. I'm sorry.

Q. And in your written statement the day of the incident, you said the same thing.

A. Okay.

Q. So, now you don't remember saying it or do you believe it could've happened?

A. I believe it could've happened.

Q. Okay.

A. I have a hard time remembering. I'm sorry.

*(Id.)*

Blake then testified that he believed he had told Agent McDermott that Trysten then got in the pickup and went into the field to find Holcomb and that Trysten was mad and was yelling and screaming. (*Id.* at 38-39.)

Holcomb did not testify.

## **XI. The court's refusal of the justifiable use of force instruction**

The defense offered jury instructions on justifiable use of force. (Doc. 110.) When the court settled the instructions, Holcomb's counsel argued that it had "reached that threshold through the evidence presented through a whole variety of witnesses that the Defendant was afraid and that he was bleeding and there were additional shots and he'd already been, you know, assaulted by the decedent and he

was being chased by essentially a lethal weapon.” (3/7/22 Tr. at 72.) The defense argued that even if there was conflicting evidence, the defense was entitled to the instruction if there was evidence to support it. (*Id.*) In contrast, the State argued that Holcomb was not entitled to the instruction because he did not testify that he acted in self-defense. (*Id.* at 74-75.)

The court took a break to review case law. After doing so, the court concluded that it could not instruct on justifiable use of force. (*Id.* at 79.) The court explained that *State v. Marquez*, 2021 MT 263, 406 Mont. 9, 496 P.3d 963, requires that the evidence be ““so great that the person reasonably believes that he or she is in imminent danger of death or serious bodily injury.”” (3/7/22 Tr. at 79.)

The court explained that

The evidence presented as far as physical contact or involvement between Mr. Holcomb and Trystan Fellers was that he may have pulled him out from the vehicle when he was in the driver’s side. And I think there may have been testimony that he was agitated. However, in the Court’s view that is insufficient to show that at the time of the incident that Mr. Holcomb was in imminent danger of death or serious bodily injury which is exactly what the *Marquez* case requires.

(*Id.* at 79-80.)

Referencing *State v. Lackman*, 2017 MT 127, 387 Mont. 459, 395 P.3d 477, the court also noted that a defendant is ““justified in using lethal force only if you believe that the use of unlawful force against you was imminent and the force that was used was commensurate with the threat of force.”” (3/7/22 Tr. at 80.) The

court explained that it did not “have any information in front of me that would indicate that at the time of this incident Mr. Holcomb believed that he was—there was imminent threat of force and that it was necessary for him to use deadly force in order to protect himself. So, based upon that, I’m not going to give a justifiable use of force instruction.” (*Id.* )

The defense then made a record of why they believed the instruction was warranted. Counsel stated that there was evidence that Holcomb “was scared for his life” because Holcomb’s father, Jeffrey, testified that Holcomb said there were people trying to kill him and Siller said Holcomb sounded frightened. (*Id.* at 81.)

Counsel also said Holcomb had inquired about his friend Blake, which demonstrated that he was “fighting for himself and for Blake.” (*Id.* at 82.)

Counsel asserted that “[w]e also have evidence that he’s being chased by a vehicle which is a lethal weapon, okay? So, if you’re on foot, you’re being run down by a vehicle, I would say that that is reasonable fear. . . . We have evidence that he was jerked out of a vehicle, that there was force being used on him, that he fled and that he was pursued by a vehicle.” (*Id.*) Counsel also argued that the testimony that a witness had heard six to eight shots demonstrated that more shots were fired, which supported Holcomb’s use of force. (*Id.* at 83.)

## **SUMMARY OF THE ARGUMENT**

The court's refusal to give the justifiable use of force instruction was not an abuse of discretion because the evidence did not support the instruction. Contrary to Holcomb's assertion, there was not any evidence that Trysten ever pulled Holcomb out of a truck. Further, there was no evidence that Trysten ever threatened Holcomb or had any intention of harming him in any way. To the contrary, the evidence demonstrated that Trysten was trying to give Holcomb a ride home so he and his companions would get home safely. Given the lack of evidence to support the justifiable use of force theory, the court's denial of the instruction was not an abuse of discretion.

