IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 24-0654

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOE NAVA, JR

Defendant and Appellant

APPELLANT'S OPENING BRIEF

On Appeal from the 1st Judicial District Court
Lewis and Clark County, Montana Cause No. DC 25-2024-01-IN
The Honorable Michael McMahon

Appearances

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STATEMENT OF ISSUES

1. The district court erred when it admitted evidence showing Joe was on probation at the time of the offense and allowing the State to imply Joe was violating the terms of his probation.
2. The district court erred when it refused to instruct the jury in accordance with the evidentiary presumptions set forth in MCA § 26-1-303(5) and MCA § 26-1-602(3) and simultaneously threatening to advise the jury law enforcement had "no duty to investigate."
3. It was record based ineffective assistance of counsel not to file Defendant's proposed jury instructions and ensure they became part of the record.

STATEMENT OF THE CASE

On December 19, 2023, an altercation took place inside the home of Daniel Ward, Alice Williams and Joe Nava. The altercation escalated quickly. Daniel grabbed a baseball bat. Joe felt threatened and had no way to escape the apartment. He grabbed a knife to defend himself and started trying to get out of the apartment. Unable to do so, he stabbed Daniel, stunning him, and fled the home. He then waited in the vicinity until law enforcement arrived.

Leading up to the altercation was an argument between Joe and Alice over transportation to California to see a dying relative. Alice is Joe's sister and Daniel's wife. In the course of the argument, Alice told Joe she was calling his probation officer because she believed Joe did not have permission to travel with the person supposedly driving Joe to California, another probationer. Joe sought to

exclude reference to his probation officer as unfairly prejudicial. The district court determined information regarding Joe's probation was "transactional" and therefore admissible. The State then argued not only that Joe was on probation, but that the reason he became enraged was that he was in violation of his probation and feared Alice exposing him. The district court erred in allowing Joe's probationary status to be presented to the jury.

Joe never denied stabbing Daniel. Rather, he claimed self-defense. Based on the events, one of them was going to be charged with assault with a weapon. Law enforcement decided within minutes Joe was the aggressor and further investigation efforts ceased. As a result, the results of the investigation remained riddled with unanswered questions. Daniel testified he remained in the living room at all times until he ran outside, but blood was found in multiple other areas of the house. Based on Alice's testimony, she had a conversation with Daniel right before the incident. Daniel denied this. Police never sought call records from Daniel or Alice. Joe claimed Daniel came after him with a butcher knife, which was consistent with Alice's statements that she found a butcher knife outside. Daniel denied it was his and denied ever having a knife in his hand. There was a ringcam security camera at Daniel and Alice's door which would have recorded Daniel and Joe exiting the apartment. The evidence clearly establishes Daniel destroyed the footage. Law enforcement had access to it and, without preserving the evidence, returned the phone to Daniel.

Given the inadequacies of the investigation and the evidence that Daniel destroyed evidence that was inconsistent with Daniel's version of events, Joe

requested a jury instruction pursuant to MCA § 26-1-303(5) which provides that when a party presents weaker evidence and has the power to present stronger evidence, a negative inference arises. Joe also requested a jury instruction pursuant to MCA § 26-1-602(3), instructing the jury that there is a rebuttable presumption that evidence willfully suppressed would be adverse if produced. The district court refused these instructions as "civil" jury instructions. Further, it advised Joe it would instruct the jury that law enforcement had no independent duty to investigate cases involving justifiable use of force if Joe sought to argue that the investigation was inadequate. This was reversible error.

Finally, the substance of the jury instructions proposed by Joe is only known from snippets in the trial transcript and references to statutes, some of which appear to contain typographical errors in the transcript. Joe's proposed jury instructions were never filed with the court, potentially leaving the record insufficient. If the Court determines the record is too insufficient to determine the actual substance of the jury instructions, it must also find that Defense Counsel's failure to file proposed jury instructions was record based ineffective assistance of counsel.

STATEMENT OF FACTS

On January 2, 2024, the State charged Joe by *Information* with Assault with a Weapon for stabbing Daniel with a steak knife. *Information*, Dkt. 4 (Jan. 2, 2024). Joe filed a *Notice of Defenses* on January 9, 2024, claiming justifiable use of force and compulsion. Dkt. 7 (Jan. 9, 2024).

Leading up to the events of December 19, 2023, Joe regularly stayed with

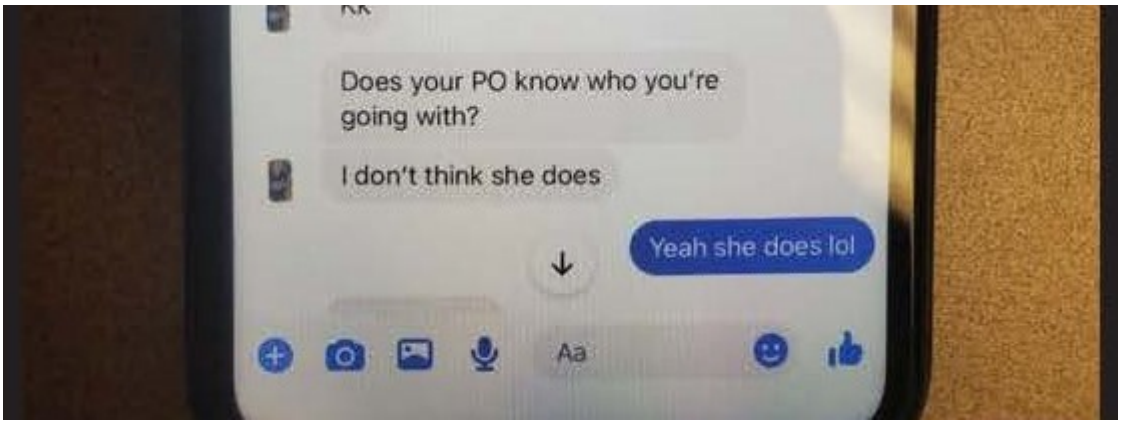
his sister Alice and her husband Daniel. He was allowed to walk into the home whenever he wanted without knocking and he had permission to just walk in. Transcr. 347:25-348:20. Alice testified Joe was "pretty much" residing there and regularly stayed the night. *Id.*

In December of 2023, Joe and Alice's grandfather was dying. They wanted to visit him in California, but were having trouble figuring out how to get there. The transmission was out in Alice's car. Due to suspended licenses, a rental was difficult. Joe wanted to take an extra person, which would require a van rather than a car, adding significant costs. Alice indicated she could arrange the trip cheaper. Joe stated if she didn't want to go with him, he'd go by himself and an argument escalated. During the argument, Alice asked "Does your PO know who you're going with? I don't think she does." Alice then pretended to be on the phone calling Joe's probation officer. Joe called her a rat, said "U ain't my blood if you gonna report me to my po…" State's Exhibits 1-4.

