

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0632

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LORENZO HARRIS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Michael Moses, Presiding

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STATEMENT OF THE ISSUE

Whether this Court should invoke plain error to review Harris's claim that the district court erred by failing to determine whether his conduct constituted mitigated deliberate homicide before convicting him of deliberate homicide when Harris's sole theory during the bench trial was that he was not the shooter.

STATEMENT OF THE CASE

The State charged Appellant Lorenzo Harris (Harris) with deliberate homicide with a weapons enhancement, in violation of Mont. Code Ann. §§ 45-5-102(1)(a) and 46-18-221, and tampering with witnesses and informants, in violation of Mont. Code Ann. § 45-7-206(1)(a). (Doc. 45.)

Harris waived his right to a jury trial and the case proceeded to a six-day bench trial. (Docs. 53, 96; 1/13/22 Tr. at 2-11.) The State presented testimony and evidence that Harris shot and killed James Williams (James) on the morning of December 27, 2020, and then asked multiple individuals to make statements to provide him with an alibi. The defense's sole theory was that someone other than Harris shot and killed James.

After trial, both parties submitted proposed findings of facts and conclusions of law. (Docs. 98, 99.) Harris asserted that the evidence failed to prove beyond a reasonable doubt that he shot James. (Doc. 98 at 4-11.) Harris did not propose any

findings of fact or conclusions of law asserting that he acted under extreme emotional or mental stress.

The district court found Harris guilty of deliberate homicide and tampering with witnesses and informants. (Doc. 100 at 35.) The court also found that Harris used a firearm in the commission of the deliberate homicide. (*Id.* at 34-35.)

In his sentencing memorandum, Harris claimed for the first time that the homicide happened under mitigating circumstances. (Doc. 109.) Harris asserted that because of the mitigating factors listed under Mont. Code Ann. § 46-18-304, the court “should sentence Lorenzo Harris to the maximum sentence he would receive under the mitigated homicide scheme.” (Doc. 109 at 1-5.)

At the sentencing hearing, the State introduced a post-trial jail call and referenced trial testimony from Harris’s cellmate Brice Bailey (Brice) to refute Harris’s new mitigation assertion. (8/4/22 Tr. at 39-54.) In the call, Harris said he was looking into raising mitigation and self-defense and he never should have talked to his cellmate because his cellmate told the court everything Harris had told him about the murder. (Doc. 112, State’s Ex. 4.) The State noted Harris had told Brice he meant to shoot James in the face but missed and shot him in the neck. (8/4/22 Tr. at 52.)

Harris’s attorney told the court he and Harris had previously discussed self-defense and mitigated deliberate homicide but declined to pursue those theories

because Harris was not ready to admit that he shot James. (8/4/22 Tr. at 58-60.) He said Harris wanted to do so now and that Harris understood the consequences of doing so, including “jeopardize[ing] rights of appeal.” (*Id.* at 58.) Harris’s attorney played an undisclosed video he said would “shed light” on James’s death. (*Id.* at 60.) In the video, multiple people—including Harris—repeatedly punched James, who was bent over in a fetal position. (Doc. 139, State’s Ex. 1.)¹ Harris grabbed a gun off the ground, James was pushed out the door, and Harris followed with the gun in hand right before the gunshot can be heard. (*Id.*)

After addressing the aggravating and mitigating circumstances in the case, the district court sentenced Harris to the Montana State Prison (MSP) for 65 years for deliberate homicide, and 10 years for tampering with witnesses and informants, with the sentences to run concurrently to each other. (Doc. 119 at 1.) The court also sentenced Harris to 10 years for the use of a weapon to run consecutively to the deliberate homicide sentence. (*Id.*)

On appeal, Harris only challenges his deliberate homicide conviction.

¹ The video was inadvertently omitted from the record. (Order Feb. 12, 2025, Case No. DA 22-0632.) In accordance with this Court’s order, the district court certified and transmitted a supplemental record with the omitted video following two evidentiary hearings. (Docs. 138, 139.)

STATEMENT OF THE FACTS

I. The trial

Michelle Lister (Michelle) testified that she met James three or four months before his death and that he was a “friend slash friend with benefits.” (3/29/22 Tr. at 84-85.) Michelle was at Shooters Bar with her friends Michelle Contreras and Victoria Salazar (Victoria) on the night of December 26, 2020, and early into the next morning. (*Id.* at 89-90.) James and Cheyenne American Horse (Cheyenne) were also there, and James told Michelle a guy in the bar “was meanmugging him.” (*Id.* at 90.) Michelle recognized the guy from previous parties as “Zo” and explained that “Zo” was Harris’s nickname. (*Id.*)

Cheyenne invited Michelle and Victoria to a house party and sent them the address over Snapchat. (*Id.* at 91, 138.) James went with Michelle to the house party after leaving Shooters Bar and Victoria followed them. (*Id.* at 91.)

When they got to the house, Michelle went to the dining room. (*Id.* at 91, 141.) Michelle, Dawan Jones (Dawan), Cheyenne, and Harris’s brother Carvell Scott (Carvell) gathered around the table. (*Id.* at 92; 3/31/22 Tr. at 21-22.) Dawan testified there was an incident between Harris and James regarding a blunt. (*Id.* at 57.) Dawan explained a blunt is a hollowed-out cigar filled with marijuana. (*Id.* at 87.) He said people were passing a blunt around and Harris “was in rotation” to take a hit. (*Id.* at 77.) James “was trying to hit it and got denied.” (*Id.*)

Michelle asked Dawan to sell her \$20 worth of marijuana for James. (3/29/22 Tr. at 94; 3/31/22 Tr. at 20-21, 79.) Michelle had money in the car and sent James to get it. (3/29/22 Tr. at 95.) Still standing near the dining table, Michelle said she saw James and Lorenzo begin fighting in the entryway hall. (*Id.* at 95-96.) In an interview, Michelle told Detective Michael Yarina that four or five guys piled in on the fight and she could not tell if they were helping or hurting James. (*Id.* at 108-09.)

While Dawan was “breaking off grams” of marijuana, Michelle came and asked him to break up the fight. (*Id.* at 96-97; 3/31/22 Tr. at 23.) Michelle said Dawan had a gun on the table, but she did not know if he took it to break up the fight. (3/29/22 Tr. at 106-07.) Dawan also saw a gun on the table, but he did not know who it belonged to. (3/31/22 Tr. at 37.) Dawan could not remember if he brought a gun inside, but he knew he had one in the truck that night. (*Id.*) Michelle said James did not have a gun that night. (3/29/22 Tr. at 131-32.)

