

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0406

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID ALLEN PEIN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Tenth Judicial District Court,
Fergus County, The Honorable Nickolas C. Murnion, Presiding

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STATEMENT OF THE ISSUES

1. Whether the district court properly exercised its discretion in disallowing Appellant to rely on justifiable use of force based on his failure to comply with the disclosure deadline when Appellant did not establish good cause for extending the disclosure deadline.

2. Whether the district court properly exercised its discretion in refusing to instruct the jury on justifiable use of force when there was no evidence to support the instruction and Appellant made no argument that evidence supported the instruction.

STATEMENT OF THE CASE

By Amended Information, the State charged Appellant David Pein with misdemeanor operating a vehicle without liability insurance, misdemeanor disobedience to a direction of a peace officer, misdemeanor obstructing a peace officer, misdemeanor criminal mischief, misdemeanor resisting arrest, and two counts of felony assault on a peace officer. (D.C. Doc. 22.)

In the omnibus hearing order signed on February 22, 2021, Pein checked that he intended to rely on justifiable use of force. (D.C. Doc. 18, attached to Appellant's Br. as App. B at 7.) Pein did not indicate whether he had given notice of the affirmative defense within 30 days of arraignment. (*Id.*) The district court

record shows that Pein had not given notice of the affirmative defense. The omnibus hearing order provided, “If [notice] not given, defendant requests until _____ (date) to file such notice.” (*Id.*) Pein did not ask for additional time to file his notice in the omnibus hearing order. (*Id.*) The order then provided, “For each affirmative defense identified, defendant shall provide names and addresses of all witnesses to be called in support of the defense, together with all written reports or statements made by them, to the State on or before the following date: March 26, 2021.” (*Id.*)

On February 28, 2022, the State filed motions in limine that included a request for the district court to rule in advance of trial that justifiable use of force was not available to Pein when he resisted arrest and, while doing so, assaulted two peace officers. (D.C. Doc. 73, attached to Appellant’s Br. as App. C.) On March 8, 2022, Pein responded that he gave the State notice in the omnibus hearing order of his intent to rely on justifiable use of force. Pein then added, “The Defendant does understand that the assertion of his affirmative defense requires he leap certain hurdles; and [he] will not assert the defense until such burden has been met. The use of this affirmative defense is improper as to a resisting arrest charge; but may apply to other charges in this matter. This motion should be held in abeyance until trial.” (D.C. Doc. 81, attached to Appellant’s Br. as App. E.)

After obtaining new counsel, on April 29, 2022, Pein filed a motion to extend the pretrial briefing schedule, asserting that he had requested additional information from the State and needed additional time for briefing. (D.C. Doc. 98.) The State objected, arguing that Pein failed to establish good cause for extending the deadline. (D.C. Doc. 100.) The district court denied the motion because Pein only made a vague statement that he had requested additional information from the State and this did not establish good cause to extend the briefing deadline. (D.C. Doc. 101.)

On June 22, 2022, the district court issued an order addressing, in part, the State's motion in limine to preclude Pein from asserting justifiable use of force at trial, in which the court concluded:

The defense concedes that this affirmative defense is not available for the offense of resisting arrest but may apply to other charges in this matter. The Court will grant the motion in limine with regard to the offense of Count IV: Criminal Mischief, a misdemeanor. The Court will reserve ruling on whether the Defendant may assert justifiable use of force with regard to the other charges.

In the Omnibus Hearing Order of February 22, 2021, the Defendant indicated his intent to rely on the affirmative defense of justifiable use of force. The Omnibus Hearing Order further provided that the Defendant was required to provide names and addresses of all witnesses to be called in support of the defense, together with all written reports or statements made by them, to the State on or before March 26, 2021. Defendant has not filed a notice of intention to rely on this defense nor has he filed a list of the witnesses he intends to call in connection [with] this defense by March 26, 2021 The Court has not been provided a motion by the defense to extend the deadline set forth in § 46-15-323, MCA or the deadline set forth in the

Omnibus Hearing Order regarding the affirmative defense of justifiable use of force.

....

