

1 Andrew W. Paul
2 Deputy County Attorney
3 FRED VAN VALKENBURG
4 Missoula County Attorney
5 Missoula County Courthouse
6 Missoula, Montana 59802
7 (406) 258-4737
8 ATTORNEYS FOR PLAINTIFF

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SHIRLEY E. FAUST, CLERK

By *Shirley E. Faust*
Deputy

9 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

10 STATE OF MONTANA,

11 Plaintiff,

Dept. No. 1
Cause No. DC-14-252

12 -VS-

13 STATE'S RESPONSE TO
14 DEFENDANT'S FIRST MOTION *IN*
15 LIMINE

16 MARKUS HENDRIK KAARMA,

17 Defendant.

18 Comes Now, Andrew W. Paul, Deputy County Attorney for Missoula
19 County, and files this Response to Defendant's First Motion *In Limine*.
20 Defendant has identified five proposed items (listed A-E) that he seeks to
21 preclude from trial. The State will address each item in turn.

22 A. Photographs of the deceased, the crime scene photographs of the
23 deceased, autopsy photographs of the deceased and the photos or video
24 tape of the autopsy or post mortem exam.

25 The State objects to this motion. The State should be allowed to
26 present photographs of the deceased Diren Dede during the testimony of Dr.
Gary Dale to assist the jury in understanding Dr. Dale's examination of the
wounds inflicted on Dede. The State intends to use these photographs as

1 demonstrative exhibits, only. The photos will not be sent with the jury to the
2 deliberation room.

3 While the Defendant argues there "is no dispute as to how the
4 Deceased died," (Def.'s First MIL, p. 3, lines 13-14) there is a dispute as to
5 whether Defendant could see Dede in the garage. The photographs provide
6 compelling evidence that Defendant was aware of Dede's location and
7 movement in the seconds before his death. Further, the State is still
8 obligated to prove each and every element of the offense and may be
9 required to prove that the Defendant was not justified in using deadly force.

10 The standard for reviewing the admission of photographs is an abuse of
11 discretion. *State v. DuBray*, 2003 MT 255, ¶ 67, 317 Mont. 377, ¶ 67, 77
12 P.3d 247, ¶ 67. The test for abuse of discretion is whether the trial court
13 acted arbitrarily or exceeded the bounds of reason resulting in substantial
14 injustice. *State v. Kearney*, 2005 MT 171, P12, 327 Mont. 485, ¶ 12, 115 P.3d
15 214, ¶ 12. It is well established that the trial courts have wide discretion in
16 admitting photographs. *State v. Warnick* (1983), 202 Mont. 120, 127, 656
17 P.2d 190, 194. Photographs are admissible for the purpose of explaining and
18 applying the evidence and for assisting the court and the jury in
19 understanding the case. *State v. Johnson* (1986), 221 Mont. 503, 515, 719
20 P.2d 1248, 1256. The Montana Supreme Court has consistently held that
21 photographs possessing instructive value are relevant and admissible
22 provided their probative value is not substantially outweighed by the danger of
23 unfair prejudice. *State v. Close* (1994), 267 Mont. 44, 48, 881 P.2d 1312,
24 1314.

25 The Montana Supreme Court has held that it is appropriate for the State
26 to present photographs taken during a post mortem examination during a
homicide trial. *State v. Mergenthaler*, 263 Mont. 198, 204-205, 868 P.2d 560,

564. At trial, Dr. Henneford, the physician who performed the autopsy on the victim, referred to slides taken during the autopsy when he was explaining the nature of the injuries to the jury. *Mergenthaler*, at 204, 564. The Montana Supreme Court held that the autopsy slides provided important and probative evidence in explaining to the jury how and why the victim died, and thus were properly used for demonstrative purposes. *Mergenthaler*, at 204, 564.

In *State v. English*, 2006 MT 177, ¶ 49-¶ 52, 333 Mont. 23, 32-33, 140 P.3d 454, 460-461, the defense argued that because the death of the deceased was not in dispute, the photographs of the deceased should not have been shown to the jury. *Id.* The Montana Supreme Court disagreed and found that the photographs "may have been useful to the jury in understanding the manner by which [the deceased] was injured," and "may have enabled the jury to make inferences regarding English's intent and state of mind..." *Id.* at ¶ 52.

In the case at bar, the photographs may be useful to the jury in understanding how Dede was injured. It will aid the jury in understanding the testimony of Dr. Gary Dale. The photos may also assist the jury in making inferences regarding Defendant's intent and state of mind at the time of the shootings.

B. Using the term "victim" to refer to the deceased.

The State does not object. However, per the Court's prior oral ruling, neither may the defense refer to Dede as "a burglar" or "the burglar."

C. Evidence as to the specific level of marijuana present in Defendant's blood.

The State does not object.

1 D. Statements by Defendant's neighbors about Defendant intimating he
2 was involved with drugs.

3 The State does not object.
4

5 E. The terms "Lure" and "Bait."

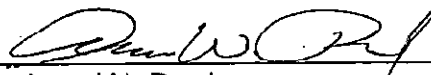
6 The State does object. The word "lure" was used by the Defendant
7 during his interview with detectives. (Transcript of Defendant's Interview, p.
8 45.) The Defendant acknowledges that they lured the deceased by leaving
9 the garage door open. The word "bait" was used by Ms. Pflager, the
10 Defendant's common law wife and cohabitant, while she was relating her
11 account of what occurred on the night of the shooting to several neighbors.
12 According to witnesses, Pflager specifically referred to a purse that was found
13 in the garage as the "bait purse." Furthermore, the Defendant cites no case
14 law or statute in support of this motion *in limine*.
15

16 CONCLUSION

17 Based on the foregoing Response, the State respectfully asks this
18 Court to deny Defendant's Motions in Limine: A and E. The State should be
19 allowed to show the jury photographs of the nature and extent of Mr. Dede's
20 injuries to aid Medical Examiner Dr. Gary Dale in explaining his examination
21 of the body. The State concedes that these photographs are for
22 demonstrative purposes only and should not accompany the jury to the
23 deliberation room. The State should be allowed to present a photo of Mr.
24 Dede alive and well. Furthermore, the State should not be precluded from
25 using the words "lure" or "bait."
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DATED this 24th day of November, 2014.

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Andrew W. Paul
Deputy County Attorney

CERTIFICATE OF SERVICE

I, Andrew W. Paul, hereby certify that on the 24th day of November, 2014, I emailed a true and accurate copy of the above to Counsel for the Defendant, Paul Ryan, Nate Holloway, Brian Smith, Katie Lachy and Lisa Kauffman.


Andrew W. Paul
Deputy County Attorney