Dawan testified that when he went to help, he found James on top of Harris. (3/29/22 Tr. at 24.) He said James was “a pretty big guy so he was like kind of laying on top of [Harris].” (*Id.* at 24.) Dawan said he had to attempt to lift James off Harris twice and that the second time he was successful because he grabbed James “a little higher by his shoulders.” (*Id.*) Dawan said that, “to [his] knowledge,” no one else was part of the fight. (*Id.* at 25.)

After he picked James up, Dawan said, “somebody pushed [them]” out of the door. (*Id.* at 25.) Dawan did not see who pushed them but said it could have been Harris. (*Id.* at 25-29.) Michelle said she saw a gun in Harris’s back left pocket when she saw Harris in the doorway. (3/29/22 Tr. at 57-58, 130-31.)

After being pushed out the door, Dawan fell over the railing on the stairs, knocking the railing down. (*Id.* at 25-26.) Dawan and James crashed to the ground and Dawan said he felt a pop in his right arm when he landed. (*Id.*) Dawan said he pulled himself up using his left hand because he could not feel anything in his right arm. (*Id.*) As he pulled himself up, Dawan heard a gunshot. (*Id.*) Dawan said “[i]t felt like the muzzle blast [was] behind [his] head.” (*Id.*) Dawan picked himself up and saw James on the ground. (*Id.* at 27-28.) Dawan said Harris was standing on the sidewalk near the steps. (*Id.* at 28-29.)

Michelle testified that after she asked Dawan to help James she walked towards the entryway where a lot of people were standing. (*Id.* at 97; State’s Exs. 98, 98a, 98b.) Michelle was trying to get through the crowd of people in the doorway when the gunshot rang out. (3/29/22 Tr. at 99.)

After the gunshot, Dawan went back into the house to get his bookbag from under the table. (3/31/22 Tr. at 30-31; State’s Exs. 102, 104, 105.) Victoria left the house and while “walking to [her] car on the sidewalk [she] heard a female say [to Harris] take off your sweatshirt because it has blood on it.” (3/29/22 Tr. at 147.)

Dawan went back outside and both he and Victoria saw Harris get into a red Pontiac. (3/29/22 Tr. at 148; 3/31/22 Tr. at 33-34.)

On cross-examination, the defense asked Dawan if there was “any reason why [Dawan] could be ruled out as the shooter?” (3/31/22 Tr. at 49.) Harris’s counsel challenged Dawan on whether his injury that night would have prevented him from shooting a gun and asked if 16 rounds of 9-millimeter Blazer brand ammunition were found in his home during a federal probation search after James’s death. (*Id.* at 49-75.) Dawan repeatedly denied shooting James but agreed that his injury would not have prevented him from firing a gun and that ammunition had been found in his home. (*Id.*) Harris’s counsel also cross-examined Dawan on the terms of a plea agreement in the federal court in which the prosecution agreed to a specific sentencing range if Dawan cooperated in the investigation into James’s death and testified truthfully at Harris’s trial. (*Id.* at 64.)

After the shooting, Michelle stayed in the yard next to James and everyone else left before law enforcement arrived. (3/29/22 Tr. at 100.) Michelle told law enforcement she thought Harris had been the shooter. (*Id.* at 134; 3/28/22 Tr. at 46.) Medical personnel took James to the hospital, where he died three days later on December 30, 2020. (3/28/22 Tr. at 46; State’s Ex. 113 at 4.) Michelle testified that Harris called her after James’s death and told her to “say that it wasn’t him. And that he didn’t do it.” (3/29/22 Tr. at 89.)

Dr. Walter Kemp (Dr. Kemp), the forensic pathologist who conducted James's autopsy, testified that James had three wounds that "all went along with one pathway." (3/30/22 Tr. at 6-13; State's Ex. 113.) Dr. Kemp believed all three wounds or defects were caused by one bullet. (3/30/22 Tr. at 14.) He recovered a bullet from James's "left chest wall underneath the third rib." (*Id.* at 16.) Dr. Kemp placed a rod through the defects in James's body to indicate the bullet's path. (*Id.*) He said the positioning was consistent with someone leaning forward when they were shot. (*Id.* at 17-18.)

James also had a "five-eighths-inch laceration on the back of the scalp" and a small abrasion on the left cheek. (*Id.* at 22; State's Exs. 116, 117.) Dr. Kemp explained that blunt force injuries cause lacerations and that it could have been from a fall or hit. (3/30/22 Tr. at 23-24.) Dr. Kemp did not see anything else that looked like a resolving injury. (*Id.* at 29.)

Brice testified that he and Harris were cellmates from August to October 2021. (3/30/22 Tr. at 60.) Brice said he and Harris got along well and that Harris "told [him] about what happened with James on the South side." (*Id.* at 61, 64.) Harris put James's obituary up on their cell wall and told Brice that "he shot [James]." (*Id.* at 61, 64, 66.) Brice said Harris told him that he and James were involved with the same girl and they had been arguing (*Id.* at 62.) Harris told Brice he had pulled out his gun and shot James in the neck. (*Id.*) Harris said "he was

trying to shoot him in the face but he got him in the neck.” (*Id.*) Brice testified that Harris told him they were standing on the front porch of Harris’s mother’s house when Harris shot James. (*Id.*) Brice did not remember telling law enforcement that Harris said he was in the yard when he shot James, nor did he remember Harris telling him James was on the ground when he shot him. (*Id.* at 63.)

According to Brice, Harris said he used a .40 caliber Smith and Wesson and gave it to his brother, who “dumped” it. (*Id.* at 64.) Harris told Brice the gun he used was “in the bottom of the river. No one will find it.” (*Id.*) Brice said Harris had photos of himself holding a firearm on Facebook, but he had told Brice “[t]hat’s not the one that I shot him with so they don’t have shit on me.” (*Id.* at 70.) Brice said Harris told him that after the shooting “he left right away to Chicago” in a white Impala. (*Id.* at 65.)

Brice said Harris also tried to get someone to create an alibi for him while they were housed together in the jail. (*Id.* at 71.) He said the individual “was familiar with [Harris’s] mother’s house. He’d been over there quite a few times. So he said that he would try to create an[] alibi for him and say that he wasn’t the one that shot him.” (*Id.*) Brice also saw Harris and another male “trying to fabricate a story” to say Harris was not present during the shooting and that “it was a heavier set individual that actually committed the crime.” (*Id.* at 72.)

Brice testified that he told several attorneys he wanted to talk to law enforcement about what Harris told him because “he really fe[lt] like it [wa]s true,” and he felt uncomfortable and unsafe. (*Id.* at 66, 68, 81-82.) Eventually, an attorney coordinated with Detective Yarina, who told Brice he would not promise him anything in exchange. (*Id.* at 68.) Brice said his statement was voluntary and that he was not promised anything in return. (*Id.* at 68, 87.) Brice’s pending drug possession charge was ultimately dismissed, and he was transported back to MSP as soon as possible so he “could be away from [Harris].” (*Id.* at 85.)