Under § 46-15-329, MCA, the Court is authorized to preclude a defendant from raising a defense if he failed to comply with the discovery provisions or any order issued by the Court. Here the Defendant failed to comply with § 46-15-323, MCA by providing a written notice to the prosecutor of intention to rely on the affirmative defense of justifiable use of force. Under the terms of the Omnibus Hearing Order, the Defendant was required to provide evidence in support of justifiable use of force by March 26, 2021. It appears that the Defendant failed to provide such evidence as required.

(D.C. Doc. 102, attached to Appellant’s Br. as F, at 4-5.) Despite Pein’s failure to comply with the omnibus order, the court reserved ruling on whether he could assert justifiable use of force for charges other than criminal mischief. (*Id.* at 7.)

On July 19, 2022, Pein filed notice of his intention to rely on the affirmative defense of justifiable use of force. (D.C. Doc. 114, attached to Appellant’s Br. as App. G.) Pein blamed the lack of timely notice on his former counsel and surmised, without analysis, the lack of notice would lead to a claim of ineffective assistance of counsel. (*Id.* at 1.) Pein moved the court for an order extending the deadline for providing notice, arguing that his prior counsel’s failure to file the notice was ineffective assistance. Pein also alleged the State could not claim surprise because he had informed both officers that he “would deem them as threats at the time of the incident.” (*Id.* at 2.)

The State responded, arguing that Pein’s notice was untimely and he failed to establish good cause to excuse the untimeliness of his notice. The State also argued that Pein was the initial aggressor and the charges of assault on a peace officer directly stemmed from his resisting arrest. (D.C. Doc. 118, attached to Appellant’s Br. as App. H.)

The district court denied Pein’s motion to extend the deadline for filing notice of defenses. (D.C. Doc. 119, attached to Appellant’s Br. as App. I.) In so doing, the court noted that the only good cause Pein alleged was the possible ineffective assistance of counsel claim against his former counsel. Pein also claimed that because he had informed the officers that if they touched him, he would deem them a threat, the State should not be surprised that he was relying on justifiable use of force. (*Id.* at 2.) In rejecting Pein’s assertion, the district court explained:

The defendant does not get to “deem” law enforcement a threat. The use of force is only justified “when and to the extent that the person reasonably believes that the conduct is necessary for self-defense . . . against the other person’s imminent use of unlawful force.” § 45-3-102, MCA (Emphasis supplied). The Defendant must have a reasonable belief that his conduct in resisting is necessary and that law enforcement is about to use unlawful force. No such allegation is made in this case.

.....

The Defendant was non-compliant with the requests of law enforcement to provide his license, registration and proof of insurance. He was notified that he was obstructing justice and that he

was being placed under arrest. The Defendant then allegedly slapped Sgt. Routzahn's hand which is the first act of aggression. The Defendant's continued resistance to his arrest caused the alleged assaults on the two officers. "A person is not authorized to use force to resist an arrest that the person knows is being made by a peace officer . . . even if the person believes the arrest is unlawful and the arrest in fact is unlawful." § 45-3-108, MCA. There is no allegation that the arrest was not [lawful], and the Court has previously upheld the legality of the stop of the Defendant. *Order Re: Defendant's Motion to Suppress filed May 21, 2021*. The Defendant is not entitled to the defense of justifiable use of force when it involves his arrest by a law enforcement officer, he was the aggressor, the arrest was lawful and there was no threat of imminent force.

....

The Defendant has failed to provide good cause to extend the deadlines under § 46-15-323, MCA or the deadline set forth in the Omnibus Order. The Defendant has also failed to provide an argument as to how the Defendant is entitled to the defense of justifiable use of force with regard to the offenses charged.

(Appellant's App. I at 2-3.)

Pein submitted proposed jury instructions that included instructions on justifiable use of force. (D.C. Doc. 120, Defendant's Proposed Instrs. 5-7, attached to Appellant's Br. as App. J.) The State objected to Pein's proposed instructions. (D.C. Doc. 124, attached to Appellant's Br. as App. K.) The district court refused Pein's proposed instructions 5-7. (8/2/22-8/5/22 Transcript of Jury Trial [Tr.(1)-Tr.(4), at Tr.(2)] at 234-35.)¹

¹The numbering of each day of the jury trial begins anew at page 1. The State will reference the trial transcript as Tr. followed by the numerical day of the trial and the page number of the transcript.

