IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 15-0214

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MARKUS HENDRIK KAARMA,

Defendant and Appellant.

# BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Edward P. McLean, Presiding

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## STATEMENT OF THE ISSUES

1. Did the district court correctly instruct the jury on justifiable use of force (JUOF)?

2. Did the district court properly deny Kaarma's motions for change of venue based on pretrial publicity?

3. Did the district court properly deny Kaarma's for-cause challenge of prospective juror Hughes?

4. Did the district court properly admit evidence of Kaarma's assault of his partner, Janelle Pflager?

5. Did the district court properly admit Detective Baker's opinions and inferences about blood evidence?

## STATEMENT OF THE CASE

Appellant Markus Hendrik Kaarma (Kaarma) appeals from his judgment of conviction for the deliberate homicide of 17-year-old German exchange student, Diren Dede (Diren), and the denial of his motion for new trial. (D.C. Docs. 153, 177, 180, 184.) Kaarma asserted the affirmative defense of JUOF "in defense of self, others, [and] home" (D.C. Doc. 21 at 4) when he deliberately shot to death the unarmed boy who had unlawfully entered Kaarma's garage through the door left

open by Kaarma and his partner Janelle Pflager (Pflager). (D.C. Docs. 1 at 2-19, 173 at 3-10.)

The district court, the Honorable Edward P. McLean presiding, sentenced Kaarma to Montana State Prison for 70 years, with a 20-year parole restriction, among other conditions. (D.C. Doc. 177 at 3, 6; *see* D.C. Doc. 173 at 19-23; 2/12/15-Tr. 276-77.) Judge McLean stated the reasons for judgment, in part, as follows:

> You expressed days in advance, that you were going to kill someone, and how you were going to do it, and then you did it by firing a shotgun into a confined space that you knew a human being was situated, and now try to rationalize it.
>
> You set this up, and it went down exactly how you had planned it, and [that] is called deliberate homicide.

(D.C. Doc. 177 at 4-6 (paragraph numbering omitted); *see* D.C. Doc. 173 at 3-12, 17-19; 2/12/15-Tr. 272-78.)

At sentencing, Kaarma took no responsibility for wrongdoing in causing Diren's death: "I did what I felt was necessary to protect my family, and myself, and I hope that no one ever finds themselves in that position, that I was placed in." (2/12/15-Tr. 272.)

## STATEMENT OF THE FACTS

In early April 2014, Kaarma and Pflager were burglarized by high school students entering their open garage. (Tr. 516-22, 564-66.) Kids called it "garage hopping"--"[w]hen you go into people's garages and tak[e] their belongings. . . . Just drive around looking for an open one." (Tr. 515, 517.) A flashlight, or a phone, was essential equipment to be able to see and take stuff from the dark garage. (Tr. 555, 565-66, 1820.) Garage-hoppers only chose to enter "[w]hichever ones were open," and they did not go back to ones whose doors had been closed, or try to enter cars that were locked. (Tr. 556.) Given the prior burglaries from Kaarma's open garage and other incidents in the neighborhood, one neighbor thought "it was just odd that their garage door would be open the night of the shooting." (Tr. 510-11.) Leaving the garage door open was also odd, because Pflager had emailed their neighbors about the burglaries and warned them to "keep garage doors shut and cars locked up." (State's Ex. 15, Tr. 707-08.)

These young burglars had no intention of entering the house, had no intention of harming anyone inside the house, and were not armed. (Tr. 522, 586; *see* Tr. 1846.) One of the burglars landed in youth drug court, and another pled guilty to conspiracy to commit a burglary. (Tr. 529-30, 552, 574.) The former was not aware of any "intricate burglary ring at Big Sky High School," involving Diren or anybody else. (Tr. 515, 553-54; *see* Tr. 1766-67.) He agreed that entering

someone's garage was a crime, but did not believe that a person deserved to be shot and killed for that crime. (Tr. 558-59.) An officer testified that "garage hopping" is a burglary, and burglary is a felony. (Tr. 1110.)