Travis Spinder (Spinder), the Montana State Crime Lab Forensic Division Administrator, testified that a fired cartridge taken from the yard outside Harris’s home was a “Blazer brand nine millimeter Lugar fired cartridge case.” (*Id.* at 108.) He said Blazer was a “[v]ery common manufacturer” used in handguns. (*Id.*) Spinder testified that the bullet recovered from James’s body had six lands and grooves with the right twist polygonal rifling. (*Id.* at 111-13.) Bursa, FIE, Garrison, Glock, Heckler and Koch, IMI, RWI, Savage Arms, LIW, Sights, and Walter firearms all have those rifling characteristics. (*Id.* at 113-14.) However, Spinder said, “six rifling polygonal generally leans towards a Glock.” (*Id.* at 114.)

The Billings Police Department submitted a Smith and Wesson nine-millimeter handgun for Spinder to analyze under a different case number. (*Id.* at 116.) After comparing test fires from the handgun to the bullet and cartridge from Harris’s case,

Spinder testified the Smith and Wesson handgun “was eliminated as having fired the cartridge case and the bullet[.]” (*Id.* at 118.) Spinder explained that the Smith and Wesson handgun had a “different rifling component all together[.]” (*Id.*)

Spinder testified that the gun in State’s Exhibit 94 was a Glock firearm. (*Id.* at 121.) Exhibit 94 was a video obtained from Harris’s Snapchat account that was taken less than two weeks after the homicide. (3/29/22 Tr. at 33-34.) In the video, Harris displayed the Glock firearm for the camera. (State’s Ex. 94.) Spinder testified that the Glock had been modified with a switch on the very rear portion, allowing it to fire continuously. (3/30/22 Tr. at 122.) He also noted that it had an extended magazine. (*Id.* at 123.) Spinder said there were “aftermarket barrels” that could be put on the Glock, but in 24 years he had only seen one with a switched barrel. (*Id.* at 128.) A Glock with standard rather than aftermarket components would have polygonal-style rifling. (*Id.* a 127.)

Sergeant Ryan Kramer testified to the work he did on the case, including review of numerous social media and security videos. (3/31/22 Tr. at 89-233.) Sergeant Kramer was able to identify various occurrences that were visible across three of the videos to create an order of events and timeline. (*Id.* at 100-125; State’s Exs. 7, 91, 92.) State’s Exhibit 7 contained Snapchat videos taken by

Toni Weinberger (Toni) who was at the party.² (3/28/22 Tr. at 91-92, 102.) State's Exhibits 91 and 92 are security camera videos that captured movement outside the residence. (3/29/22 Tr. at 12; 3/31/22 Tr. at 99.) Sergeant Kramer explained that he created a timeline and order of events based upon key points captured across the videos, such as Harris's movements, a cell phone illumination light, Toni and her positioning when she came out of the residence, movement on the window shades when Toni began recording, and the gunshot. (3/31/22 Tr. at 100-125.)

Sergeant Kramer also obtained content from Harris's social media accounts. (*Id.* at 95.) In a video taken at the Shooters Bar in the hours before the homicide, Harris wore a puffy white jacket with a hood and an orange beanie. (*Id.*; State's Exs. 157, 158.) Harris wore the same clothing in the security camera videos and Toni's snapchat video. (3/31/22 Tr. at 96-98.) Sergeant Kramer was also able to identify others in the videos, including Cheyenne, Dawan, Michelle, and Ashayla Ponce (Ashayla), as well as Carvell whose white Nike t-shirt stood out against the dark sky. (*Id.* at 98-108.)

² State's Exhibit 7 contains two Snapchat videos taken by Toni that were merged into one video even though the two were played as separate clips at trial. (3/28/22 Tr. at 103-04.) Because the clips are merged into one, the State refers to the timestamp of the combined clips for simplicity and clarity. State's Exhibit 7a is on the same disc and is a Snapchat video clip showing Dawan selling marijuana and drug paraphernalia on the dining room table.

In Toni's first Snapchat video, Toni filmed a group of people crowded around in the entryway hall from her position in the dining room. (State's Ex. 7 at 0:00-0:02.) On the security camera footage, people exit the house and appear to tumble off the stairs, including an individual wearing white. (State's Ex. 91 at 2:47:03-2:47:11.) Carvell can be seen leaving the house wearing the white t-shirt after the first person in white exited the house. (*Id.* at 2:47:11.) Four seconds later, on Toni's first video clip, a gunshot can be heard. (State's Ex. 7 at 0:08.) A second later, Harris's puffy white coat hood can be seen near the window on the side of the house in the security footage. (State's Ex. 91 at 02:47:16.)

On Toni's video, everyone pushed back into the house away from the front door—the only door leading outside. (State's Ex. 7 at 0:09-0:12.) Movement continued outside the house with Carvell and Harris visible next to each other. (State's Ex. 91 at 2:47:11-2:47:41.) Harris and Carvell walked toward the red Pontiac with Ashayla following. (State's Ex. 91 at 2:47:48; State's Ex. 92 at 2:47:44-2:47:58.) Harris opened the rear driver's side door of the Pontiac. (State's Ex. 92 at 2:47:50.) On the security video, Harris, Carvell, and Ashayla walked back towards a white Yukon and Harris removed his puffy white coat. (State's Ex. 92 at 2:48:00-2:48:05; State's Ex. 91 at 2:47:56-2:48:10.) Ashayla walked westbound with Harris's coat and then began to run as Harris and Carvell embraced. (State's Ex. 91 at 2:48:13; State's Ex. 92 at 02:48:15.) This

corroborated Victoria's testimony that she had heard a female tell Harris to take off his sweatshirt because it had blood on it as she walked back to her car.

While Harris and Carvell walked around outside and Harris removed his coat, Toni's video showed Dawan entering the living room with nothing in his hands. (State's Ex. 7 at 0:40-0:46.) As Toni made her way to the front door, Dawan said, "where's my bag G?" (*Id.* at 0:45-0:55.) This corroborated Dawan's testimony that he went back into the house to get his backpack after the shooting.

Toni's first video clip ended at 0:59. Toni's second video clip began after Ashayla left with Harris's coat. Meanwhile, security camera footage showed Harris and Carvell walking back into the house. (State's Ex. 91 at 2:48:15-2:48:30.) Toni's second video clip captured Carvell reentering the house. (State's Ex. 7 at 1:04.)