At the close of the State's case-in-chief, the district court granted Pein's motion to dismiss the misdemeanor criminal mischief charge for insufficient evidence. (Tr.(2) at 205-06.) The jury found Pein not guilty of operating a vehicle without liability insurance and not guilty of one count of assault on a peace officer. The jury found Pein guilty of disobeying a direction of a peace officer, obstructing a peace officer, resisting arrest, and one count of assault on a peace officer. (D.C. Doc. 137.)

For the misdemeanor offenses, the district court either imposed a fine or a 6-month suspended sentence. For the felony assault on a peace officer, the district court imposed a 15-year prison term, suspended, and ordered the sentences to run concurrently. (D.C. Doc. 152, attached to Appellant's Br. as App. A.)

STATEMENT OF THE FACTS

I. The offenses

In December 2020, Officer Johnson of the Lewistown Police Department was a narcotics officer and a K-9 officer, who also performed normal patrol duties. (Tr.(1) at 267-68.) On December 26, 2020, Officer Johnson was on duty from 6 p.m. until the following morning. At about 7 p.m. that evening, he was in his vehicle patrolling with Sergeant Routzahn. It was a slow evening, so the two officers decided to ride together patrolling the main thoroughfares in town. Officer

Johnson parked his vehicle and turned his headlights off. (*Id.* at 270.) As a vehicle passed him, he saw that it did not have a license plate light with proper illumination, so he pulled out and activated his top lights to make a traffic stop. (*Id.* at 271.)

The driver of the vehicle, later identified as Pein, did not stop, although he had several opportunities to do so. Instead, Pein turned right into the local brewery parking lot, where he still did not come to a stop. Pein slowed his vehicle enough to stick his head out the window and say he was not going to stop and continued driving towards his nearby home. (*Id.*) Officer Johnson instructed him to stop his vehicle. As this exchange occurred, Sergeant Routzahn jumped out of the vehicle. Pein ignored Officer Johnson's direction to stop his car, while Sergeant Routzahn followed Pein's vehicle on foot. (*Id.*)

Officer Johnson followed Pein until Pein came to a stop near his residence. Officer Johnson quickly got out of his vehicle and advised Pein, who was starting to open the driver's side door, to stay in the vehicle with the door shut so Officer Johnson could conduct his traffic stop. Pein refused to stay inside his vehicle. Officer Johnson placed his hand on the door to prevent Pein from exiting the vehicle, as he was trained to do for safety reasons. Pein was agitated, would not listen to Officer Johnson, and got in Officer Johnson's face. (*Id.* at 272-73.) Officer Johnson's vehicle camera and his body camera were both activated. (*Id.* at 274;

see State's Exs.7-9.) Pein was nearly touching Officer Johnson's vest with his torso, creating issues with Officer Johnson's safety. Officers need at least an arm-length distance to react to behaviors implicating their personal safety. (Tr.(2) at 7; State's Ex. 7.)

As Officer Johnson does for every traffic stop, he asked Pein for his license, registration, and insurance information. Pein told Officer Johnson that he did not recognize the authority of police officers and demanded Officer Johnson's badge number and his place of employment. (*Id.* at 273.) Officer Johnson identified himself by name and place of employment. He attempted to explain that he was simply trying to make a traffic stop and needed the information requested. Officer Johnson intended to give Pein a warning for the defective light illuminating his license plate. He advised Pein that was all he intended to do if Pein would calm down and cooperate. (*Id.* at 275; *see* State's Ex. 7.)

After Sergeant Routzahn's numerous unsuccessful attempts also urging Pein's compliance, he informed Pein that since he refused to cooperate by supplying Officer Johnson with the requested information, he was under arrest for obstruction. Pein emptied the content of his pockets onto the hood and informed the officers that if they touched him, he would deem them to be a threat, and declined to follow any of Sergeant Routzahn's further commands. (*Id.* at 276-77.) After Pein repeatedly refused Sergeant Routzahn's requests to place his arms

behind his back, Sergeant Routzahn attempted to grab one of Pein's arms to place him under arrest. Pein swung his arms to get them away from Sergeant Routzahn and pushed Sergeant Routzahn in the chest. When Sergeant Routzahn continued to trying to get control of one of Pein's arms, Pein began throwing punches toward Sergeant Routzahn and hit him in the face with a closed fist. (*Id.* at 277-78.)