Further, even if this Court concludes that there was some evidence that required that court to give the justifiable use of force instruction, the failure to give the instruction does not require reversal because it did not prejudice Holcomb. The jury could not have reasonably concluded from the evidence presented that Holcomb reasonably believed that using deadly force was necessary to prevent Trysten from causing Holcomb serious bodily injury or death. The evidence demonstrates that Trysten was trying to get Holcomb and his friends into a truck so that he could give them a ride home. It is impossible to conclude from that evidence that Trysten planned to cause Holcomb serious bodily injury or death.

Thus, if the court abused its discretion by not giving the instruction, the error would be harmless.

## **ARGUMENT**

### **I. Standard of review**

This Court reviews a district court's decisions regarding jury instructions for abuse of discretion. *State v. Marquez*, 2021 MT 263, ¶ 14, 406 Mont. 9, 496 P.3d 963. This Court considers whether the instructions given, taken as a whole, fully and fairly instructed the jury on the law applicable to the case. *Id.* A district court's error in the jury instructions constitutes reversible error only if it prejudicially affects the defendant's substantial rights. *Id.*

### **II. The court did not abuse its discretion when it refused to instruct the jury on justifiable use of force because there was not any evidence presented from which a jury could conclude that Holcomb reasonably believed that deadly force was necessary to prevent imminent death or serious bodily injury.**

#### **A. A justifiable use of force instruction must be given only when the evidence supports the instruction.**

Justifiable use of force is an affirmative defense, Mont. Code Ann. § 45-3-115, which “admits the doing of the act charged, but seeks to justify, excuse or mitigate it.” *State v. Daniels*, 2011 MT 278, 362 Mont. 426, 265 P.3d 623 (quotation marks and citation omitted). A “person is justified in the use of force

likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person or another or to prevent the commission of a forcible felony.” Mont. Code Ann. § 45-3-102. If the defendant presents evidence of justifiable use of force, the State “has the burden of proving beyond a reasonable doubt that the defendant’s actions were not justified.” Mont. Code Ann. § 46-16-131.

To obtain a justifiable use of force instruction, a defendant must present evidence that supports the theory that the use of force was justified. Mont. Code Ann. § 46-16-131; *State v. Lackman*, 2017 MT 127, 387 Mont. 459, 395 P.3d 477; *State v. R.S.A.*, 2015 MT 202, ¶ 15, 380 Mont. 118, 357 P.3d 899 (“If the defendant offers no evidence, then he fails to satisfy his initial burden and the defense fails.”). A defendant who uses deadly force must demonstrate that he reasonably believed that the force used was necessary to prevent imminent death or serious bodily harm. Mont. Code Ann. § 45-3-102; *see State v. Fredericks*, 2024 MT 226, ¶ 15, 418 Mont. 220, 557 P.3d 32.

A defendant may be required to testify to obtain a justifiable use of force instruction if the evidence presented does not already support the defense. *R.S.A.*, ¶¶ 31-37. If the justifiable use of force theory is supported by evidence presented at trial, the court must instruct on the theory, even if conflicting evidence is also presented. *Fredericks*, ¶ 14; *Marquez*, ¶ 17. Support for the theory can come

“from direct evidence or from ‘some logical inference from the evidence presented.’” *Fredericks*, ¶ 14.

*Marquez* demonstrates that a defendant is not entitled to a justifiable use of force instruction when he has not presented evidence to support the theory. The defendant in *Marquez* was an inmate who jerked and attempted to headbutt an officer escorting him out of his cell. *Marquez*, ¶ 5. The officer pushed Marquez down onto a bench and held Marquez down. *Marquez*, ¶ 6. Marquez hit the officer in the chest with his knee and continued to struggle as the officer held him down. *Marquez*, ¶ 7. Marquez was charged with assault on a peace officer based on his conduct. The district court refused to instruct the jury on justifiable use of force because Marquez did not testify or present any evidence in his case. *Marquez*, ¶ 12.