Toni exited the house off the side of the porch and turned around facing the steps. (*Id.* at 1:17.) In the surveillance videos, a man pointed to the red Pontiac as Harris got into it at the same time a male was heard on Toni's Snapchat video saying "you dropped that nigga" approximately three times. (*Id.* at 1:19-1:21; State's Exs. 91 and 92 at 2:48:46.)

In a video clip Harris posted on December 28, 2020, Harris filmed a white Chevy Impala being towed. (3/31/22 Tr. at 161-62; State's Ex. 167.) Sergeant Kramer explained that the towing company was based out of Moorhead, Minnesota,

and that it served the Fargo, North Dakota area. (3/31/22 Tr. at 161-62.) Sergeant Kramer explained that Harris's cellmate, Brice, had reported that Harris told him he drove to Chicago in a white Chevy Impala after the homicide. (*Id.*)

Sergeant Kramer next addressed Snapchats sent between Harris and another female noting a press release on the shooting that came out before Harris was identified as a suspect. (*Id.* at 162-64.) Sergeant Kramer had also found Snapchats between the two attempting to create an alibi for Harris that were sent before Harris was identified as a suspect. (*Id.* at 166-75; State's Exs. 169, 169A, 170, 170A.)

Detective Yarina obtained jail phone call recordings between Cheyenne and Carvell made after Cheyenne's arrest on a tampering charge related to Harris's case. (3/29/22 Tr. at 75-76.) In the calls, Cheyenne told Carvell that she was mad at Harris because he was the one who chose to do this and he obviously did not even value life. (*Id.*; 4/1/22 Tr. at 146, 165-68.)

Andrew Bishop, a forensic DNA analyst for the Montana State Crime Lab testified that he developed DNA profiles from two swabs of blood drops taken from the south entrance wall of Harris's house. (3/30/22 Tr. at 129-35.) The first profile from the first swab matched James's DNA profile and Harris was excluded as possible contributor. (*Id.* at 134.) The DNA profile from the second swab indicated a mixture of at least two individuals and the major DNA profile matched

James's DNA profile. (*Id.* at 135.) Harris was excluded as a possible contributor to the major profile. (*Id.*)

The defense called Thomas Bevel (Bevel) who testified that he worked for a forensic science and consulting company and that the defense had provided him with materials from the case to review. (4/1/22 Tr. at 15, 70-75.) Bevel issued a report and summary stating his opinion that, based on blood spatter evidence, James was on the inside of the residence with the door partially open when he was shot. (*Id.* at 69-80; State's Exs. 179-80.) Bevel opined that after being shot, James had exited the doorway onto the porch and knocked over the metal handrailing as he fell to the ground. (State's Ex. 179; 4/1/22 Tr. at 132.) Bevel said he had ruled out the possibility that the blood spatter could have been caused by blunt force trauma injuries based on the evidence he was given. (4/1/22 Tr. at 48-49.) During cross-examination it became clear the defense had never provided Bevel with some of the evidence, including the Snapchat videos taken by Toni, the security camera videos, or the photo taken of James in the hospital depicting active bleeding from the laceration on his head. (4/1/22 Tr. at 70-92.)

Carvell testified on behalf of the defense and said he was out by the curb telling people arriving in cars that they could not come to the party when the gunshot rang out. (4/1/22 Tr. at 136-37, 142-43.) Carvell said the party was supposed to be small; his girlfriend Cheyenne had invited Victoria and Michelle,

who brought James with them. (*Id.* at 137.) Carvell said it was supposed to be them, Carvell, Cheyenne, Dawan, and his sister. (*Id.*)

Carvell said Dawan got “into it with this girl named Donna and her friend.” (*Id.* at 141.) He said Dawan had “up two guns,” meaning “[t]win . . . handguns, Glocks or something.” (*Id.*) He said “the fights went crazy from there.” (*Id.*) Carvell said Harris was not armed and that Harris only owned a BB gun. (*Id.* at 141-42.) Carvell said the PX-4 Storm firearm Harris was holding in a video was Dawan’s gun and that they were just taking pictures with it on Christmas Eve. (*Id.* at 142.) Carvell said he did not see who shot James. (*Id.* at 142.)

Carvell said there were lots of fights that night. (*Id.* at 152-53.) He said there had been three fights in the hallway at the same time. (*Id.* at 153.) He said he was right behind James and Dawan in the hallway when they fell off the porch. (*Id.* at 152.) Carvell said he and Harris had been pushing people outside. (*Id.* at 152-53.) The State showed Carvell a photo still from the security camera footage. (*Id.* at 155-56.) The photo, taken right after the gunshot rang out, showed two individuals in white facing where James’s body was found. (*Id.*; State’s Ex. 129.) Carvell identified himself and Harris as the two individuals in white. (*Id.* at 156.) Carvell continued to assert that he did not see who shot James but said that Dawan was armed and he “was the last person on top of [James].” (*Id.* at 157.)

II. Sentencing

The district court held a combined sentencing hearing for three cases. (8/4/22 Tr. at 4.) The State played a compilation of three different Snapchat videos from Harris's account. (*Id.* at 28-35; Doc. 112, State's Ex. 2.) Harris's children were with him in the videos and in one they talked about running from law enforcement. (State's Ex. 2 at 0:00-0:09.) In the second clip, taken the day an alert announced Harris was a person of interest in James's death, Harris played a shooter video game and told his kids that Montana wanted their dad, so they were going to go to the Billings hospital and school and shoot everyone. (0:16-0:58.)

The State also presented a portion of a jail phone call Harris made after trial. (8/4/22 Tr. at 36-39; Doc. 112, State's Ex. 4.) In the call, Harris told another male that a guy in the jail was "smart as hell when it comes to law" and that he was helping Harris. (*Id.* at 0:00-0:47.) The cellmate had told Harris he should have pursued self-defense or mitigation. (*Id.* at 1:23-2:38.) Harris said his lawyer was visiting the following day and Harris was going to bring it up with him. (*Id.* at 0:47.)

The other man on the call told Harris that was what he had been telling him from the beginning too, but Harris would not listen. (*Id.* at 3:01-3:54.) The man said the decision had been up to Harris though. (*Id.*)

Harris responded, saying,

[W]hatever goes down, you know, I'm—I'm hoping for the best, but I put myself in this fucked up—that's why I'ma eat it. I'ma take it. I'ma

charge it to the game. Because I knew I wasn't ever supposed to come to my celly about shit, you feel me? And the judge only brought up my, my celly. You feel me? That's the only thing they brought up. They ain't got nobody else to go out. They, they witnesses were incredible.

(*Id.* at 3:55-4:21.)