Diren's friend Robby Pazmino (Pazmino), another exchange student, said that when he and Diren learned about garage hopping in the Missoula high school community, for the purpose of obtaining alcohol, he thought it was "like a game and we didn't know the rules." (Tr. 1421, 1423-24; *see* Tr. 1765-66.) He did not think it was right, but he said, "No one told us you could be shot if you went inside a garage. . . . [T]he worst thing that could happen if you went to a garage . . . [was] that people steal your stuff. That's it. Nothing else." (Tr. 1424.)

But that's not how Kaarma felt about it. Kaarma was "Mad. Angry. Pissed off." (Tr. 637.) Days before the shooting, Kaarma told his haircutter that he was tired and had "been up the last three nights with a shotgun wanting to kill some kids"--some "F'ing kids." (Tr. 630, 641-42.) Kaarma told her about the burglaries, and that "he was going to shoot them." (Tr. 631.) "He was waiting up with a shotgun so he could kill them." (Tr. 632.) Kaarma was loud, belligerent, repetitive, and using profanity: "He was going to shoot the fucking kids. He didn't know fucking how old they were or whose fucking kids they were. He was just going to fucking kill them." (Tr. 631-32, 641.) Kaarma did not like the way the police were dealing with the situation, so he was going to "fix it."

(Tr. 633-34.) And as he left the salon, Kaarma warned: "I'm not kidding. You're seriously going to see this on the news." (Tr. 635.)

In response to the burglaries, Pflager started parking her SUV in the garage, locking the doors to the house, and installing motion detectors in the driveway and garage. (Tr. 681-85.) She also installed a video baby monitor in the garage behind the parked Buick. (Tr. 686-87.) Pflager also bought a baseball bat, "[j]ust in case they were going to come back." (Tr. 689-90, 701.) She reorganized the garage to create a "perimeter" or "barricade" so a person could not just waltz in there, and she placed an old purse with identifying items to aid in tracking down a burglar if they came back in and took the purse. (Tr. 691-94, 788.) "Target hardening," one defense expert called it. (Tr. 2134.) At one point, Pflager said that "she really wanted those fuckers arrested because twice is too many times." (Tr. 694.) Remarkably, Pflager did not testify that her new protection measures included keeping the garage door closed. (*See* Tr. 681-706.)

Pflager told one neighbor that they were going to use the baby monitors to catch the burglars; Pflager knew they would come back "because we are going to bait [them]." (Tr. 1479-80, 1489-90.) Pflager did not seem fearful, she seemed aggressive. (Tr. 1493.) Pflager told another neighbor about "baiting" the burglars in order to catch them, and also that "guns were loaded"--although she did not want to "shoot some 14-year-old kid." (Tr. 1498-99, 1504-05.)

After reporting the burglary, Pflager said that Kaarma took all of his possessions and drug paraphernalia out of the garage, locked his truck, made sure not to leave his phone or wallet out there, and was adamant about locking the doors. (Tr. 701.) And Kaarma got out his pump-action shotgun, loaded it, and left it in the dining room, ready to use to "apprehend" whoever was stealing their stuff. (Tr. 701-04.) He parked his truck outside the garage so that it was "just pulled strategically there." (State's Ex. 107A[1] at 43.) Kaarma said that they either had to accept being watched and living in fear of continued burglaries, or they could "put a stop to it . . . [and] be a little proactive." (*Id.* at 65-66.)

By the time April 27, 2014, rolled around, Kaarma was still mad. (Tr. 735, 738-40.) That night, Kaarma and Pflager hung out at home, had dinner, smoked in the garage, sat in the hot tub, and watched part of a movie. (Tr. 745-48; State's Ex. 107A at 35.) That night, their garage door was left open by Pflager, Kaarma thought because "she probably wanted to catch burglars." (Tr. 748; State's Ex. 107A at 46.) He said, "[I]f we leave the garage open, there's a higher likely chance a burglar's gonna come in." (*Id.*) "[A]ll we did to lure was really . . . leave the garage door open again and here's this guy, we're watching him on . . . video on her phone, jiggling my doorknobs." (State's Ex. 107A at 45.)

[1] A copy of Kaarma's statement with similar pagination was attached as an appendix to the Brief of Appellant as Exhibit Q.

Shortly after midnight, Pflager started getting pings on her motion detector and then thought she saw something outside. (Tr. 752-56; State's Ex. 107A at 35.) Pflager told Kaarma, "show time. . . . I see something, a flashlight." (State's Ex. 107A at 35.) Kaarma was skeptical, but Pflager insisted, "no there's flashlights . . . someone's tryin' to break into your car right now." (*Id*.) Kaarma says he saw the individual by his truck on the monitor. (*Id.* at 50.)