Sergeant Routzahn and Pein became entangled and fell to the ground. Officer Johnson was able to pry Pein's arms off Sergeant Routzahn's head and neck and got Pein handcuffed with his hands in front of his body, just to regain control of the situation. (*Id.* at 278.) Even after Officer Johnson handcuffed Pein, Pein still had not fully released Sergeant Routzahn. Officer Johnson kept telling Pein to calm down, but Pein remained agitated. (*Id.* at 279.) While Officer Johnson was attempting to place Pein in handcuffs, his pinky finger was dislocated. (*Id.* at 280.) He popped his finger back into place himself, causing considerable pain. (*Id.*) Officer Johnson later sought medical treatment, where a doctor confirmed his finger had been dislocated. (*Id.* at 281.)

Sergeant Routzahn also recounted that on the evening of December 26, 2020, he had been patrolling with Officer Johnson. (Tr. (2) at 106.) Sergeant Routzahn was wearing his body camera. (*Id.* at 107-08; State's Ex. 17.) He explained that after Officer Johnson approached Pein's vehicle and Pein forcefully exited the vehicle, Sergeant Routzahn firmly ordered Pein to step away from

Officer Johnson because he was creating an officer safety issue. (Tr.(2) at 109.)

Sergeant Routzahn explained that officers need a safe distance between them and a person they have stopped to be able to react to any safety issues. (*Id.* at 109-10.)

Sergeant Routzahn had concerns that based on Pein's aggression he might assault Officer Johnson. (*Id.* at 110.) Pein was extremely angry and agitated. (*Id.* at 111.)

After Pein refused to comply with any of the officers' requests, Sergeant Routzahn told Pein he was arresting him for obstructing the officers from carrying out their duties. (*Id.* at 112-13; *see* State's Ex. 17.) Sergeant Routzahn requested Pein to turn around and put his arms behind his back numerous times. Pein refused to comply and instead emptied out his pockets, placing the contents on the hood of his vehicle. (Tr.(2) at 114-15.) Pein also postured himself in a manner that looked like he was preparing to fight. (*Id.* at 116.) Pein told the officers he did not recognize their authority and that if they touched him, he would deem them a threat. (*Id.* at 123.) Sergeant Routzahn explained that Officer Johnson was considerably smaller than Pein, while Pein and Sergeant Routzahn were similar in size. (*Id.* at 117.)

When Sergeant Routzahn reached for Pein to gain control of his arms and arrest him, Pein slapped his hands away and pushed him in the chest. (*Id.* at 123.) Pein punched Sergeant Routzahn in the face several times. The two got entangled

and tumbled to the ground. Even after the officers handcuffed Pein, he remained agitated. Pein grabbed Sergeant Routzahn's hand and refused to let go. (*Id.* at 125.)

After Pein was arrested and transported to the detention center, Sergeant Routzahn realized he had considerable pain in his shoulder, and he went to the emergency room. He also had a small cut on his face and a painful, loose tooth. Initially, the emergency room doctor thought he had a shoulder sprain and gave him some pain medication. When Sergeant Routzahn got home, he was unable to remove his pistol from his belt because of the pain. (*Id.* at 132, 143.) Sergeant Routzahn could not work his shift the following day due to the pain in his shoulder and his inability to perform normal functions as a peace officer. (*Id.* at 135.) Ultimately, Sergeant Routzahn had an MRI and shoulder surgery. (*Id.* at 140.)

Dr. Hebert is an orthopedic surgeon who treated Sergeant Routzahn for his shoulder injury. (*Id.* at 62, 65.) Dr. Hebert concluded that Sergeant Routzahn had a superior labral tear in his shoulder, known as a slap tear, which required surgical repair. Sergeant Routzahn was experiencing significant shoulder pain and had difficulties with forward flexion such as reaching for something, manipulating a steering wheel, or drawing his pistol. (*Id.* at 66-67.) Without surgery, Sergeant Routzahn was unable to perform his job duties. (*Id.* at 68.) Dr. Hebert performed the surgery in March 2021. For the first six weeks following the surgery, Sergeant Routzahn's arm was in a sling and he was restricted from all activity. (*Id.* at 73.)