Harris said the judge only convicted him “because of what [his] celly said and what [his] celly told them.” (*Id.* at 4:59-5:05.) Harris lamented, saying, “I ran my mouth to my goofy ass celly, a white boy, racist ass white boy, and he went back and told everything on me.” (*Id.* at 5:05-5:13.)

The other male on the call became angry, yelling at Harris, telling him he told him not to talk to his cellmate. (*Id.* at 5:13-5:42.) The clip ended with Harris stating, “yeah, I fucked—I fucked myself up.” (*Id.* at 6:15-6:18.)

Referencing the jail call, the prosecutor said there was nothing mitigated about the homicide, challenging Harris's contention in his sentencing memorandum that it was some sort of “accidental discharge of a firearm during a brawl.” (8/4/22 Tr. at 52.) The prosecutor pointed to Brice's testimony that Harris told him he was aiming for James's face but he missed and shot him in the neck. (*Id.*) The prosecutor reminded the court that Harris had tried to pin the murder on Dawan and asked several people to say he was not there the night of the murder. (*Id.* at 54.)

The State noted Harris's criminal history, including four Yellowstone County cases Harris “picked up” during the four months he lived in Montana. (*Id.*

at 47-55.) Harris had assaulted his then-girlfriend on August 30, 2020, let his GPS monitoring unit die on September 21, 2020, been arrested on warrants on September 25, 2020, and then posted bond on October 1, 2020. (*Id.* at 48.) On December 13, 2020, officers had responded to the Rims after someone reported Harris was waving a gun around. (*Id.*) The prosecutor reminded the court that in that case Harris dismantled the back of the officer's patrol car and threatened to kill an inmate or officer. (*Id.* at 48-49.) Harris appeared on that charge on December 15, 2020, and posted his \$20,000 bond the next day. (*Id.* at 49.) "Just 11 days later, on December 27 of 2020, he murdered James." (*Id.*)

The prosecutor said there were many aggravating factors and recommended a life sentence at MSP for the deliberate homicide charge, 10 years at MSP for the use of a weapon, and 10 years for tampering, all to run consecutively. (*Id.*) The defense recommended 40 years at MSP for the deliberate homicide charge, 10 for the use of a weapon, and 10 for the tampering charge, all to run concurrently. (*Id.* at 57-58, 79.) He explained,

Your Honor, today Mr. Harris is going to take accountability for the death of James Williams. This has been long time coming. And of course, part of that is the State has forced our hand and part of this is as a result of conversation that I have had with Lorenzo.

He understands that in doing so he may jeopardize rights of appeal. He understands that there are consequences to this course of action.

(*Id.* at 58.)

Harris's counsel said the homicide "was a house party that turned tragic." (*Id.* at 59.) He said people were drunk and potentially high and James and Harris got into a fight in Harris's family's home. (*Id.*) Harris's counsel said he had discussed this with Harris, and Harris "knew that in order for any of those defenses to become operable or to be asserted, he would first have to admit to shooting James[.]" (*Id.* at 60.) He said Harris "could have asserted those defenses, Your Honor, had he been psychologically prepared to accept responsibility" but he had not previously been prepared to do so. (*Id.*)

Harris's attorney asked to present a video the defense had never disclosed to the prosecution. (*Id.*) He said the video would show the witnesses were not entirely credible, that there had been a gun on the ground, James had reached for the gun, and Harris had grabbed it. (*Id.*) He said it would show there was a fight between two males trying to get the upper hand and that no one knew what would have happened if James got the gun instead. (*Id.* at 60-61.) He said there was no solid evidence proving what started the fight between James and Harris. (*Id.* at 61.)

Harris's attorney said the court's findings of fact indicated there were several fights that night, including the fight between Harris and James. (*Id.* at 62.) He said the court had endorsed the notion that Carvell and Harris were attempting to remove individuals from the house. (*Id.* at 63.) He asserted that "[f]ights by definition produce extreme mental and emotion[al] distress." (*Id.*)

Harris’s attorney said they had explored these theories before trial and, while they may not have been successful, they were “colorable” theories. (*Id.* at 64.) He again explained they did not raise them at trial because Harris was not prepared to admit to shooting James. (*Id.*) He said Harris wanted the court to see the video because he thought “that the video does show that it was spur of the moment, that it was, in fact, some form of mitigated.” (*Id.* at 66.)

The court permitted the defense to play the video over the State’s objection. (*Id.* at 70-72.) In the video, multiple people were just inside the front door, which was partially open. (Doc. 139, State’s Ex. 1 at 0:00-0:03.) Multiple people, including Carvell, Cheyenne, and Harris repeatedly punched James, who was doubled over. (*Id.*) Harris, wearing a puffy white jacket with the hood up, stood in front of and facing James. (*Id.*) Harris grabbed James’s shirt with his right hand. (*Id.*) Cheyenne—wearing a pink shirt and long jacket—and Carvell—wearing a white t-shirt—repeatedly punched James in the head while Harris held onto James’s shirt. (*Id.*) A female yelled “Get him!” (*Id.*) Harris repeatedly punched James with his left hand while continuing to hold onto James’s shirt behind James’s head with his right hand. (*Id.* at 0:02-0:10.) James appeared to grab Harris’s right hand, the hand that was grabbing James’s shirt. (*Id.* at 0:07-0:09.)

Dawan entered from outside, pushing the door into James and the group assaulting him. (*Id.* at 0:04.) Cheyenne held onto the edge of the open door with

her left hand. (*Id.*) Harris and Cheyenne continued to repeatedly punch James in the head while Dawan entered the house. (*Id.* at 0:04-0:11.) A female yelled, “Get him!” multiple times. (*Id.* at 0:04-0:09.) Blood was visible on the back of Harris’s puffy white jacket and on the right sleeve. (*Id.*) A female yelled “swing them hands” while they punched James. (*Id.* at 0:10.) Another female said, “You got blood on your jacket Zo.” (*Id.* at 0:11-0:12.)

James was pushed toward Cheyenne and Carvell and, once Dawan was inside, Dawan hit James twice on the head with his left elbow. (*Id.* at 0:09-0:12.) One of Dawan’s elbow blows appeared to break Harris’s right-hand grip on James’s shirt and Harris switched to grabbing James’s shirt with his left hand. (*Id.* at 0:08-0:12.) As Harris switched hands, Cheyenne began to push James, and James grabbed Harris’s right jacket sleeve with his right hand. (*Id.*)

Cheyenne pushed James down and forward, onto the ground. (*Id.* at 0:12-0:14.) The video depicted James, still holding onto Harris’s right jacket sleeve with his right hand, catching himself with his left hand on the ground. (*Id.* at 0:12-0:14.) Harris continued to hold a bunched-up portion of James’s grey shirt in his left hand. (*Id.*) A gun became visible on the ground near a laundry bin and another rectangular cardboard item on the ground. (*Id.* at 0:14.) James’s left hand was still on the ground, and James slid that hand away from the gun toward the laundry bin. (*Id.* at 0:14-0:15.) Harris grabbed the gun off the ground with his right hand while

James still held onto Harris's right jacket sleeve with his right hand. (0:14-0:16.) A female said, "Zo, you got blood on you. Let it go" (*Id.* at 0:15-0:17.) Blood drops were visible on the rectangular cardboard item under Cheyenne's right boot. (*Id.* at 0:16.)