Pflager said she saw a flashlight on outside the garage as Diren approached. (Tr. 745.) She also said, at the time, that "the kid had a flashlight . . . that would have given his position away for sure." (Tr. 744.) Pictures from Pflager's phone connected to the video monitor show Diren entering the garage holding what appears to be a flashlight in his hand, a Maglite Kaarma thought. (State's Exs. 20-21, Tr. 755-56; *see* State's Ex. 107A at 39, 50.) Pflager, Kaarma, and Pazmino all said that Diren had a light source when he went into the garage. (Tr. 1847-48.)

Kaarma got up and grabbed his shotgun, but Pflager told him to wait, "hold on, hold on." (State's Ex. 107A at 35.) Kaarma was getting shaky from the adrenaline and thought "oh my God these guys actually came back to the house." (*Id*.) Once Pflager was sure there was a person in the garage--"oh my God, he's coming in"--she thought "here's the guy, go get him." (Tr. 756, 765-66.) She told Kaarma, "he's in the garage . . . okay go. . . . [G]et out there." (State's Ex. 107A

at 36, 51.) Pflager did not know what the perceived threat from this person was. She assumed he was just stealing things, exactly what the previous burglars had done. (Tr. 833-34.)

Things happened very fast at this point. Kaarma exits the front door and turns left to face into the open garage door. That takes about one second. (State's Ex. 107A at 36, 54-55.) At that moment, according to Kaarma, Pflager turns on the outside light, which blinds Kaarma as he is looking into the garage standing just outside the open door. (*Id*. at 36, 53.) Pflager, however, testified that she did not turn the outside light on until after shot number three. (Tr. 768, 771.) One second later, Kaarma fires the first shot out of his shotgun into the dark garage. (State's Ex. 107A at 53) Thus, Kaarma started shooting within two seconds of leaving the front door. Kaarma fired all four shots--without a pause, he said, boom, boom, boom, boom--within two more seconds. (*Id*. at 54.) Thus, the total time from when Kaarma went out his front door to the time the last shot was fired amounted to five seconds. (*Id*. at 55.) Other witnesses said there was a pause between the third and fourth shots. (*See* Tr. 1514, 1517-18, 1530, 1544, 1549-50, 1918.)

Pflager stated she heard Kaarma say something like "hey" and then she heard him chamber a round in the shotgun. (Tr. 770.) Pflager stated she then heard Diren say "hey" or "wait" in response. (*Id*.) Whatever it was, Pflager was sure that she heard some exchange between the two, contrary to Kaarma's

statement. (Tr. 1751.) Pazmino, who was waiting in the street when Diren went into the open garage, heard an angry male voice yelling "you are there or I see you there" followed instantly by three or four gun shots. (Tr. 1430-34.) A neighbor, who had been lying in bed, also said he heard a yell followed immediately by gun shots. (Tr. 1613-15.)

Despite the condensed time frame, Kaarma said that he "stood there . . . and heard something move, like, a piece of metal hit the cement either that or a piece of metal hit a piece of metal, it sounded like either a metal wrench being picked up or maybe the axes." (State's Ex. 107A at 36.) Kaarma said he had a lot of hand tools by the door that goes into the kitchen, "axes, a maul[], and a sledgehammer, so I don't know if that got kicked, picked up, moved, I don't know." (*Id*.) All he knew was he "heard something in there like that, and . . . panicked." (*Id*.)

The first thing that came to his mind--in those two seconds--was that this guy was trapped, Kaarma was standing in the only way out, and the guy was going to do whatever he had to to get out of there. (State's Ex. 107A at 36, 63.) "So I'm thinkin' any moment now a wrench is gonna come flyin' out of that darkness and hit me in the head, you know, and I would have no idea." (*Id*.) The picture in his head was that he was "gonna die." (*Id*. at 56, 63.) Kaarma believed his life depended on taking those four shots into the dark garage, though they were not directed at anyone in particular, just aimed high to avoid hitting his cars. (*Id*.

at 59.) Kaarma considered the individual in his garage a "caged animal" creating a very high risk of danger: "There's really no tellin[g], I don't know who it is . . . [what] they're after . . . if they're a drug addict, they need cash, are they broke are they homeless . . . I don't know." (*Id*. at 64.)