When Sergeant Routzahn returned to work at the end of April, he was on light duty. He finally returned to his normal activities at work and home in September 2021. (*Id.* at 140-41.)

Pein did not call any witness to testify at trial. (*Id.* at 208.)

II. Justifiable use of force and jury instructions

During Pein's jury trial, after the State rested, the following dialogue occurred between defense counsel and the court:

MR. KITCHIN: Before the defense's case in chief though I'm gonna ask for some guidance based upon pretrial rulings. It's my understanding that we're still not allowed to present any evidence of justifiable use of force, is that the case?

COURT: That's correct.

MR. KITCHIN: Okay.

COURT: I've seen nothing to change my mind at this point.

MR. KITCHIN: Okay. Even, and we would argue that the videos specifically stating that he would deem them a threat in connection with the officer's testimony that he specifically reached out to make contact with Mr. Pein and then [Pein] struck him goes to that analysis. Based upon the Court's rulings however and based upon the continued effort to not cause a mistrial by saying something in appropriate we will be advising my client Mr. Pein not to testify based on the pretrial rulings.

COURT: All right. Mr. Pein then is that correct? You don't wish to testify today?

MR. PEIN: Yes sir.

COURT: And are you under the influence of any substance today?

MR. PEIN: No sir.

COURT: And are you doing this willingly and voluntarily, making this choice not to testify?

MR. PEIN: With guidance, yes.

COURT: Okay. I just want to make sure. It's your decision, it's your constitutional right not to testify or to testify, but you've taken [advice] of your counsel and you wish to assert your right not to testify, is that correct?

MR. PEIN: Yes.

(Tr.(2) at 206-08.)

During the settling of jury instructions, the district court denied Pein's proposed instructions 5 through 7 on justifiable use of force. Pein made no argument that there was evidence in the record, including the officers' body camera videos, to support the instructions. (*Id.* at 234-35.)

SUMMARY OF THE ARGUMENT

The district court properly exercised its discretion when it denied Pein's untimely notice of justifiable use of force. Pein made no effort to establish good cause for his untimely notice. Pein's notice was about a year late and disclosed no witnesses. Pein never made an offer of proof that disallowing justifiable use of force was an unduly harsh sanction. Based on the officers' body camera videos,

Pein cannot establish the sanction was unduly harsh because there is no credible claim of justifiable use of force. Pein turned a routine traffic stop that would have resulted in a warning into his own show of force against peace officers who were trying to complete a simple traffic stop. Pein initiated physical contact with the officers when there was no evidence that the officers were doing anything but making a lawful arrest. The officers repeatedly tried to obtain Pein's cooperation, but he steadfastly refused and created a showdown. He now wants to be rewarded for his conduct by receiving a new trial so he can present an unmeritorious claim of justifiable use of force that is not supported by the videos documenting the stop. The district court properly exercised its discretion in imposing its sanction for Pein's untimely and deficient notice of justifiable use of force.

There was no evidence in the trial record to support Pein's justifiable use of force jury instructions. Pein chose not to call any witnesses or testify on his own behalf, and the State's evidence clearly did not support justifiable use of force jury instructions.

ARGUMENT

I. The standard of review

This Court reviews a district court's imposition of sanctions pursuant to Mont. Code Ann. § 46-15-329 for an abuse of discretion. *State v. DeMary*,

2003 MT 307, ¶ 10, 318 Mont. 200, 79 P.3d 817. This Court reviews a district court's decision regarding jury instructions for abuse of discretion and considers whether the instructions given fully and fairly instructed the jury on the applicable law. *State v. Gysler*, 2025 MT 106, ¶ 12, 422 Mont. 45, 569 P.3d 167. "To constitute reversible error, any mistake in instructing the jury must prejudicially affect the defendant's substantial rights." *State v. Wienke*, 2022 MT 116, ¶ 16, 409 Mont. 52, 511 P.3d 990, citing *State v. Courville*, 2002 MT 330, ¶ 15, 313 Mont. 218, 61 P.3d 749.