Cheyenne and Harris pushed James out of the door. (0:16-0:18.) Cheyenne and Harris exited the front door at the same time. (*Id.* at 0:19-0:21.) The camera moved and Carvell was visible putting his shoes on just inside the door. (*Id.* at 0:21-0:22.)

The camera turned and faced the girl who was filming. (*Id.* at 0:24.) The female put her arm around another girl and said, "you look pretty." (*Id.* at 0:24-0:27.) While the two posed for the camera, a gunshot went off. (*Id.* at 0:27-0:29.)

After the court and the parties viewed the video on the record, Harris's counsel explained that the defense had not used the video at trial "because it was inconsistent with the defense that [they] had to present." (*Id.* at 74.) The defense said the court had broad discretion to sentence Harris within the 10-to-100-year range for deliberate homicide and asked the court to sentence him to 40 years based on the argument that the video depicted a mitigated homicide. (*Id.*)

The prosecutor compared and contrasted the contents of the video to the defense's sentencing memorandum and said it did not depict what the defense purported. (*Id.* at 76-77.) Harris's sentencing memorandum described Harris on the

ground with a 218-pound male on top of him. (*Id.* at 77.) The video showed James, “in kind of an upright fetal position” as the “blows land[ed] down.” (*Id.*) Cheyenne, Carvell, Dawan and others all landed blows. (*Id.*) They “outnumbered [James] probably six to one.” (*Id.*) “[A]t no point in th[e] video d[id] Harris appear[] to be in any danger whatsoever.” (*Id.*)

The State said the video made clear that “[a]fter multiple people began beating up on James [], who was outnumbered five or six to one, [] Harris armed himself and nine seconds later shot [James].” (*Id.* at 77-78.)

Harris told the court he felt empathy for James’s family and that he made a grave mistake when he failed to take responsibility for his actions. (*Id.* at 79.) He said he was empowered to live a different life, that he regretted many of his lifestyle choices, and apologized for the “tragic event that took place in [his] home.” (*Id.*) Harris said he wanted to be there for his own kids. (*Id.*)

Harris said he was “extremely under the influence that night of the event and mentally distressed.” (*Id.* at 80.) Harris asserted, “I also was scared for my life and I fear when I seen the gun on the floor and seen James going for the gun [sic].” (*Id.*) Harris claimed the whole thing was an accident. (*Id.*)

The district court said it was struggling with the assertion that Harris intended to take responsibility for shooting James based on his statements. (*Id.* at

80-81.) After being permitted to speak privately with his attorney, Harris told the court the following:

Yes, I am the man that shot James Williams that night. And it was all an accident. It was not to be trying to kill anybody or belittle somebody. [sic]

I was—I was in the heat of the moment drunk. I am the man that shot the man. And I’m sorry to—for the family. I want the Court to know that.

(*Id.* at 82.)

The district court told Harris it appreciated his admission to killing James. (*Id.* at 83.) Referencing the statutory sentencing considerations, the court said “there [we]re a ton of aggravating circumstances” in the case. (*Id.* at 89-90.) Harris used a gun, he “tamper[ed] with witnesses[,]” and drugs and alcohol were involved. (*Id.* at 90.) Harris was also subject to conditions of release in his other two felonies when he killed James, and his conduct violated many of those conditions. (*Id.* at 90-91.) The court said Harris’s “criminal record [wa]s atrocious” in comparison with defendants outlined by the State and the DOC in their summaries of sentences imposed for similar crimes. (*Id.* at 91.)

Addressing mitigating circumstances, the court noted Harris was “only 29 years old . . . [a]nd this was a fight. This was a house fight in Mr. Harris’[s] house. I get that. I understand that. But Mr. Harris picked up a gun and finished the fight, finish[ed] the fistfight outside with a gun.” (*Id.* at 91-92.) Because Harris was a

repeat violent offender, alternatives to prison were inapplicable. (*Id.* at 92.) The court outlined Harris’s personal history and childhood events that likely led to his criminal behaviors. (*Id.* at 94-97.)

The court sentenced Harris to 10 years at MSP for witness tampering and 65 years at MSP for deliberate homicide, both sentences to run concurrently with each other. (*Id.* at 99-100.) The court sentenced Harris to 10 years at MSP for the use of a weapon in commission of the crime and explained that it was required by statute to run that sentence consecutively to Harris’s deliberate homicide sentence. (*Id.* at 100.)

SUMMARY OF THE ARGUMENT

This Court should decline to exercise plain error review of Harris’s claim that the district court erred by failing to sua sponte address whether he committed mitigated homicide before convicting him of deliberate homicide. The district court did not address mitigated homicide at that time because Harris made the strategic decision at trial to solely argue that he was not the shooter. At trial, Harris chose to withhold the evidence he believed supported a theory of mitigated homicide or self-defense “because it was inconsistent with the defense” that he did not kill James. Invoking plain error review would undermine the very purpose

of the timely objection rule and permit Harris to present a divergent theory after his strategic choice proved unsuccessful.

Even if this Court excuses Harris's failure to preserve his claim, Harris's claim still fails. Harris's sole theory at trial was that Dawan likely shot James, not Harris. If his theory had been believed, Harris would not have been found guilty of either deliberate or mitigated homicide.

ARGUMENT

I. Standard of review

Generally, “[a] party waives the right to appeal an alleged error when the appealing party acquiesced in, actively participated in or did not object to the asserted error” in the trial court. *State v. Winter*, 2014 MT 235, ¶ 17, 376 Mont. 284, 333 P.3d 222 (citing *State v. Bomar*, 2008 MT 91, ¶ 33, 342 Mont. 281, 182 P.3d 47); *State v. Abel*, 2021 MT 293, ¶ 4, 406 Mont. 250, 498 P.3d 199 (citations omitted). This Court has repeatedly stated that it will not put a trial “court in error for an action in which the appealing party acquiesced or actively participated.” *Winter*, ¶ 17 (citing *State v. Harris*, 1999 MT 115, ¶ 32, 294 Mont. 397, 983 P.2d 881).