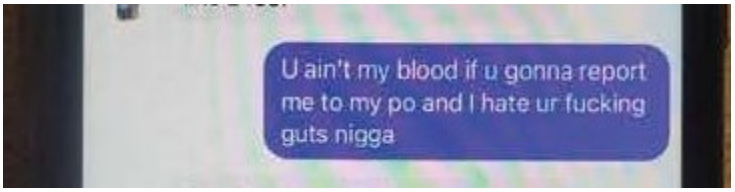
Joe objected to reference to his probation officer, which could have been done by simply blacking out "PO." The State argued that redacting "PO" from the texts would "mangle the facts of the case beyond recognition and understanding." Transcr., 40:4-40:5. It speculated as to what the jury might conclude if "PO" was redacted and argued reference to Joe's probation officer had to be presented for context. Transcr., 39:9-42:17. The State went on to argue "there is just no way of telling the jury accurately, giving them an accurate understanding of what happened in this case without sharing some information that under other circumstances we would not share" and claimed a cautionary jury instruction could

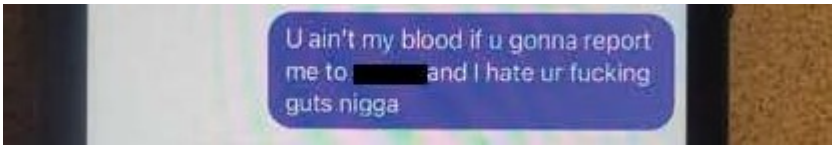
cure the unfair prejudice. Transcr., 44:2-44:10. The Court allowed the testimony in and provided a cautionary jury instruction.

Contrary to the State's position, blacking out "your PO" would not have mangled the facts:



The same is true of the second text reference to "probation officer:"





State's Exhibits 1-4 (edited version not in transcript.

The State openly discussed probation in the opening statement. The discussion wasn't limited to context, as the State actively argued not only that Joe was on probation, but that his travel plans violated his probation:

> At one point, during the argument, Alice threatened to call Joe's probation officer, thinking that he was going to be in trouble for that trip. And in one of the messages, she says "I am on hold right now.

Transcr., 286:17-286:21. After the opening, Joe asked the court to preclude the State from bringing up probation again during closing and the court refused. Transcr., 378:11-382:4. The State then went full speed ahead arguing it was Joe's fear of being exposed for violating his probation that caused him to become enraged and stab Daniel:

> She threatens to tell his probation officer who he's going to California with, and the next messages are not difficult to interpret. "You are a rat. Eat a dick. You are not my blood. I hate your fucking guts."

Transcr., 1116:25-1117:22. The State went well beyond leaving "PO" in the text chain for transactional reasons. It argued the reason this altercation took place was because 1) Joe is a criminal, 2) Joe wasn't allowed to go to California with another probationer (another criminal), 2) Joe was going to go to California with another criminal in violation of his probation, and 3) Joe stabbed his brother-in-law because his sister threatened to expose his probation violation. The State made this argument without ever presenting any evidence that Joe wasn't allowed to leave Montana with someone who's identity we never learned. We don't know if it's another probationer. We don't know if Joe's probation officer had, in fact,

authorized the trip. Regardless, these arguments were made to the jury.

After the State's opening statement, Joe had no choice but to address the issue, not only that he was on probation, but that he was supposedly violating probation. He attempted to do so by testifying he had permission to travel with the person who was driving him, meaning that he was not violating his probation. Transcr., 1143:23-1144:11.

The State took a second opportunity to capitalize on the unfairly prejudicial nature of Joe's alleged probation violation in final remarks:

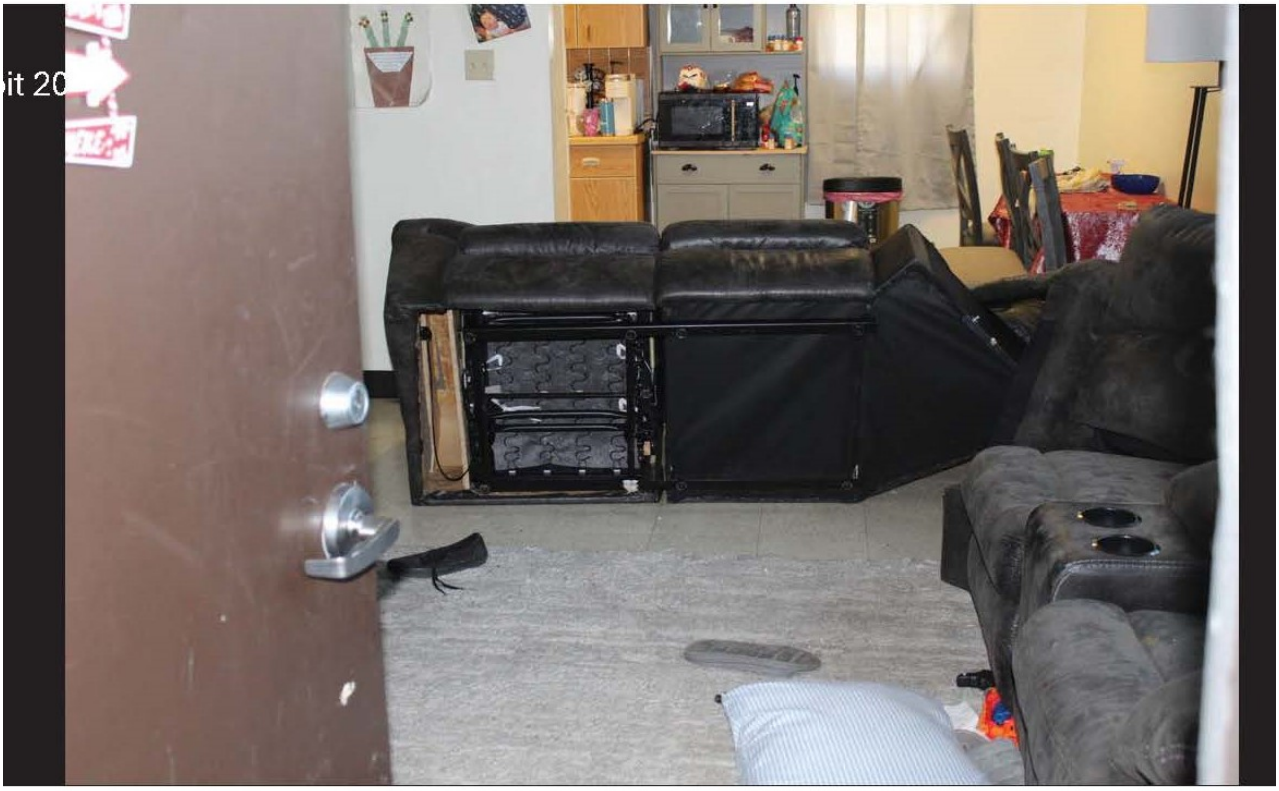
> They are not talking about the trip anymore. They start calling each other rats because Alice, as she admitted, said, "I am going to call your probation officer."
>
> And now, apparently, we are going to say that that's the dispute because why would it be a problem for him to go to California? She says "Who you are going with?" That's what the text message says.
>
> It's also what happened on the call when she said "You were going with another probationer." So another person who is on probation. It's a different issue than traveling. "Who you are going with" is what she called for. And she says, "I'm on hold."

Transcr., 1176:20-1177:9. This went beyond "context" and argued, not only was Joe on probation for a prior crime, but he was also spending time with other criminals and violating probation. As this Court can see, no context is lost by redacting "PO."