II. The district court properly exercised its discretion in precluding Pein from relying on justifiable use of force.

A. Pein's notice was untimely.

As Pein recognizes, Mont. Code Ann. § 46-15-323(2) requires a defendant, within 30 days of arraignment, or "a later time as the court may for good cause permit," to provide the prosecutor with written notice of the defendant's intention to introduce evidence of justifiable use of force. The district court arraigned Pein on January 7, 2021. (D.C. Doc. 7.) In the omnibus order dated February 22, 2021, the district court ordered Pein to file notice of justifiable use of force including the names and addresses of all witnesses he intended to call to support the defense by March 26, 2021. (Appellant's App. B at 7.) Pein filed an untimely notice on July 19, 2022, approximately two weeks before the jury trial, which the court had

already continued three times. (Appellant’s App. G; D.C. Docs. 39, 52, 94.) Pein urged the district court to overlook the untimely notice because he had retained new counsel, and because if the court disallowed justifiable use of force it might result in an ineffective assistance of counsel claim against Pein’s former counsel. (Appellant’s App. G.) Pein also urged that the officers’ reports and body camera videos “disclosed” his affirmative defense since Pein told both officers that he would deem them as threats. (*Id.*)

Even Pein seems to concede that his notice was untimely. (Appellant’s Br. at 26-27.) Also, Pein did not disclose any witness to support his reliance on justifiable use of force. Pein asserts on appeal, however, that he established good cause to file his notice two weeks before the jury trial. By the time of trial, Pein had not disclosed any witness that would support his assertion that he was justified in using force against the officers. *See State v. Cooksey*, 2012 MT 226, ¶ 8, 366 Mont. 346, 286 P.3d 1174 (After trial starts, the defense may not call any witness in support of justifiable use of force if that witness had not been previously listed, except upon a showing of good cause.).

B. Pein did not establish good cause.

The standard this Court has applied in determining whether good cause is shown is whether “substantial reason that affords a legal excuse” exists for the

delay in asserting a defense. *State v. Wells*, 202 Mont. 337, 344, 658 P.2d 381, 385 (1983), citing *State v. Rozzell*, 157 Mont. 443, 450, 486 P.2d 877, 881 (1971).²

In sum, Pein argues that there was good cause because there was no way the State was surprised by his intention to rely on justifiable use of force. But Pein fails to recognize that he was required to supply the State with the witnesses he intended to call at trial to support the defense. Notably, both officers' body camera recordings showed that Pein's passenger used a cell phone to record the stop and arrest. (*See State's Exs. 7, 17.*) Pein did not disclose his passenger as a witness, although he clearly knew she was there and had recorded Pein's interaction with the officers.

Pein simply asserts that he was obviously the only witness because once the district court concluded it had not heard anything to suggest his untimely-noticed justifiable use of force was appropriate, Pein indicated that he would not testify. The State, however, should not be forced to guess how Pein initially intended to establish justifiable use of force, just as Pein should not be forced to guess how the State intended to prove its case at trial. *See State v. Dezeeuw*, 1999 MT 331, ¶ 11, 297 Mont. 379, 992 P.2d 1276.

²In *Wells*, the defense of alibi was at issue, but the good cause definition used should apply equally to other defenses.

Pein offers no legitimate explanation for filing his untimely, incomplete notice of justifiable use of force just two weeks prior to trial and almost a full year after the court-imposed deadline. Rather, on appeal, he suggests that it is the State's burden to demonstrate why it was surprised by his disclosure or how it would have been prejudiced if Pein was allowed to proceed with the late-noticed justifiable use of force defense. But the issue before this Court is whether the district court properly exercised its discretion in concluding Pein failed to establish good cause for allowing the untimely filing. Pein had the burden to establish good cause to the district court, and he failed to do so. On appeal, it is Pein's burden to prove the district court abused its discretion in concluding that he did not establish good cause for his untimely notice. *State v. Carter*, 285 Mont. 449, 462, 948 P.2d 1173, 1180 (1997). He has also failed to meet his burden on appeal.

On the one hand, Pein argues that the justifiable use of force defense was obvious simply by watching and listening to the officers' body camera videos. But on the other hand, Pein does not acknowledge that if it was so obvious, it should not have taken his retained counsel four months from their notice of appearance to ask the district court to allow for filing untimely notice of justifiable use of force. (*See* D.C. Docs. 85, 118.) If the affirmative defense was obvious, there was no good cause to wait until two weeks before trial to file the notice.