This Court held that the district court did not abuse its discretion in denying the instruction because the evidence presented did not demonstrate unlawful force by the officer that would justify self-defense. *Marquez*, ¶¶ 19-24. This Court concluded that because “Marquez offered no evidence of his own and did not admit to a forceful act, our inquiry could end here.” *Marquez*, ¶ 19. The Court also rejected Marquez’s argument that the evidence Marquez presented through cross-examination was sufficient for him to obtain the instruction. The Court explained that the evidence did “not make apparent any deliberate attempt by

Officer Juers to jeopardize Marquez’s safety[,]” and it was not “self-evident that Marquez could reasonably think defensive force was necessary in response.” *Marquez*, ¶¶ 21-22. The Court also noted that the evidence demonstrated that Marquez initiated the conflict. *Marquez*, ¶ 23. Because the evidence did not support the justifiable use of force instruction, the court did not abuse its discretion when it denied the instruction. *Marquez*, ¶¶ 19-24.

Similarly, this Court held in *Fredericks* that the defendant was not entitled to a use of force instruction when the evidence did not indicate that, as the aggressor, his use of force was justified. *Fredericks*, ¶¶ 16-17. Although there were conflicting accounts of the events that led to Fredericks stabbing the victim, all of the evidence indicated that Fredericks initiated the fight by shoving the victim. *Fredericks*, ¶ 4. After further conflict, Fredericks stabbed the victim three times. *Fredericks*, ¶ 3. The district court declined to give a justifiable use of force instruction because there was not any testimony about Fredericks’s thoughts. *Fredericks*, ¶ 9.

This Court held that the district court’s reason for denying the instruction was erroneous because evidence of the defendant’s state of mind can be discerned from the totality of the circumstances surrounding the incident. *Fredericks*, ¶ 15. But, the Court held that the refusal to give the instruction was right for the wrong reason because the uncontradicted testimony demonstrated that Fredericks was the



aggressor, and none of the evidence indicated that he met the requirements for an aggressor to use force. *Fredericks*, ¶¶ 16-17. Thus, the court did not abuse its discretion when it refused to give the instruction.

**B. The evidence presented at trial did not support the justifiable use of force instruction.**

The court did not abuse its discretion when it concluded that the evidence did not support a jury instruction on justifiable use of force. To begin with, Holcomb's appellate counsel repeatedly and erroneously represents the statements of trial counsel as facts. (Appellant's Br. at 5-9, 17 (citing 3/1/22 Tr. at 13-15, 32-37 (opening statements))). The "statements of counsel are not evidence." *State v. Stuart*, 2001 MT 178, ¶ 22, 306 Mont. 189, 31 P.3d 353. The district court correctly relied on the evidence admitted through witnesses, rather than defense counsel's unsupported statements.

Significantly, there was no evidence, contrary to Holcomb's assertion, that Trysten pulled Holcomb out of the truck and threw him on the ground. (*See* Appellant's Br. at 6, 16.) The closest any witness came to saying that Trysten pulled Holcomb out of the truck was Blake, who testified that "Trysten was coming, and he was going to pull him out and then Erin jumped in the back." (3/7/22 Tr. at 37.) Holcomb's counsel then attempted to get Blake to testify that he had told law enforcement that Trysten had pulled Holcomb out of the truck, but Blake testified that he could not remember, and he "could've" made that statement.

(*Id.* at 38.) Holcomb’s counsel did not present testimony from law enforcement indicating that Blake had made the statement about Trysten pulling Holcomb out of Teigan’s truck. That would have been necessary for that statement to become evidence because the statements of counsel are not evidence. Holcomb’s appellate counsel also cites his trial counsel’s statements during his opening statement, but those statements also are not evidence. (Appellant’s Br. at 6, 16 (citing 3/1/22 Tr. at 32-34, 37).) The court correctly concluded that the only “evidence presented as far as physical contact or involvement between Mr. Holcomb and Trystan Fellers was that he may have pulled him out from the vehicle when he was in the driver’s side.” (3/7/22 Tr. at 79.)