After Alice threatened to call Joe's PO, the fight further escalated. According to Joe, the texting was distracting from his work and it wasn't going anywhere, so he took a break to go across the street to Alice's house to discuss

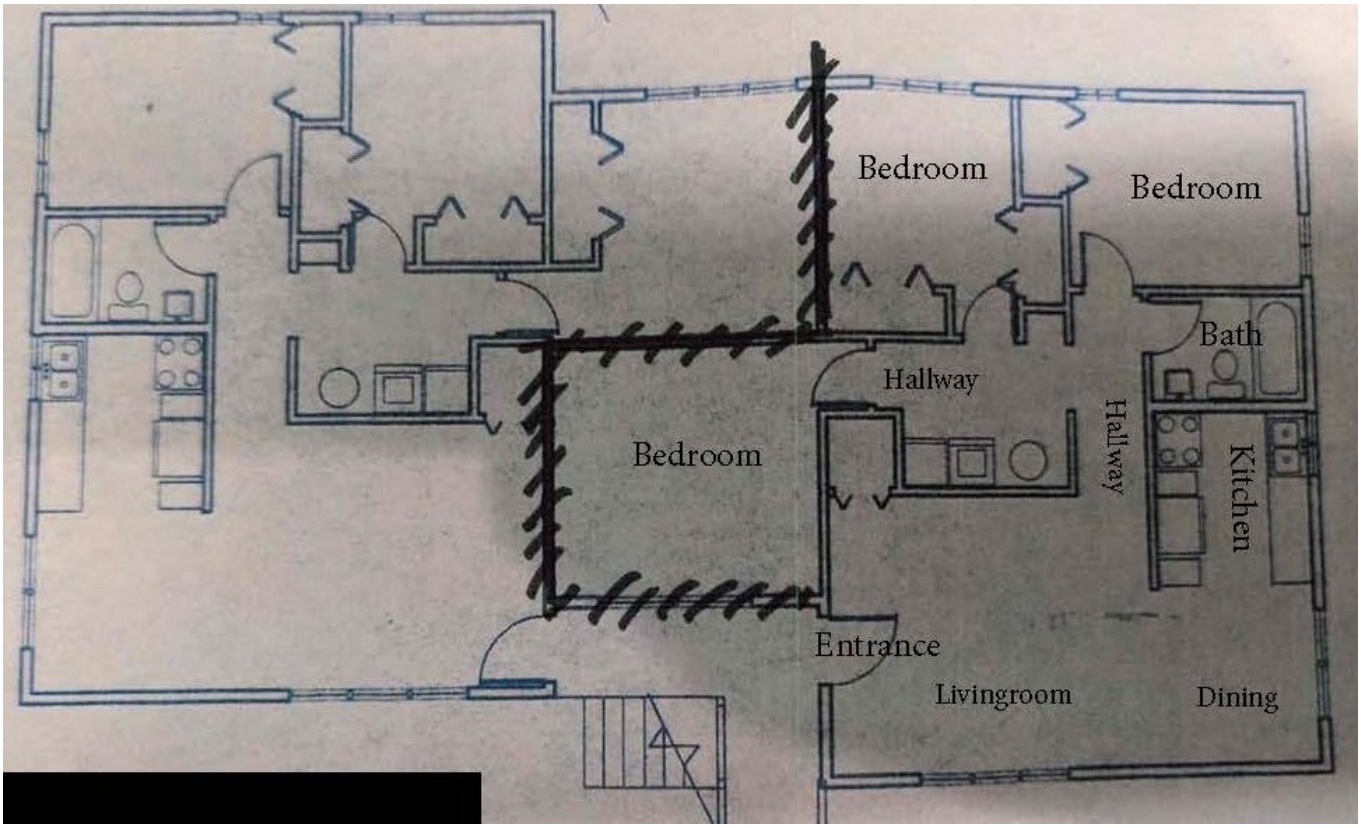
transportation arrangements with Alice in person. "Everything was kind of time sensitive because my friend was already halfway from Billings to Helena". Transcr., 844:9-844:21, 845:2-845:11.

The testimony regarding the events within the apartment is best understood with a visual of the floor plan of the apartment where the altercation took place. The picture below shows the living room and dining room looking into the house from the front door. Transcr., 402:13-403:13.



To the left of the above picture is a hallway that leads towards the bathroom and Ward's daughter's bedroom. The hallway then turns and leads to bedrooms in the back of the house. Transcr., 403:7-403:25. See also State's Exhibit 36.

This picture depicts the floor plan of the apartment, edited from the State's Exhibit 36 to label the rooms and redact irrelevant words. Transcr., 298:5-299:2, 848:17-854:3.



When Joe left work to talk with Alice, Joe walked into the apartment and said "What's up" to Daniel. Daniel had just gotten off the phone with Alice. Transcr., 356:3-356:11. Daniel became immediately confrontational, screaming "If you want to go, Joey, we can go. Let's go." Daniel ran around the couch and into the kitchen. Transcr., 855:13-855:23. Joe was in a hurry so he brushed off Daniel's behavior. Joe didn't find Alice in the living room, so he walked down the hallway to her bedroom. As Joe walked away from the kitchen to the bedrooms, he heard someone coming behind him. He turned around and saw Daniel with a large

butcher knife in his hand. Transcr. 856:1-856:24. Joe stopped moving, stayed in the general area and was trying to tell Daniel to calm down. Daniel continued trying to stab at Joe. Transcr., 857:8-857:25.

Daniel was unsuccessful and ran back into the living room. Familiar with the house, Joe knew he couldn't get past Daniel to get to the front door and leave. Even if he could get to the door, he'd have to open it, which would open him up to being stabbed in the back. Transcr., 858:11-859:1. Knowing he was trapped, Joe ran into the kitchen to grab something he could use to defend himself or use as leverage to get escape the house. He grabbed a steak knife and returned to the dining room to begin working his way out of the house. Transcr., 859:6-859:19.

At that point, Daniel began charging Joe, swinging at him with a bat. Joe was trapped in the dining room and trying to dodge the bat. Daniel was swinging hard enough, Joe thought Daniel would kill him if he was able to make contact with the bat. Daniel would charge Joe while swinging and then back up to create distance to avoid being stabbed. Every time Daniel receded, Joe used the extra room to move towards the exit. During one swing, Joe dove towards the TV to avoid the bat, knocking it over. During the swing, Daniel exposed his back. Joe stabbed him. Transcr. 860:24-864:1. Daniel was stunned, which gave Joe an opening to flee the house. He ran out, called 9-1-1 and remained in the vicinity until police arrived. Transcr., 854:2-854:17.

Daniel's version of events was much different. According to Daniel, Joe entered the home in a rage and immediately began running up and down the hallways yelling for his sister and saying he was going to beat her up. Transcr.

394:14-395:25. Daniel says he was in the living room and he told Joe that Alice was not there and that Joe needed to leave. Transcr. 395:1-395:6. According to Daniel, it was clear Joe was not initially there to see him and any aggression was not directed at him. "[H]is intentions wasn't toward me until he noticed that I had the baseball bat…" Transcr., 427:6-427:8." It is critical to note that it is undisputed Joe was unarmed until he saw Daniel with a bat, even by Daniel's testimony. After seeing the baseball bat, Joe ran into the kitchen and grabbed a couple of knives. Joe was standing by the refrigerator behind the couch. Daniel was in the living room. According to Daniel's own testimony, he advanced on Joe, jumped over the couch between the living room and kitchen and swung a baseball bat at Joe, which knocked a knife out of Joe's hand. Somehow, in the commotion where Daniel allegedly feared for his life, the altercation paused long enough for Daniel to pick up the knife Joe dropped and put it back on the kitchen counter. Transcr. 395:3-395:13. Later, Daniel claimed "I had no time to pick up the knife and throw it." Transcr. 401:5-401:8. After striking Joe with the bat, Daniel claimed his dog jumped on him, knocking him down. Joe leaned down, "hugged" Daniel, and stabbed him in the back with a steak knife. Joe immediately fled the house through the front door. Transcr. 395:3-395:25.