Pein has failed to prove on appeal that the district court erred in concluding he did not demonstrate good cause for the untimely notice of justifiable use of force because he did not offer the district court a substantial reason that afforded a legal excuse to overlook his complete failure to comply with the statute and the district court's order. Based on the circumstances of this case, Pein's threat of making some future ineffective assistance of counsel claim rings hollow when the officers' body camera recordings show that he was immediately hostile to the officers, refused to listen to them, refused to follow their instructions, and threatened to respond to any attempt to arrest him with physical force. Pein slapped Sergeant Routzahn's hands away, shoved him, and hit him in the face as he tried to arrest Pein.

C. The district court did not abuse its discretion in imposing its sanction.

When a party fails to comply with discovery deadlines, a district court “may impose any sanction that it finds just under the circumstances, including but not limited to . . . precluding a party from calling a witness, offering evidence, or raising a defense not disclosed.” Mont. Code Ann. § 46-15-329(4). A district court abuses its discretion in imposing a sanction when it acts arbitrarily, without the employment of conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *DeMary*, ¶ 22. The imposition of a discovery sanction “allows the court to consider the reason why disclosure was not made . . . and any

other relevant circumstances.” *State v. Pope*, 2017 MT 12, ¶ 25, 386 Mont. 194, 387 P.3d 870, quoting *State v. Waters*, 228 Mont. 490, 495, 743 P.2d 617, 621 (1987).

Notably, in the district court’s order dated June 22, 2022, it did not legally conclude that Pein could not assert justifiable use of force, as Pein suggests, but it did note that he had failed to comply with Mont. Code Ann. § 46-15-323 and the terms of the omnibus order by not filing a written notice along with witnesses and statements to support the defense. Even so, Pein waited another month to file his untimely notice. When Pein did so at such a late date, it was incumbent upon him to at least make some offer of proof that precluding him from relying on justifiable use of force was an unduly harsh sanction. As the district court observed, Pein never did so. It seems that Pein’s untimely notice was more about creating an issue for appeal than it was about pursuing a credible justifiable use of force defense at trial. This Court should not reward Pein for his tactics. Also, even when the State rested its case, the district court still considered whether Pein had uncovered anything to support a justifiable use of force defense, and concluded he had not.

But even if this Court were to conclude that the district court abused its discretion by imposing its sanction, Pein still cannot prevail because he has not established prejudicial error. *See State v. Berg*, 1999 MT 282, ¶ 22, 296 Mont. 546, 991 P.2d 428. At no time in the district court or on appeal has Pein made even a

prima facie showing that he had a credible claim of justifiable use of force. Pein was angry and defiant about Officer Johnson stopping him from the start. He refused to pull over even though he had numerous opportunities to do so. He finally parked outside of his residence and then refused to heed Officer Johnson's instruction that he remain in his vehicle and roll down the window.

Officer Johnson attempted to explain to Pein that he stopped him because of his defective license plate light and only intended to give him a warning. Pein, however, was spoiling for a fight. He informed Officer Johnson and later Sergeant Routzahn that he did not recognize their authority and repeatedly stated he would not comply with any of the officers' requests. When Sergeant Routzahn had enough and informed Pein he was under arrest for obstructing the officers' investigation, Pein responded by stating that if the officers approached him, he would deem the officers as threats. Despite Sergeant Routzahn's repeated requests that Pein simply put his hands behind his back, Pein stubbornly refused. Sergeant Routzahn implored Pein not to make the officers wrestle him, but Pein remained defiant. When Sergeant Routzahn reached for Pein's arm, Pein first pushed his hands away and then shoved him in the chest. When Sergeant Routzahn continued with his attempt to handcuff Pein, Pein punched him in the face and the two wrestled to the ground. The jury heard testimony from the officers, but also watched the officers' body camera videos.

Montana Code Annotated § 46-6-104(2) provides, “All necessary and reasonable force may be used in making an arrest, but the person arrested may not be subject to any greater restraint than is necessary to hold or detain that person.” There is no evidence in this case that the officers used anything but necessary and reasonable force. Also, Mont. Code Ann. § 45-3-108 provides, “A person is not authorized to use force to resist an arrest that the person knows is being made [] by a peace officer . . . even if the person believes that the arrest is unlawful and the arrest in fact is unlawful.” A person is justified in the use of force only to the extent that “the person reasonably believes that the conduct is necessary for self-defense . . . against the other person’s imminent use of unlawful force.” Mont. Code Ann. § 45-3-102.