Aside from Kaarma's stated conjecture, there was no evidence that Diren used or threatened any imminent force, was committing an assault, or used or threatened any physical force or violence against Kaarma or anybody else. (Tr. 1936-37, 2056.) Rather, Diren was "garage hopping" and probably looking to steal some booze, if anything, but not to physically harm anybody. (S*ee* Tr. 1421.) Because Diren was killed, however, there was no direct evidence presented about what his intent was when he entered the garage. (S*ee* Tr. 1783-84, 2056.) Other inconsistencies between Kaarma's statement and that of other witnesses indicated to police that they were dealing with an unjustified homicide. (Tr. 1758-63, 1927-38.)

Also, police testified that if they entered a dark building and simply heard a noise, they would not shoot, because "you have to be able to articulate the threat," not speculate about it. (Tr. 1296-97.) In the dark building scenario, it is important to set up a perimeter and illuminate the area, not shoot blindly into the dark. (Tr. 1295-96.)

With those thoughts in his mind during those two seconds, Kaarma tries to fire a shot, but bungles it, re-racks another shell, and finally disengages the safety and fires his first shot. (State's Ex. 107A at 36.) Kaarma never considered just stepping back in those two seconds before he fired into the garage--he just wanted the burglar to "get arrested." (*Id*. at 64.)

Pflager told police that "I heard the kid yelling 'no, no, no, no, no, please,' . . . but by then there was already a shot fired." (State's Ex. 29, Tr. 835, 1092-93, 1097.) In addition to hitting Diren, a number of shotgun pellets went into the house through the door to the kitchen and back wall of the garage, causing damage inside the house. (Tr. 775, 1053-54, 1581-82; *see* State's Ex. 30, Tr. 1164-70.) The first three shots to the right--hitting the door, the wall, the freezer--likely came in quick succession and were fairly evenly spaced at the same height; and then there was more of a spread and likely a pause before the final shot to Diren's head and higher up on the back wall. (Tr. 1358, 1749-50.)

Kaarma described aiming high, starting in the right side of the garage then panning each successive shot more to the left. (State's Ex. 107A at 37, 56.) He did not have a good reason for that shot pattern, except maybe so he would not hit his cars, or because he was right-handed, or that he panicked. (*Id*. at 56.) He says he stopped at four rounds, because someone in the garage would have heard it and they would have yielded. (*Id*. at 57.) Kaarma figured whoever was in there would

be laying on the ground and "pissin' his pants." (*Id*. at 37.) Kaarma was right about the "laying on the ground" part, and he heard something fall to the ground. (*Id.*)

It was Diren's dying body that Kaarma heard falling, shot twice: first in the back of the arm, likely on the second shot, and then the devastating fatal wound to the head on the fourth shot as Diren stood facing his attacker and pleading for his life at the back of the Buick. (Tr. 1361, 1386; *see* Tr. 1313-25.) Diren died of that wound to the head; the undisputed manner of death was homicide. (Tr. 1325.) The next day, Pflager told the neighbors, "you do not have to worry about the burglaries anymore . . . because he's dead." (Tr. 1577-78.)

Although Kaarma moved to dismiss for insufficient evidence at trial (Tr. 2071-72, 2341), he makes no such claim on appeal. Therefore, there is no dispute now that there was sufficient evidence to prove beyond a reasonable doubt that Kaarma committed the deliberate homicide of Diren and that his actions were not justified under the circumstances. Additional facts in the record will be cited in relation to specific issues.

## I. JURY INSTRUCTIONS RELATING TO KAARMA'S AFFIRMATIVE DEFENSE OF JUOF

Kaarma gave notice that he would rely upon the affirmative defense of JUOF "in defense of self, others, [and] home." (D.C. Doc. 21 at 4.) S*ee* Mont.

Code Ann. § 46-15-323(2). Before trial Kaarma proposed jury instructions regarding JUOF, both as to defense of self and others, and as to defense of an occupied structure. (Def.'s Proposed Instrs. 20-21, D.C. Doc. 84 (instructions not included in electronic file), *see* attached as App. 1.)