As a narrow exception to the waiver rule, this Court may invoke plain error review of unpreserved claims if the defendant affirmatively establishes “(1) a plain or obvious error; (2) that affected a constitutional or other substantial right; and

(3) which prejudicially affected the fundamental fairness or integrity of the proceeding.” *Abel*, ¶ 4 (collecting cases). An error is plain only if it leaves one “firmly convinced” that some aspect of the proceeding, if not addressed, would result in a manifest miscarriage of justice, call into question the fairness of the trial or proceeding, or compromise the integrity of the judicial process. *State v. Taylor*, 2010 MT 94, ¶ 17, 356 Mont. 167, 231 P.3d 79. A “mere assertion that an asserted error implicates a constitutional or other substantial right is thus insufficient—the party asserting plain error must affirmatively demonstrate satisfaction of all elements of the plain error doctrine.” *Abel*, ¶ 4 (citation omitted).

II. This Court should decline to invoke plain error review of Harris’s claim that the district court erred in failing to consider mitigated homicide before convicting him of deliberate homicide.

Harris asks this Court to exercise plain error review of his claim, raised for the first time on appeal, that the district court had to consider whether Harris acted under the influence of extreme mental or emotional stress, for which there was a reasonable explanation or excuse, when he shot and killed James before convicting him of deliberate homicide. Harris has not met his burden to establish a plain or obvious error that affected a constitutional or other substantial right, nor has he established that the alleged error prejudicially affected the fundamental fairness or integrity of his trial.

A. Harris has not met his burden to establish any error, much less plain error.

Harris cites this Court's holding in *State v. Black*, 270 Mont. 329, 331, 891 P.2d 1162 (1995), which states a trial court presiding over a bench trial "is *permitted* to" sua sponte convict a defendant of a lesser-included offense. (Appellant's Br. at 6 (emphasis added).) While Harris is correct that a trial court *may* sua sponte convict a defendant of a lesser-included offense, Harris fails to cite any authority stating that a court *must* consider mitigated homicide when neither party advances a theory of mitigation and the defense's sole theory is that he did not kill the victim. Without any authority requiring a court sitting as fact finder to address mitigated homicide before convicting a defendant of deliberate homicide, Harris cannot establish that the district court committed any error, much less plain error.

B. Harris has not met his burden to show that the claimed error implicates a fundamental right.

Harris offers no authority for his proposition that the due process clauses of the Montana and United States constitutions include the right to have a trial court address the lesser-included offense of mitigated homicide before convicting on deliberate homicide when the defendant's sole theory at trial, if believed, would require acquittal of both deliberate and mitigated homicide.

This Court has held that a trial court is permitted but not required to sua sponte instruct juries on lesser-included offenses when the parties strategically choose not to ask for a lesser-included instruction, even when the evidence at trial would have supported a finding for the lesser-included offense. *State v. Sheppard*, 253 Mont. 118, 122-27, 832 P.2d 370, 372-75 (1992). In *Sheppard*, this Court specifically found that the district court's failure to sua sponte give the unrequested lesser-included instruction did not implicate Sheppard's due process rights. *Id.* at 124-27, 832 P.2d at 374-75. Harris offers no authority stating that failure to sua sponte consider a lesser-included offense in a bench trial implicates a fundamental right, nor does Harris distinguish or cite to *Sheppard*.

Harris strategically withheld the evidence he believed supported mitigation until after trial because he believed it was inconsistent with his claim that he did not kill James. Harris has not established that the court's failure to sua sponte address mitigated deliberate homicide before convicting him of deliberate homicide implicated his due process rights. Because Harris has failed to establish that any fundamental right is implicated, further analysis is unnecessary, and this Court should decline to exercise plain error review.

C. Harris has failed to establish that failure to review his claim would call into question the fundamental fairness of the proceedings.

Harris speciously claims that the district court's failure to consider mitigated homicide before convicting him of deliberate homicide calls into question the fundamental fairness of the proceedings. (Appellant's Br. at 5.) The record establishes that Harris strategically chose to withhold any suggestion of mitigation until after trial. Harris cannot complain about the timing of the court's consideration of mitigation when the timing was by his own design.

Harris waited until the sentencing hearing to offer any evidence that he believed supported a theory of mitigation. He explained he did so because arguing that Harris shot James under extreme emotional or mental stress or in self-defense ran contrary to his theory that he did not shoot James. Harris received exactly the process he sought. Harris has failed to meet his burden to establish that failure to review his claim would call into question the fundamental fairness of the proceedings.

III. Even if this Court reviews Harris’s claim, the district court did not err by not considering whether Harris committed mitigated deliberate homicide before convicting him of deliberate homicide when Harris’s sole theory, if believed, would have required acquittal of either charge.

A. The district court did not have to address the lesser-included offense of mitigated homicide because Harris asserted someone else killed James.

A person commits the offense of deliberate homicide if “the person purposely or knowingly causes the death of another human being.” Mont. Code Ann.

§ 45-5-102(1)(a) (2019). A person is guilty of mitigated deliberate homicide when the person “purposely or knowing causes the death of another human being . . . but does so under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse.” Mont. Code Ann. § 45-5-103(1) (2019).

“Mitigating circumstances that reduce deliberate homicide to mitigated deliberate homicide are not an element of the reduced crime that the state is required to prove or an affirmative defense that defendant is required to prove. Neither party has the burden of proof as to mitigating circumstances, but either party may present evidence of mitigation.” Mont. Code Ann. § 45-5-103(3); *State v. Gratzner*, 209 Mont. 308, 319, 682 P.2d 141, 146 (1984).

“A defendant may be convicted only of the greatest included offense about which there is no reasonable doubt.” *State v. Craft*, 2023 MT 129, ¶ 12, 413 Mont. 1, 532 P.3d 461 (quoting *State v. Freiburg*, 2018 MT 145, ¶ 13, 391 Mont. 502, 419 P.3d 1234). There is sufficient evidence for a fact finder

“to convict a defendant of a lesser offense when there are alternate theories of the case, including a theory about the lesser-included offense, and other witness testimony—especially the defendant’s testimony—supports that theory.” *Id.* ¶ 15 (citing *Freiburg*, ¶ 18; *State v. Daniels*, 2017 MT 163, ¶¶ 15-16, 388 Mont. 89, 397 P.3d 460).

There is insufficient evidence for a fact finder to convict a defendant of a lesser-included offense “when the evidence, if believed, would require an acquittal on both the greater and lesser offense—that is, the defense’s entire theory is that the defendant did not commit the crime.” *Id.* “This Court has consistently held that limited pieces of evidence, without more, especially when the defendant maintains his innocence, will not support a finding that the defendant acted under extreme emotional or mental stress for which there is no reasonable explanation or excuse.” *Craft*, ¶ 17 (citations and internal quotation marks omitted).