According to Daniel, Joe came in very aggressively. Transcr. 397:16-397:19. Daniel claims to have told Joe to leave over 100 times. Transcr., 398:13-398:15. Daniel testified he stayed in the living room area the entire duration of the altercation. Transcr., 399:17-399:23. According to Daniel, Joe tipped the TV over because Joe knew it was Daniel's favorite thing. Transcr., 405:2-405:12.

According to Joe, Joe fell into the TV trying to escape the bat and that's where he stabbed Daniel. Consistent with Joe's story, the other half of the knife used to stab Daniel was find next to the television, exactly where Joe said the stabbing occurred. *Transcr.*, 582:2-582:7:

State's Exhibit 23 (edited to include arrow pointing to knife handle.)

Daniel testified he *immediately* left the apartment:

> Q. All right. You started to tell us already, but I want you to tell us now. After you got stabbed, what happened next.
>
> A. I ran straight out the door.

Transcr., 411:2-411:4. Daniel never went back into the apartment. Transcr., 445:4-445:12.

Joe left the apartment, called law enforcement, and was screaming "you're

chasing me with a baseball bat" or "he's chasing me with a baseball bat." Transcr., 412:16-412:17, 413:16-413:17. At trial, Daniel testified he was trying to deescalate the fight. Transcr., 429:22-430:2. Its clear Daniel had a bat and it's clear Joe was trapped in the dining/kitchen area with no route of escape.

Daniel was cross-examined with prior statements, one of which was that he originally thought Joe was coming over to do a dab. Transcr., 441,11-441:20. During the 9-1-1 call Daniel reported Joe "broke into" the apartment and flipped over the couch. Daniel also initially reported Daniel grabbed a knife during the altercation, but did not remember making that statement. Daniel's initial report was inconsistent with his trial testimony in that, rather than Joe coming into the house and walking down the hallway, Daniel told law enforcement Joe ran straight to the kitchen, grabbed a knife and stabbed Daniel. 442:5-25. He initially told police he chased Joe out of the apartment with a bat.

In striking contrast to Daniel's testimony that he ran "straight out" of the apartment and never went back in, Detective McLean Peterson found blood believed to be Daniel's in the kitchen, hallway, and bathroom, all three of which are areas of the apartment Daniel claimed to have never been. In the State's Exhibit 32, there is a dark red spot near a knife in the kitchen which Detective Peterson stated could be blood, but she didn't know and never tested it. She noted it could potentially be evidence, but did not know for sure. Transcr. 637:20-637:23. There were at least three drops of blood on the kitchen floor. Transcr. 638:22-639:5. The blood went six feet into the kitchen and Detective Peterson believed it to be Daniel's. Transcr. 640:12-641:1.

Defense Exhibit K was introduced through Detective Peterson, who noted "possible" blood in the hallway of the apartment and he "deduced" the blood belonged to Daniel. Transcr. 642:2-642:11. Defense Exhibit L was also introduced through Detective Peterson, which Peterson believed to be a picture of blood in the bathroom. Peterson testified Exhibit O showed what she believed to be blood in the bedroom. Transcr. 644:24-646:24.

Detective Peterson stated the large knife on the kitchen counter was a knife he believed Alice brought back inside the house because Daniel "had that knife at one point." Transcr., 635:2-635:4. Daniel vehemently denied that he ever had a knife in his hand or that he took a knife outside. Transcr., 413:18-413:23.

In contrast with Daniel's claim that no one took a knife outside, Alice found a knife in the rocks outside the apartment. She handed that knife "to a cop." She's absolutely certain she brought it to their attention. Transcr. 335:1-336:7. Despite the questions of fact as to whether Daniel had gone after Joe with a knife versus Daniel's testimony that he never had a knife, law enforcement did not attempt to fingerprint the knife Alice found outside the apartment. According to Detective Peterson, there was no reason to do so because, in his opinion, there was "no dispute over who touched what or had what." Transcr. 634:1-634:17. Contrary to Detective Peterson's opinion, the trial transcript reflects a clear factual question regarding whether Daniel went after Joe with a knife or whether Daniel never had a knife in his hand.

Joe's testimony that Daniel had a knife in his had was also corroborated by testimony from the neighbor, Debra Smith. Smith testified to seeing Daniel and Joe

coming out of the apartment. Smith testified she saw a knife in Ward's back. She also testified at one point, Daniel started taking off his shirt and put a knife down next to his hat and the shirt. The State attempted to clarify with Smith that it was Joe setting the knife down, but Smith was adamant it was Daniel. Tr. Transcr., 464:3-13.464. This could not have been the knife with which he was stabbed because that knife had to be surgically removed.

At Alice and Daniel's front door is a video camera. The camera has a motion sensor. When someone walks past it, the camera will pick it up. The camera has a live feed function as well as a recording function. Alice could access the recordings from an app on her phone. When talking to law enforcement, she retrieved the available video footage and emailed it to law enforcement. It was clear from the testimony that motion of any kind will trigger the recording. The only recordings still available when Alice accessed them were a recording of Joe going into the house and then recordings after law enforcement arrived. Transcr. 338:8-340:14.

The video recording system is set to time-stamp all recordings. Transcr., 344:18-345:7. It records if someone walks by, if someone comes into the apartment and if someone exits the apartment. Transcr. 350:6- 352:11. It records "the whole front yard, playground, porch." Transcr., 417:4-417:7. Alice was adamant it should have recorded when Joe and Daniel fled the apartment. *Id.* When Alice attempted to access the recordings, there was no recording of Daniel and Joe exiting the apartment. Transcr., 351:10-351:14.

Alice was clear that Daniel had access to the video recording app on his phone. She believed Daniel had possession of the phone the entire time and never gave it to law enforcement, which is consistent with Daniel's testimony. Alice and Daniel are the only two people who can access the application. The videos can be deleted from the system using the cell phone app. Alice was sure Daniel knew how to delete pictures. Alice concluded "there should have been quite a bit more footage." Transcr., 352:17-354:10.

Daniel conceded he had access to his phone all the way to the hospital. He was separated from law enforcement during that time. At first, Daniel claimed the phone was broke and he got a new phone while he was in the hospital. Just moments later he stated he got the new phone after he got out of the hospital. He claimed it died before he got to the hospital. Transcr., 437:14-439:11. Alice recalls being with Daniel in the hospital while he was talking on that phone. Transcr., 359:6-359:8. Daniel admitted he refused to allow law enforcement to take his phone. *Id.*

The evidence is abundantly clear Daniel deleted the video footage of the parties leaving the apartment. Daniel denied deleting the video footage. Transcr., 418:18-418:20. His denial is not plausible. As there was footage before and after the incident, the camera system was working properly. Daniel and Alice are the only people who can access the footage. The footage did not disappear on its own and Alice remembers Daniel using his phone in the hospital, so it was not, as Daniel claimed, dead.