Holcomb’s appellate counsel also misrepresents Grayce’s testimony about Sonny coming to the house when counsel states that Grayce “hurried into the house . . . because she knew there would be fighting when Sonny arrived.” (Appellant’s Br. at 6 (citing 3/1/22 Tr. at 140).) Grayce actually testified that she went inside, without describing any hurry, because “I figured there would be voices raised, and I try to shut down when voices are raised or there’s yelling involved, because I just didn’t want to be around the yelling.” (3/1/22 Tr. at 140.) She also testified that there were not any threats or argument when Trysten was frustrated, and that Trysten just tried to get Holcomb out of the driver’s seat. (*Id.*)

Although Holcomb's counsel characterizes Trysten's drive into the field as a "pursuit," there is no indication that Trysten was doing anything other than trying to find Holcomb to give him a ride home so that Holcomb did not spend the night drunk in a field outside of Trysten's house. The only witness to Trysten's drive into the field was Sonny, who testified that Trysten "crawled through the ditch" with the truck and then "rolled out into the field[,] " indicating that he was moving slowly. (3/1/22 Tr. at 276-77.) Trysten then drove the truck out and around Holcomb, before coming to a stop. (*Id.* at 278.) Immediately after Sonny heard the door open, he heard a gunshot. (*Id.* at 278; 3/2/22 Tr. at 17-18.)

There is no evidence that anybody other than Holcomb fired that gunshot or any of the gunshots that followed. All of the cartridge casings that were located came from Holcomb's gun. (3/3/22 Tr. at 56-58, 65-69, 76-77, 167-68, 176-77, 185-87; 3/4/22 Tr. at 130; 3/7/22 Tr. at 27-28.) The evidence also demonstrates the two guns Trysten had access to in the farm truck were lying down, with a safety vest over them. (3/3/22 Tr. at 16, 21-24; State's Exs. 109-17.) There is no indication that Trysten had a weapon in his hand or did anything to threaten Holcomb.

Although Holcomb asserts that the bullet hole in the truck came from a gun fired from inside the truck, that is not demonstrated by the evidence. (*Compare* Appellant's Br. at 8, *with* 3/4/22 Tr. at 182-87.) A hole was located in the

passenger door of the farm truck after the shooting, but no testimony indicated that it came from a firearm fired from inside the truck. (3/4/22 Tr. at 182-87; State's Exs. 206-11.) Further, the testimony demonstrated that the size of the hole was consistent with having been fired by Holcomb's gun and was too large to have been fired by either of the rifles in Trysten's farm truck. (3/4/22 Tr. at 200-01.)

Holcomb's appellate counsel cites to Holcomb's trial counsel's assertion that the bullet was fired from inside the truck, but again, counsel's statements are not evidence. (Appellant's Br. at 8 (citing 3/1/22 Tr. at 35).) During closing arguments, the State argued that the hole in the door was consistent with evidence indicating that Trysten opened the driver's door of the truck, Holcomb shot him, and the bullet passed through Trysten's neck and out his back, where it could have continued on through the far side of the truck. (3/7/22 Tr. at 151-52.) Regardless of whether that is how the bullet defect in the door was formed, the hole in the door is not evidence that Trysten, whose guns were lying on the floor of his truck, had a gun in his hand or ever fired one.

Testimony from Holcomb's father and Holcomb's friend, Siller, that he was afraid when he called after he fatally shot Trysten also does not establish that his use of force was justified. Holcomb's father testified that Holcomb told him he shot somebody, he needed a ride, and he was scared because there were people trying to kill him. (3/1/22 Tr. at 245.) Siller testified that Holcomb sounded

frightened, but did not indicate that he was in any danger, when Holcomb called asking for help. (3/2/22 Tr. at 139.)

That evidence does not establish that Holcomb was reasonably afraid of death or serious bodily injury when he shot Trysten. By the time Holcomb began making calls for help, he had already fatally shot Trysten. If he felt fear at that point, it could have been fear of being arrested or fear of retribution. His statements do not demonstrate that he reasonably feared that Trysten would cause him serious bodily harm when Trysten drove out to the field. Further, even if Holcomb told his father that people were trying to kill him, the evidence demonstrates that was not true. And even Holcomb's father did not initially believe what Holcomb said and thought he just wanted a ride because Holcomb had previously made similar statements to his father when he wanted a ride. (3/1/22 Tr. at 246-47.) Holcomb's actions throughout the evening are also inconsistent with a person who was afraid for his safety. Holcomb called people he knew requesting a ride, but he did not call 911 or seek any assistance from law enforcement, which was present nearby. Instead, he attempted to leave in a stolen grain truck. This demonstrates that Holcomb was afraid of the consequences of his actions, not of Trysten.