In his opening, Kaarma talked about the evidence of his state of mind when he killed Diren: "In his mind, he's going to get attacked." (Tr. 485.) The defense would provide testimony of a psychologist to explain what Kaarma was "going through that evening" including the "imminent fear that was occurring not only that night but in the weeks prior, his state of mind." (Tr. 494.) The defense references phone calls from the jail between Kaarma and Pflager which will show that Kaarma was "fearful. He's concerned. He's angry." (Tr. 499; *see* State's Ex. 105, Tr. 1876-77.) Finally, the defense says that Kaarma had to take steps to take Diren's life, because he was "fearful and . . . he felt his life was threatened by the movement specifically of Mr. Dede, who made the decision to go into this family's garage." (Tr. 504.)

Throughout the State's case in chief, Kaarma also emphasized, during cross-examination of witnesses, the variety of ways a person might be justified in the use of force: to "protect yourself if you feel threatened;" to "protect your property;" and to protect "against the commission of a forcible felony." (Tr. 909-10.) Also, that a burglary may present a threatening situation in which a

person may feel threatened. (Tr. 969-70.) At times, the district court prohibited witnesses testifying what the law allows: Montana law allows homeowners to protect their homes. (*See*, *e.g.*, Tr. 975, 1065-66.) But the court also allowed it to show an officer's training: officer was aware that a person can use force to defend themselves. (Tr. 1019.) The defense elicited testimony that a person may, depending on the circumstances, protect against a forcible felony being committed in the home, as well as when "you feel your life is in danger." (Tr. 1032.) There was testimony about burglaries in progress being a dangerous situation in which the use of force may be necessary for the protection of self or others, or to stop a forcible felony. (Tr. 1142-45.)

Kaarma also elicited testimony that during the investigation police understood that JUOF and "self-defense" had been raised. (Tr. 1232.) The officer recognized "Kaarma's claim of self-defense." (*Id*.) The defense was focused on investigations of "self-defense" shootings. (*See* Tr. 1235; *see also* Tr. 1300 (redirect regarding "self-defense" cases).) Counsel inquired about a "homeowner trying to defend their family and themselves." (Tr. 1271.)

Kaarma elicited testimony from one neighbor that she thought it was "reasonable . . . for one to protect themselves with a weapon or to have a weapon ready." (Tr. 1506.) On redirect, without objection by Kaarma, she talked about "having a weapon in your home to protect yourself," and the limited circumstances

in which "you should protect yourself." (Tr. 1509-10.) Another neighbor testified on cross-examination about Pflager's concerns about the prior burglaries and said that she expressed worry "about herself and her baby. . . . Not the house. . . . [T]he safety of the people in the house." (Tr. 1729-30.)

On direct examination of the main detectives in the case, Dean Chrestenson and Guy Baker, the state introduced the statements of Kaarma, thus offering evidence of JUOF and that the police were investigating the case as a JUOF case. (Tr. 1758-63, 1925-37; *see* State's Ex. 107A.) Another detective testified that the best evidence in JUOF cases is "a statement from the person who used force as to what their state of mind is and what they were feeling at the time compared to other evidence that corroborates or refutes that statement." (Tr. 1876.) On cross-examination of the detectives, Kaarma expressly inquired about "self-defense" cases. (Tr. 1838, 1840, 1844, 1994, 2057-58, 2064, 2066.) The defense confirmed that in Kaarma's interview, "he tells you that he is afraid for his life." (Tr. 1862.)

At the close of the State's case in chief, Kaarma moved to dismiss based on insufficient evidence. (Tr. 2071-72.) Kaarma pointed out the "unique circumstances in a self-defense case for . . . evidence to be presented and the burden to shift to the prosecution." (*Id*.) Kaarma acknowledged that, "In this case, the State has chosen to play statements of the defendant and the burden has shifted

to the State." (Tr. 2072.) Consequently, Kaarma asserted that there was "insufficient evidence at this time for the State to carry its burden to prove beyond a reasonable doubt that he was not acting in a justified manner." (*Id*.) The district court denied the motion, finding the State "has certainly presented evidence to deliver this matter to the jury to make that determination." (Tr. 2072-73.)