Joe presented Defendant's Jury Instruction No. 1, which relied on Mont. Code Ann. § 26-1-303. The State objected. Mont. Code Ann. § 26-1-303 provides:

> **26-1-303. Instructions to jury on how to evaluate evidence.** The jury is to be instructed by the court on all proper occasions that:
>
> …
>
> (5) if weaker and less satisfactory evidence is offered and it appears that it is within the power of the party to offer stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

Id. The State argued the instruction was unnecessary, unhelpful and inappropriate. Specifically, the State argued subsection (3) "is an inappropriate comment on testimony under the circumstances and is also kind of is duplicative and, partially in other ways, contradictory to the latter part of Instruction No. 3." The State argued it was inappropriate to get the Court to comment on the way evidence should be interpreted, despite that this is exactly what the statute directs. The State went on to claim the instruction was an effort to "get the Court to put its imprimatur around –onto a bunch of defense arguments that are disputed questions of fact." The court concluded Mont. Code Ann. 26-13-035 [sic][1] "is a powerful civil argument, not a criminal argument." The court refused the instruction stating it would not give a civil jury instruction for a criminal case. Transcr., 734:18-738:24.

Joe also offered Defendant's Jury Instruction No. 3, based upon Mont. Code Ann. 26-1-602(5), which states "Evidence willfully suppressed would be adverse if produced." The State argued "It's improper for the court to instruct the jury on

[1] The correct version of "26-13-305" which is in the transcript is "26-1-303(5)"

how they are to view it or to give them a presumption or an inference on evidence." The Court concluded the instruction "was not a correct application of the law" and refused the instruction. Transcr., 740:2-743:5.

On August 2, 2024, the jury returned a verdict of guilty on both counts. *Verdict* (Aug. 2, 2024).

STANDARD OF REVIEW

Issue one pertains to whether the probative value of Joe's status as a probationer is substantially outweighed by the danger of unfair prejudice. The standard of review is abuse of discretion. *State v. Detonancour*, 2001 MT 310, ¶ 29.

The standard of review of a jury instruction in a criminal case is whether the instruction fully and fairly instructed the jury on the law applicable oo the case. A reversible error occurs only if the jury instructions prejudicially affect the defendant's substantial rights. *State vs. Maloney*, 2003 MT 288, ¶ 14.

The issue of whether it was ineffective assistance of counsel when Joe's attorney failed to file Joe's proposed jury instructions is plain error. The decision to invoke plain error review is discretionary. *State v. Rosling*, 2008 MT 62, P 77, 342 Mont. 1, P 77, 180 P.3d 1102, P 77

SUMMARY OF THE ARGUMENT

Evidence of a person's probationary status is evidence that he committed a prior crime. Such evidence is generally inadmissible. Here, the State argued reference to Joe's probation officer was transactional and the facts of the case would be mangled so badly as to be unrecognizable without the reference. Once

the evidence was admitted, the State not only referenced Joe's probation but argued it was Joe's fear of being reported for violating his probation by hanging out with another convicted criminal that triggered the stabbing. The case law does not support the State's argument that evidence of probation was admissible under the transaction rule. Reference to probation, and the way the State argued it, resulted in a jury finding Joe guilty not based on the facts of this case, but rather based on the jury's belief that Joe was a criminal, violating his probation by hanging out with another criminal. The jury was allowed to judge Joe as a criminal without ever finding out whether Daniel was also on probation at the time.

Given Daniel's destruction of the video footage of him leaving the apartment, Joe asked for a jury instruction advising the jury that it is to presume evidence willfully suppressed is adverse. Based on law enforcement's inadequate investigation, Joe asked for a jury instruction advising the jury that if a party brings weaker and less satisfactory evidence and it is within that party's power to bring stronger and more satisfactory evidence, the weaker evidence should be viewed with distrust. The district court stated that it would not instruct the jury on how it was to view the evidence and it would not give a "civil" jury instruction in a criminal case. It advised Joe's attorney that if he continued down the path of arguing an insufficient investigation, it would interrupt him immediately and read the jury an instruction that stated, "Under Montana law, law enforcement has no independent duty to investigate cases involving justifiable use of force." Joe's entire defense hung on 1) establishing reasonable doubt by pointing out deficiencies in the State's case and 2) discrediting Daniel's version of events. The

district court erred when it refused the proposed jury instructions. It compounded the error by threatening to advise the jury that law enforcement had no duty to investigate if Joe drew the jury's attention to law enforcement's shoddy investigation. This was reversible error.

In the event the Court determines the record is not sufficient enough to ascertain the substance of the proposed jury instructions, it must find record based ineffective assistance of counsel. Despite a court order to do so, Joe's attorney inexplicably failed to file his proposed jury instructions. This leaves the Court, and appellate counsel, piecing together the content of the jury instructions from a record wherein the parties are arguing over their applicability but never reading the full text of the instruction. It was Joe's duty, through counsel, to ensure the record was sufficient for this Court to issue a ruling. If it determines it does not have sufficient information regarding the test of the proposed jury instructions, it must find record based ineffective assistance of counsel for not filing the proposed instructions.

ARGUMENT

I. The district court erred when it admitted evidence showing Joe was on probation at the time of the offense and allowed the State to argue Joe's anger was because Alice was going to expose a probation violation.

A review of the text messages at issue shows that, contrary to the State's position that the facts would be mangled beyond recognition, the nature of the argument was still intact when "PO" is removed:

State's Exhibit 5. They jury may have been left to question who, exactly, didn't want Joe to go to California with the person who was driving him, but that would not have been nearly as detrimental as allowing the State to argue Joe was violating probation and that's what caused the fight. Was it a parent? A girlfriend? A boss? A sister? The "who" is not a critical fact to the argument. Joe was going to California with someone. Someone allegedly didn't want him to go with that person and Alice was threatening to expose Joe. That made Joe angry. It was unnecessary to tell the jury the "who" was a probation officer. It was unacceptable to argue to the jury Joe was about to violate his probation by spending time with another probationer (i.e. another convicted criminal), when we have no idea whether Joe had permission to spend time with that person. The State made no effort to present evidence as to whether a probation violation was actually underway or whether, as Joe claimed, he had permission to go with the person who would have driven him.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." M.R.Evid. 404. "Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." M.R.Evid. 403.

It is undisputed that evidence of status as a probationer constitutes evidence that the defendant has committed other crimes, which is generally inadmissible. *State v. Derbyshire*, 2009 MT 27, ¶ 21. The *Derbyshire* court cited a litany of case

law supporting Joe's position that proof of other crimes is not admissible because a jury needs to judge the defendant on the acts and evidence specific to the particular crime and a defendant is never to be convicted on the basis that he's simply a bad guy. *Derbyshire*, ¶¶ 21-22. The general rule that evidence of other crimes is not admissible should be strictly enforced. *Id.*

The court relied on the transaction rule, along with *State v. Michelotti* to admit evidence of Joe's status as a probationer. 2018 MT 158. The transaction rule provides "Where the declaration, act or omission forms part of a transaction which is itself the fact in dispute or evidence of that fact, such declaration, act or omission is evidence as part of the transaction." Mont. Code Ann. § 26-1-103. Joe's status as a probationer was not "part of a transaction which is itself the fact in dispute."

This Court's analysis of the transactional rule in *Derbyshire* is fatal to the State's position in this case. There, the defendant was charged after his probation officers searched his home and found a pound of marijuana. The State argued that the involvement of probation officers was part of the transaction and their status as probation officers would explain why they had certain knowledge. The State argued the information was "necessary." This Court disagreed, stating that the State's "need" for evidence does not render inadmissible evidence admissible. Derbyshire argued the fact in dispute was whether he possessed a dangerous drug with intent to distribute and therefore, the transaction rule did not apply. This court agreed, stating the "search, however, was not a fact in dispute.

Consequently, § 26-1-103, MCA, was not a ground for admitting the evidence." *Derbyshire*, ¶¶ 26-30.