None of the evidence Holcomb relies on, either individually or in the totality, supports the logical inference that Holcomb reasonably believed that the

use of force was necessary to prevent death or serious bodily harm. If Holcomb would have testified, he might have been able to present evidence that would have supported giving a justifiable use of force instruction. But he chose not to do so. Because the evidence presented did not support the justifiable use of force instruction, the court did not abuse its discretion when it declined to give the instruction.

**III. Even if the court abused its discretion by refusing to give the justifiable use of force instruction, the error would be harmless because there was not enough evidence to render the alleged error prejudicial.**

If this Court concludes that there was enough evidence to require the court to give the justifiable use of force instruction, Holcomb's conviction should still not be reversed because the alleged error did not have any effect on the outcome of the trial given the lack of evidentiary support for the defense. "[T]o constitute reversible error, any mistake in rendering the instructions must prejudicially affect the defendant's substantial rights." *State v. Cybulski*, 2009 MT 70, ¶ 34, 349 Mont. 429, 204 P.3d 7; *see also City of Missoula v. Zerbst*, 2020 MT 108, ¶ 27, 400 Mont. 46, 462 P.3d 1219. "Erroneous jury instructions that do not fully and fairly instruct the jury on the applicable law will be considered harmless if the instructions do not affect the defendant's substantial rights." *Zerbst*, ¶ 29.

In *State v. Scarborough*, 2000 MT 301, ¶¶ 51-56, 302 Mont. 350, 14 P.3d 1202, this Court held that an incorrect instruction describing mitigated deliberate homicide did not require reversal of Scarborough's conviction for deliberate homicide because the evidence in the record did not meet Scarborough's burden of proof for his affirmative defense. Although Scarborough put on evidence about general characteristics of schizophrenics, Scarborough did not put on evidence that he suffered from extreme mental or emotional stress or that he acted under its influence when he murdered one victim and attempted to murder another. *Scarborough*, ¶ 54. In contrast, the State presented substantial evidence demonstrating that Scarborough planned the acts and acted in a deliberate manner. *Scarborough*, ¶ 55. The Court concluded that the incorrect instruction on mitigation had no prejudicial effect on the outcome of the trial because Scarborough did not provide any evidence to establish the elements of his affirmative defense as more probably true than not. *Scarborough*, ¶ 56.

Similarly, Holcomb did not present any evidence that would lead a rational juror to conclude that his use of force was justified. There is no evidence demonstrating that Trysten had any intent to harm anyone. Indeed, the evidence demonstrates the opposite. It demonstrates that Trysten drove out to the field to locate Holcomb because he was trying to get everyone home safely. The jury could not have concluded from this evidence that Holcomb rationally believed that

he had to shoot Trysten to prevent imminent death or serious bodily injury. As a result, if the court erred in refusing to give the justifiable use of force instruction, he was not prejudiced by it.

### **CONCLUSION**

Holcomb's conviction for deliberate homicide should be affirmed because the district court did not abuse its discretion when it refused to give a justifiable use of force instruction.

Respectfully submitted this 13th day of March, 2025.

AUSTIN KNUDSEN  
Montana Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

By: /s/ Mardell Ployhar  
MARDELL PLOYHAR  
Assistant Attorney General



## **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 6,579 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Mardell Ployhar

MARDELL PLOYHAR

## **CERTIFICATE OF SERVICE**

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-13-2025:

Jody (Joe) W. Coble (Govt Attorney)  
PO Box 899  
Choteau MT 59422  
Representing: State of Montana  
Service Method: eService

Gregory Nelson Hood (Attorney)  
Office of the Appellate Defender  
555 Fuller Ave.  
Helena MT 59620  
Representing: Erin Elliot Holcomb  
Service Method: eService

Meghann Ford Paddock (Govt Attorney)  
215 N. Sanders  
PO Box 201401  
Helena MT 59620-1401  
Service Method: eService  
E-mail Address: Meghann.Paddock@mt.gov

David A. Buchler (Govt Attorney)  
P.O. Box 73  
100 W. Wallace Street  
Virginia City MT 59755  
Service Method: eService  
E-mail Address: dbuchler@madisoncountymt.gov

Electronically signed by LaRay Jenks on behalf of Mardell Lynn Ployhar  
Dated: 03-13-2025