There is no evidence in this case that either officer used unlawful force that would trigger the defense of justifiable use of force. Both officers attempted to gain Pein’s cooperation before Sergeant Routzahn informed Pein he was under arrest for obstructing the investigative stop. Neither officer pulled a weapon on Pein or struck him. Pein did not have a credible claim of justifiable use of force, so even if the district court abused its discretion in imposing the sanction, it did not prejudicially impact Pein. Rewarding Pein’s conduct with a new trial would only further encourage his defiant and potentially dangerous behavior. Pein’s claim of justifiable use of force lacked merit. *See DeMary*, ¶ 21 (excluding the expert

witness was not prejudicial error when the witness would have to acknowledge statements from her report that were not beneficial to the defendant); *Wells*, 202 Mont. at 346, 658 P.2d at 386 (The purported alibi defense was frivolous as a matter of law and denial of the alibi defense was not prejudicial error.).

Finally, if the district court had allowed Pein to proceed with a justifiable use of force defense, the jury would have appropriately been instructed on the above-referenced statutes, which, along with the facts, completely undermine Pein's assertion that his actions were justified. *See, e.g., Gysler*, ¶¶ 59-60.

III. The district court properly refused Pein's justifiable use of force jury instructions when Pein made no argument that there were facts in the record to support such instructions.

Pein next argues the district court abused its discretion in refusing to instruct the jury on justifiable use of force. There is nothing in the trial record that could support a justifiable use of force instruction—not even an offer of proof from Pein.

Pein asserts in his brief that the officers subjected him to a questionable stop, but fails to mention that the district court issued an order concluding the traffic stop was supported by particularized suspicion and the scope of the stop expanded when Pein refused to respond to the lights and sirens. (D.C. Doc. 45.) Pein next asserts that Sergeant Routzahn was intentionally aggressive with Pein, which could be viewed as him intentionally pushing Pein into a fight. The encounter, however,

was documented on the officers' body camera videos that demonstrate how many opportunities the officers gave Pein to cooperate, which he steadfastly refused to do. Nothing presented in the State's case supported instructions on justifiable use of force.

Pein also rested after the state's case-in-chief without calling any witness or testifying on his own behalf. Pein made no attempt during the jury instruction settlement conference to show that the officers used unlawful force, as demonstrated by their body camera videos, to support justifiable use of force instructions. *See State v. Marquez*, 2021 MT 263, ¶ 21, 406 Mont. 9, 496 P.3d 963. It is also not self-evident that Pein could reasonably think defensive force was necessary when all Sergeant Routzahn did was reach for his arm to arrest him after Pein repeatedly refused to put his arms behind his back and stated that if the officers touched him, he would deem them as a threat. *Id.* ¶ 22. Pein apparently wanted the officers to ignore his noncompliant behavior and leave, and singlehandedly created the situation requiring Sergeant Routzahn to reach for his arm so he could handcuff him.

Pein never had a credible claim of justifiable use of force, and the State's evidence demonstrated that Pein initiated the physical contact. In sum, Pein is asking this Court to view the officers' body camera videos as evidence warranting a justifiable use of force instruction. But Pein made no attempt at trial to contradict

that he was the instigator. The videos showed Pein to be the initial aggressor. Pein could have walked away with a warning to fix his license plate light. Instead, he was convicted of assault on a peace officer and a handful of misdemeanors because he did not want to recognize the authority of peace officers. The law does not allow Pein to thwart the authority of peace officers at every turn, to deem them a threat if the officers attempt to arrest him, and to respond with physical violence. The district court properly exercised its discretion in refusing Pein's proposed jury instructions on justifiable use of force.

CONCLUSION

This Court should affirm the order of the district court denying Pein's late-filed, incomplete notice of justifiable use of force because Pein failed to establish good cause for the late filing and had no credible claim of justifiable use of force. The Court should also affirm the district court's denial of Pein's proposed justifiable use of force jury instructions because there was no evidence in the

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record to support those instructions. The State requests that this Court affirm Pein's convictions and sentence.

Respectfully submitted this 26th day of September, 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 6,539 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-26-2025:

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