The same is true here, Joe was charged with assault with a weapon for stabbing Daniel with a steak knife. Joe did not dispute the stabbing but claimed it was self-defense. It was not disputed that Joe and Alice had a fight or that Joe went to the apartment as a result of that fight.

What Joe and Alice were fighting about was not critical to the State's position that Joe and Alice fought, Joe became angry and went to the apartment to settle the issue. Further, Alice's threat to call Joe's probation officer is not what triggered the fight. Before probation was ever mentioned, comments were flying like "what u botching [sic] for," "fix ur own shit," "leave me and mines alone," "I'm tired of the fucking drama u bring." State's Exhibits 2-4. An argument was underway and escalating, which is what triggered Alice to threaten to call Joe's probation officer. Joe's status as a probationer was not a fact in dispute and therefore, was not admissible under the transaction rule.

Michelotti does not support the State's position and instead dictates exclusion of evidence of probation status. There, when evaluating whether the case should have resulted in a mistrial due to reference to an arrest warrant, the court noted an arrest warrant was "somewhat prejudicial" but ***"did not rise to the prejudicial level of mentioning a prior conviction, prior incarceration, or the defendant being on probation."*** *Michelotti*, ¶ 19, emphasis added. Citing *State vs. Derbyshire*, the *Michelotti* court noted "evidence that a defendant committed other crimes is generally not admissible." Further "One of the dangers in

admitting such evidence is that the jury will prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Derbyshire*, 2009 MT 27, ¶¶ 21-22. The *Michelotti* Court affirmed a ruling that excluded reference to the defendant's probationary status. It did not hold that probationary status was admissible.

Contrary to the State's position at trial, exclusion of reference to probation would not have "mangled the facts so as to be unrecognizable" if "PO" had been redacted. The State could just as easily have explained to the issue to the jury in opening or closing. Instead of:

> She threatens to tell his probation officer who he's going to California with, and the next messages are not difficult to interpret. "You are a rat. Eat a dick. You are not my blood. I hate your fucking guts."

The State could have argued:

> Joe and Alice were in the middle of an argument over transportation arrangements. There's someone who doesn't want Joe to go to California with the person driving him and Alice threatens expose him. The next messages are not difficult to interpret. "You are a rat. Eat a dick. You are not my blood. I hate your fucking guts."

The context is not lost or mangled and it doesn't inform the jury Joe is a criminal. Further, the State wouldn't have been able to argue Joe's transportation arrangements violated his probation, which is an issue that dramatically compounds the prejudicial nature of the matter because it allowed the State to mislead the jury – there was no evidence Joe's transportation arrangements violated his probation but that is exactly what the State led the jury to believe.

Once the Court has determined evidence of probation was inadmissible, it must consider whether the evidence contributed to a conviction. *Michelotti*, ¶ 24. Here, there's no question evidence of probation improperly influenced the jury. That a stabbing occurred was never in dispute. The only question was whether Joe became enraged and stabbed Daniel or whether Daniel escalated an argument by threatening Joe with a baseball bat, trapped him in the apartment and Joe's only way to escape was to stab Daniel and run. Daniel was presented as a dad who was playing on the floor with his kids. Joe was presented as a guy who committed a prior crime, was on probation for that crime, was about to violate probation by going to California with another criminal and who was enraged that Alice threatened to expose him. This evidence wasn't "somewhat prejudicial." It was unfairly prejudicial, inflammatory, misleading and caused the jury to conclude Joe was a criminal who wasn't compliant with probation. Evidence of probation absolutely contributed to the conviction and it was reversible error to admit this evidence.

II. The district court erred when it refused to instruct the jury in accordance with Mont. Code Ann. § 26-1-303(5) and Mont. Code Ann. § 26-1-602(5).

The relevant part of MCA 26-1-602(5) provides:

> **Disputable presumptions.** All other presumptions are "disputable presumptions" and may be controverted by other evidence. The following are of that kind:
>
> …
>
> (5) Evidence willfully suppressed would be adverse if produced.

The relevant portions of MCA 26-1-303 provide:

> **Instructions to jury on how to evaluate evidence.** The jury is to be instructed by the court on all proper occasions that:
>
> …
>
> (5) if weaker and less satisfactory evidence is offered and it appears that it is within the power of the party to offer stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

These jury instructions were directed at two main issues. First, the evidence is clear that Daniel destroyed the video footage of Joe and Daniel exiting the house. Why? Well, Daniel says he never had a knife in his hand. Yet, a knife was found outside. Daniel and Alice had a ringcam. The ringcam had a motion detector and automatically started recording when it detected motion. The ringcam was working because it had footage from Joe arriving at the home and from the scene after law enforcement arrived. Mysteriously, it had no recordings from the time when Daniel and Joe left the apartment.

Only Alice and Daniel had the ability to delete video footage. Daniel refused to allow police to take his phone when he rode to the hospital via ambulance. When Alice accessed the ringcam app, the footage of Joe and Daniel leaving the house was not there. There is strong evidence to support a conclusion the evidence of the ringcam footage was willfully suppressed. Given this scenario, Joe asked for the jury to be instructed, in accordance with MCA 26-1-602(3) regarding the disputable presumption that evidence willfully suppressed is presumed to be adverse.

Joe also asked the Court to instruct the jury "if weaker and less satisfactory evidence offered and it appears that it is within the power of the party to offer stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." There was significant evidence to suggest that law enforcement did not thoroughly investigate this case. The record reflects law enforcement spoke with Daniel for about ten minutes immediately after the incident and then never questioned him again. Transcr., 647:647:12. Daniel testified he never left the living room and ran "straight outside" after he was stabbed. Yet there was blood in the kitchen, the hallway, the bathroom and a bedroom.

Daniel denied having a phone call with Alice right before the incident, making it appear he had no reason to be angry with Joe. Law enforcement could have seized Daniel's phone at the scene. They chose not to. Law enforcement could have subpoenaed Alice and Daniel's cell phone records, which would have shown if texts were exchanged, if a call took place and the duration of the call. They chose not to. Daniel claimed he never had a knife in his hand but a butcher knife was found outside. Law enforcement chose not to fingerprint it because, according to Detective Peterson, there was no question about who touched what. Had fingerprints been taken, and not been Joe's, it would have been clear Daniel was lying about having the butcher knife in his hand. By all appearances, police decided Joe was the aggressor within minutes of the incident and ceased their investigation.

As *Mitchell* makes clear:

> A recently decided case, *State v. Cooksey*, 2012 MT 226, 366 Mont. 346, 286 P.3d 1174, held that the district court had correctly applied the law when it found that § 45-3-112, MCA, did not impose any new and independent duty for law enforcement to investigate cases involving justifiable use of force. Instead, the statute reflects long-established obligations regarding thorough and complete police investigations and requirements that the prosecution disclose any evidence in the government's possession that is relevant to the defense of justifiable use of force. *Cooksey*, ¶¶ 34-35. In Mitchell's case, the prosecution complied with these obligations.

State v. Mitchell, 2012 MT 227, ¶ 16.

In this case, law enforcement had in its possession evidence that was vital to the accused, i.e. Daniel's phone. Police made no effort to keep the phone and, as a result, all the evidence on it was lost when Daniel deleted footage from the ringcam and discarded his phone. Police had a duty to conduct a thorough investigation and to preserve evidence. They did neither, and Joe sought to establish reasonable doubt by showing how little investigation was conducted before Joe was charged.