“This Court has repeatedly held that simply being intoxicated or angry does not support a finding of extreme mental or emotional stress for which there is a reasonable explanation or excuse.” *State v. Howell*, 287 Mont. 268, 954 P.2d 1102 (1998) (citing *State v. Goulet*, 283 Mont. 38, 41-42, 938 P.2d 1330, 1332-33 (1997); *State v. Williams*, 262 Mont. 530, 541, 866 P.2d 1099, 1006 (1993), *overruled in part on other grounds by State v. Good*, 2002 MT 59, ¶ 63, 309 Mont. 113, 43 P.3d 948); *State v. Heit*, 242 Mont. 488, 791 P.2d 1379 (1990).

In *Goulet*, the defendant and the victim were drinking, gambling, and playing pool at different bars. 283 Mont. at 40, 938 P.2d at 1331. Goulet asked the victim for a cigarette, but the victim refused and pushed Goulet away. *Id.*, 938 P.2d at 1331. Goulet stabbed the victim, took money and items from the victim's pockets, and told an observer he did not like the victim. *Id.*, 938 P.2d at 1331. This Court held that Goulet's intoxication and evidence that he and the victim got into an altercation over a cigarette were insufficient to support a finding of extreme mental or emotional stress for which there was a reasonable explanation or excuse. *Id.* at 42, 938 P.2d at 1332.

Similarly, in *Williams*, this Court held that the defendant's anger and intoxication were insufficient to support a finding of extreme mental or emotional stress for which there was a reasonable explanation or excuse. 262 Mont. at 541, 866 P.2d at 1106. This Court specifically noted that no "reasonable explanation [was] given for defendant's anger which led to his altercation" with the victim. *Id.*, 866 P.2d at 1106. The uncontroverted evidence involved a disagreement over drug profits the defendant believed the victim owed and the victim's request that Williams leave the mobile home that Williams owned and the victim lived in. *Id.* at 532-33, 41, 866 P.2d at 1100, 1106.

Here, there was minimal and divergent testimony about what led to the altercation between James and Harris. However, none of the possible explanations

supported a finding of mitigated deliberate homicide. Dawan testified Harris and James had a disagreement about a blunt immediately before the altercation in the hallway. Dawan explained that blunts are cigars with the tobacco removed and replaced with marijuana. A pack of cigars was found next to James's hat in the hallway.

Brice, who was not present at the time of the homicide, testified Harris told him that he and James were involved with the same girl, but he did not mention a name or explain how the girl related to the homicide. Michelle testified that she had a casual romantic relationship with James and that she did not really know Harris, she had just seen him at a few house parties. In the jail call video related to Harris's tampering charge, Harris tried to find people to testify that he and his girlfriend, Alyssa, were headed back to Chicago with the kids at the time of the shooting. There was no testimony that Harris and Michelle were ever romantically involved nor that Alyssa and James were romantically involved.

While witnesses disagreed about what prompted the disagreement between Harris and James, just as in *Williams* and *Goulet*, none of the evidence would have supported a finding that Harris acted under extreme mental or emotional stress for which there was a *reasonable* explanation or excuse. Carvell testified that Cheyenne invited Michelle and Victoria, who brought James, and that it was the people arriving just before the shooting who he told they could not come in. Carvell

never testified that Harris was trying to kick James out of the house. Even if there had been testimony that Harris was trying to get James to leave, just as in *Williams*, it still would not have been sufficient to support a finding of extreme mental and emotional distress for which there was a reasonable explanation. Similarly, a disagreement about whether it was James's turn to take a hit off of a blunt is no different than the altercation about a cigarette in *Goulet*.

The district court did not err in failing to sua sponte consider whether Harris killed James under extreme mental or emotional stress for which there was a reasonable explanation or excuse because the evidence at trial—at best—indicated that Harris was intoxicated and generally angry or annoyed, which is insufficient to support a finding of mitigated deliberate homicide.

B. The district court did not have to find the absence of mitigation before inferring from the evidence that Harris acted purposely.

Harris does not raise a separate claim regarding insufficiency of the evidence. However, in support of his claim that the court had to consider mitigated homicide before convicting him of deliberate homicide, Harris asserts the evidence was insufficient because “[t]he ‘deliberate’ element of deliberate homicide may be inferred, but *only* where no circumstances of mitigation, excuse, or justification are present.” (Appellant’s Br. at 8 (emphasis in original).) In support of this contention, Harris cites to Mont. Code Ann. § 45-5-112, which provides, “In a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused

committed a homicide and no circumstances of mitigation, excuse, or justification appear.” Harris’s assertion that Mont. Code Ann. § 45-5-112 provides the sole ground for a permissible inference of a defendant’s mental state in a deliberate homicide trial is incorrect.

This Court has already explained that Mont. Code Ann. § 45-5-112 does not “require the State in a deliberate homicide case to negate mitigation beyond a reasonable doubt before the [fact finder] may infer purpose or knowledge.” *Gratzer*, 209 Mont. at 317, 682 P.2d at 145. Montana Code Annotated § 45-5-112 “imposes no greater burden upon the State” beyond the required elements of deliberate homicide under Mont. Code Ann. § 45-5-102. *Id.*

As the district court noted in its findings of fact and conclusions of law, a person’s mental state can be inferred from what they do and say “and from all the facts and circumstances involved.” *State v. Pierce*, 199 Mont. 57, 63, 651 P.2d 62, 62 (1982) (*overruled in part on other grounds by State v. Tadewaldt*, 277 Mont. 261, 269, 922 P.2d 463, 468 (1996)). “Proof of mens rea is based on circumstantial evidence, as we cannot obtain direct proof of what is in a person’s mind or what he is actually thinking.” *Guillen v. State*, 2018 MT 71, ¶ 15, 391 Mont. 131, 415 P.3d 1.

The district court did not rely on Mont. Code Ann. § 45-5-112 in finding that Harris acted purposely or knowingly. Instead, the court found that “direct and

circumstantial evidence” established “beyond a reasonable doubt that it was Mr. Harris’s conscious object to shoot Mr. Williams in the face.” (Doc. 100 at 31.) The court based its finding on Brice’s testimony that Harris told him he tried to shoot Harris in the face but missed and shot him in the neck. (*Id.* at 30.) The district court was not required to make findings that there was no mitigation, excuse, or justification before inferring that Harris purposely or knowingly shot and killed James.

CONCLUSION

This Court should affirm Harris’s conviction for deliberate homicide.

Respectfully submitted this 27th day of August, 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 9,642 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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