The instructions sought by Joe are not discretionary. The statute titled "instructions to jury on how to evaluate evidence" states "The jury **is to be instructed** by the court on all proper occasions." MCA 26-1-303. In this case, the evidence supports giving the instructions submitted by Joe because 1) Daniel had evidence in his possession and destroyed it and 2) law enforcement's investigation was lacking. The law says this type of conduct created a negative inference and

the jury "is to be instructed by the court" regarding the negative inference presumption.

Compounding the detriment caused to Joe by the court refusing these instructions is that the court repeatedly threated to instruct the jury that law enforcement did **not** have **any** duty to investigate the matter:

> Based on the questioning to all of the law enforcement officers, especially cross-exam, there seem – the Court is getting an impression that defense believes that they didn't do enough to investigate the case, particularly with respect to justifiable use of force. And I am very concerned that's contrary to Montana law. And I can anticipate, and I am anticipating argument in closing that law enforcement should have done more. That's not the law.
>
> They have a duty to disclose, it's called prior evidence, that they discovery, but there is no independent duty and that's ***State v. Mitchell,*** I think it's ***Corsky*** (phonetic) that ***Mitchell*** cites for that proposition.
>
> But you guys have hammered law enforcement. And if that's the direction it's going to go, that's the instruction that's going to be given.

Transcr., 684:17-685:9.

Joe argued the questions he was asking were not specific to justifiable use of force but rather was poking holes in the investigation and in the evidence presented by the State. The district court responded:

> I am telling you that if you go there, that's the instruction that's going to be given. I am not going to leave this jury with the impression that somehow, some way law enforcement had a duty to further investigate.

Transcr., 685:11-685:15. The language the court threatened to present to the jury deleted "new and independent" from *Mitchell* and stated "Under Montana law, **law enforcement has no independent duty to investigate cases involving justifiable**

use of force." Transcr., 684:14-684:16, emphasis added. The court later renewed its warning to Joe:

> Mr. Delli Bovi, we talked about the Court's ***State v. Mitchell*** instruction yesterday as far as law enforcement having no independent duty to investigate cases involving justifiable use of force.
>
> I am just putting it on the record right now that if – if we get into that line of questioning again, I am just going to read it to the jury. I will interrupt, and I will read it to the jury.
>
> Understood?

Transcr., 752:16-752:25. Counsel attempted to clarify, asking:

> Yes, with respect to – Would it be with respect to whether there was investigation [SIC], or is that simply if I were prompted whether there was a duty to investigate?

The court responded:

> If you are going to continue on the path that has been walked down already about "didn't do this, didn't do that" as far as with an – law enforcement, I will just read the instruction. I am not going to leave the jury with the impression –

Transcr., 753:1-753:10. It wasn't just that the court didn't give a mandatory jury instruction. The court sought to prevent Joe from establishing reasonable doubt by presenting the myriad of factual inconsistencies police never investigated. The court was unwilling to let the jury believe law enforcement had any duty to investigate.

Contrary to the district court's position, Montana has "long-established obligations regarding thorough and complete police investigations." *Mitchell, above.* Despite the duty to conduct a thorough and complete police investigation,

Joe was repeatedly warned not to pursue lines of questioning that involved law enforcement's failure to conduct an adequate investigation.

In an attempt to address the issue, Joe asked "may we offer an alternative to that instruction for the Court's consideration?" The court responded:

> You think the Court's…misconstrued ***Mitchell***?

Transcr., 1068:14-1068:15. Joe presented an alternative instruction, which included the court's proposed language but added "the police still have an obligation to do a complete a thorough investigation." Transcr., 1089:2-1089:5. The court immediately rejected it:

> All right. That's proposed Instruction No. 4 for the defense. It will be rejected. And make sure you get it filed for the record.

Transcr., 1089:19-1089:22.

The district court's interpretation of *Mitchell* was not an accurate quotation. Police have a duty to thoroughly investigate. The legislature decided over a hundred years ago if a party brings weaker and less satisfactory evidence when it has the power to bring stronger and more satisfactory evidence, the evidence is to be viewed with distrust. MCA 26-1-303(5).

Joe did not ask the court to instruct the jury that the State brought weaker and less satisfactory evidence. Nor did he argue the defense of justifiable use of force created a new or higher duty. He merely asked the court to give the instruction that if the jury found "weaker and less satisfactory evidence and it was

in the power of the party who offered the evidence to offer stronger or more satisfactory evidence, the evidence should be viewed with mistrust." The district court refused the instruction.

There is no law to support the court's understanding that the statutes pertaining to evidence as set forth in Title 26 only apply in civil cases. In fact, Title 26, Chapter 10 contains the Montana Rules of Evidence, which are applicable to nearly all proceedings in all courts in the State of Montana. M.R.Evid. 101, MCA § 26-10-101. When the court admitted evidence of Joe's probationary status, it relied upon the "transaction rule" do admit it. The transaction rule is set forth in MCA § 26-1-103. The accomplice instruction, found in MCA 26-1-303(4) is routinely given in criminal cases and is a pattern jury instruction - Montana Criminal Jury Instruction 1-112. *State v. Allen*, 2010 MT 214; *State v. Rose* (1998), 292 Mont. 350. In *State v. Miller*, this Court supported instructing juries in accordance with 26-1-303. 2022 MT 92, ¶ 25. In *State v. Liddell*, this Court noted the applicability of 26-1-303 in instructing the jury on how to evaluate evidence. (1984), 211 Mont. 180, 186. Title 26 of the Montana Code addresses evidence in all cases.

In this case, there was evidence that Daniel destroyed video footage that would have shown he was carrying a knife when he exited the apartment. A jury instruction stating it is a disputable presumption that evidence willfully suppressed would be adverse if produced was warranted by the facts. Throughout trial, Joe pointed out numerous areas where law enforcement failed to conduct an investigation. Joe appropriately submitted a jury instruction advising the jury that

if weaker and less satisfactory evidence is offered and it appears that it is within the power of the party to offer stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. Not only did the district court refuse to give this instruction, the district court sought to curtail any probing into the deficient investigation by threatening Joe it would instruct the jury that law enforcement had **no duty** to independently investigate cases involving justifiable use of force. When Joe tried to submit a jury instruction with the complete statement from *Mitchell*, the court asked if he was accusing the court of misconstruing the law.

The case hung on the credibility Joe, Daniel and the police investigation. Joe's entire defense hinged on discrediting Daniel and showing that the state did not meet its burden. Refusal to give Defendant's proposed jury instructions, coupled with the threat to instruct the jury law enforcement had no duty to investigate cut the heart out of Joe's defense. These actions by the district court were harmful error and justify remanding the case for a new trial.

III. It was record based ineffective assistance of counsel not to file Defendant's proposed jury instructions.

As described above, Joe believes the record is clear enough to ascertain the substance of the offered, but refused, jury instructions. Joe also recognizes that the lack of the actual proposed instructions may result in a record that is not clear enough to support the relief requested. In the event the Court finds the record does not contain adequate information regarding the specific jury instructions offered and refused, the Court must find record based ineffective assistance of counsel.

On April 2, 2024, the Court issued an *Omnibus Hearing Memorandum and Order*. Dkt. 18. Therein, the Court ordered "All proposed jury instructions shall be filed by July 12, 2024." The parties were required to file one copy with citations to authority and one "clean" copy without citations. *Id.*, Pg. 8. Joe's attorney executed the *Omnibus Hearing Memorandum* on March 28, 2024.

No proposed jury instructions were filed by Joe. The discussion about which jury instructions to give begins on page 684 of the transcript. Proposed jury instructions are nowhere to be found in the record.

The Montana Rules of Appellate Procedure require the appellant to present the supreme court with a sufficient record to rule upon the issues raised. The adequacy of the jury instructions is a common area of appeal. And yet, the actual language of the proposed instructions is not available. This is record based ineffective assistance of counsel.

The right to effective assistance of counsel is guaranteed by the *Sixth Amendment* to the United States Constitution and *Article 24* of the Montana Constitution. Montana Courts have adopted the two-prong approach set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), when deciding ineffective assistance of counsel claims. *State v. Harris*, 2001 MT 231, ¶ 18, 306 Mont. 525 ¶ 18, 36 P.3d 372, ¶ 18. Under the *Strickland* test, Joe must prove that trial counsel's performance was deficient and that the deficient performance prejudiced Joe's defense. *See State v. White*, 2001 MT 149, ¶ 11, 306 Mont. 58, ¶ 11, 30 P.3d 340, ¶ 11. The question of ineffective assistance of counsel is whether counsel's conduct was based on reasonable or sound professional judgment. *State*

v. Whitlow, 2008 MT 140, ¶ 14, 343 Mont. 90, ¶ 14, 183 P.3d 861, ¶ 14. In order to satisfy the second prong, Joe must show that the result of the proceeding would have been different absent counsel's errors. *State v. Harris*, 2001 MT 231, ¶ 19, 306 Mont. 525 ¶ 19, 36 P.3d 372, ¶ 19. Here, Joe can show both that his counsel's failure to file proposed jury instructions was not based on reasonable or sound professional judgment and that it prejudiced his right to a fair trial.

A. It was ineffective assistance not to file Defendant's Proposed Jury Instructions and ensure they became part of the record.

In this case, the heart of Joe's defense was that Daniel was escalated and angry when Joe arrived and Joe felt trapped in the apartment by an angry, violent man with a butcher knife and a baseball bat. There were numerous inconsistencies between the available evidence and Daniel's statement. The phone would have shown whether there was a call between Alice and Daniel just before Joe arrived in the apartment. It was also Daniel's only access to the ringcam footage. The State failed to preserve the evidence and Daniel destroyed it. As discussed above, Joe was entitled to have the jury instructed regarding the rebuttable presumptions that can be reached from this conduct.

Unfortunately, the jury was inadequately instructed on the applicable law, and as a result, was able to conclude Daniel was credible, Joe was not, and Joe had no justifiable basis for his actions. Defense counsel failed to protect the record in a manner consistent with M.App.P. 3 by filing Joe's proposed jury instructions. The failure to offer this jury instruction cannot have been based on reasonable and

sound professional judgment. Proposed jury instructions are filed by nearly every party in nearly every case. In this case, there was a court order to file the jury instructions. During trial when Joe proffered Defendant's Jury Instruction No. 4, which was rejected, the court reminded Counsel he needed to make sure it was filed and in the record. As a result, that one instruction was filed. No others were. This undoubtedly compromised Joe's right to a fair trial and a sufficient appellate record because, while we know the general substance of the instructions from the conversation about them, we don't know what the proposed instructions actually said.

i. Defense Counsel's failure to file proposed jury instructions cannot have been based on reasonable and sound professional judgment.

This Court evaluates jury instructions to determine whether the instruction fully and fairly instructed the jury on the law applicable to the case. A reversible error occurs only if the jury instructions prejudicially affect the defendant's substantial rights. *State vs. Maloney*, 2003 MT 288, ¶ 14.

The failure to offer jury instructions on rebuttable presumptions cannot be said to be a split-second strategic decision in the course of trial. Defense counsel had six months to consider what instructions were needed given the defense he was presenting. And yet, the instructions at issue are nowhere in the record.

ii. Defendant was clearly prejudiced by his counsel's failure to offer proper jury instructions.

To establish the second prong of *Strickland*, the defendant must show that the fact finder's outcome would have been different but for counsel's conduct. In making this determination, the Court must review the totality of the evidence. *Harris*, ¶ 19.

In this case, the totality of the circumstances shows there was evidence Daniel had a butcher knife in his hand. There was evidence to show video footage, with audio and visual, would have been recorded the second Daniel and Joe left the apartment and that it was destroyed. Evidence suggests Daniel was not blissfully unaware of the family dispute. He'd received a call from Alice just before the incident but the State failed to preserve that evidence when it was in the State's possession. Daniel willfully destroyed evidence. The entire case rested on witness credibility and the jury needed to be instructed that the State's failure to preserve evidence and Daniel's willful destruction of evidence should result in a negative inference.

Unfortunately, those instructions aren't in the record. It cannot be argued that the reason not to put them in the record was of some strategic value. Joe argued them when the court settled jury instructions, so he obviously intended to submit them and pursue them.

Because the jury had no instruction regarding the credibility issues, despite the legislative mandate to provide those instructions, Joe wasn't able to argue the negative inferences in closing. In fact, had he argued the negative inferences, he

would have triggered an instruction from the court that law enforcement didn't have any duty to investigate the case.

Defense counsel's failure to file proposed jury instructions reflecting a fundamental principle of the evidentiary presumptions set forth in Title 26, Chapter 1 of the Montana Code cannot be based on reasonable and sound judgment. Joe's right to due process and his ability to pursue an appeal based on the denied jury instructions was violated by ineffective assistance of his attorney. This case should be remanded for a new trial.

CONCLUSION

Joe did not get a fair trial. From the opening statement to the closing argument, the State presented evidence of prior crimes and argued a probation violation was underway. Alice's threat to call Joe's probation officer was not the impetus of the fight. Rather, the threat was made as a result of the fight. Accordingly, it was not needed to show context. It was presented for the sole purpose of establishing Joe committed a prior crime, spent time with criminals, and was violating his probation.

Not only did the district court refuse the negative inference jury instructions presented by Joe setting forth how the jury is to view evidence, the district court repeatedly threatened Joe with instructing the jury police have no duty to investigate. The investigation was clearly problematic. Law enforcement decided Joe was the aggressor and never conducted any investigation regarding inconsistencies like a butcher knife outside, blood in places of the house Daniel

denied being, and destroyed video footage. The jury should have been instructed on negative inferences, but wasn't. The court's refusal to properly instruct the jury was reversible error. The harmful effect of the reversible error was compounded by the court's repeated threats to advise the jury law enforcement had no duty to investigate, an instruction that is wholly inconsistent with Montana law.

In the event this Court is unwilling to find reversible error because the record does not show the exact text of the refused jury instructions, it still must reverse and remand for a new trial. Failure to file jury instructions that are central to a party's theory of the case is record based ineffective assistance of counsel.

Joe respectfully asks the Court to reverse the district court's decisions and remand for a new trial.

Dated this 31st day of December, 2025

HUGHES LAW, P.L.L.C.
/s/ Jacquelyn M. Hughes
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APPELLANT'S CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with Rule 11 of the Montana Rules of Appellate Procedure. In accordance with Rule 11(a), the required portions are double spaced and printed in Times New Roman, proportionately spaced, fourteen-point typeface, with a total word count of less than10,000 as calculated by this party's word processing system and by counting the words contained in the pictures within this brief. The text of this brief contains 9828 words. The pictures included herein contain 77.

/s/ Jacquelyn M. Hughes

CERTIFICATE OF SERVICE

I, Jacquelyn Marjorie Hughes, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-31-2025:

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