Kaarma also referenced "self-defense" cases, as opposed to defense of occupied structure, during direct examination of a defense witness in his case in chief. (Tr. 2100, 2103.) One of Kaarma's experts talked about "high magnitude stress" or trauma which is unique from every-day stressors and deals with "when there's a threat of death involved [or] a threat of serious bodily injury." (Tr. 2303-04.) He talked about the stress reaction to what is "perceived as a threat to life" and "life-threatening conditions," and to the "situation when your life might be in danger." (Tr. 2307-08, 2317.) It's about responding to "extreme threat." (Tr. 2317.) The top of the "threat imminence continuum" is when the "threat is imminent, there's a threat to my life." (Tr. 2317-18.)

When the defense rested, Kaarma renewed his "motions again for sufficiency of the evidence . . . both on the deliberate homicide and . . . on the burden shifting under self-defense." (Tr. 2338, 2341.)

At the close of evidence, the parties and district court settled jury instructions. (Tr. 2362-2416, 2423-34.) For the first time, Kaarma stated that he

was raising the defense of an occupied structure only, and withdrew his proposed instruction on defense of self or others. (Tr. 2366-67, 2369-70, 2374-76, 2378-86.) Kaarma argued that "the defense gets to pick which JUOF it wants to proceed under. It is a defense that we have noticed. We are operating under defense of an occupied structure and there are different elements than [defense of self or others]." (Tr. 2376.)

The district court disagreed and gave instructions on both defense of person and defense of occupied structure. (Tr. 2379-81, 2411; *see* Instructions 25, 28, D.C. Doc. 151.2.) The court also gave an instruction to the effect that there are two types of self-defense available to a defendant and the jury had to consider them separately and make a determination on the specific elements of each, as instructed. (Tr. 2406-07; Instruction 28(a), D.C. Doc. 151.2.) The district court stated the defense does not "get to pick the law," the State has the right to establish that Kaarma's actions were not justified under either statute, and the jury had the right to be instructed on both theories. (Tr. 2379-80.) The defense of person instruction had to be given based on the evidence presented at trial, "because of the statements that were made that Mr. Kaarma was in fear that he was about to be assaulted." (Tr. 2379.)

In addition, the district court gave an instruction on the statutory definition of "forcible felony," without objection: "a felony that involves the use or threat of

physical force or violence against any individual." (Tr. 2368; Instruction 29, D.C. Doc. 151.2.) The district court gave a related instruction regarding the use of deadly force in cases involving, among other things, a "violent offense," as offered by Kaarma:

> The privilege of using deadly force is limited to cases in which the force imminently threatened apparently will cause death or serious bodily harm, or in which a violent offense is being committed which in its nature involves some serious risk of serious bodily harm such as rape, robbery, burglary, arson or kidnapping.

(Tr. 2393-95, 2410-11; Instruction 31(b), D.C. Doc. 151.2.)

The district court gave an instruction on the definition of "burglary," but rejected the State's request to instruct on "trespass." (Tr. 2397-98; Instruction 19, D.C. Doc. 151.2.) The defense argued, and the court agreed: "I think Robby Pazmino's testimony was he was entering the garage to steal alcohol or something. That's burglary. He's committing an offense inside the garage." (Tr. 2397-98.) Kaarma did not request the district court to instruct that burglary was a forcible felony as a matter of law: "We withdrew our 32, burglary is a forcible felony." (Tr. 2410.)

After trial, Kaarma filed a motion for new trial arguing in part that "instructing the jury on the affirmative defense of JUOF in defense of person, over Defendant's objection, violated his Sixth Amendment right to control his own defense." (D.C. Docs. 167 at 2-3, 19-21, 174 at 11-18; *see* 2/12/15-Tr. at 142-47,

155-56, 158-70.) The district court denied the motion for new trial on that ground. (D.C. Doc. 180 at 14-18.)

The district court reasoned, first, "it is the court's duty to instruct the jury on the law that applies to the case, not on the defense or prosecution strategy." (*Id*. at 15.) "Second, the court does not discern an inconsistency between the two statutes." (*Id*. at 16.) "[N]either statute gives one the authority to take the life of another who is committing a burglary unless the person believes that he or another is about to be assaulted or at risk of death or serious bodily injury." (*Id*.) The court concluded the jury was properly instructed on the use of deadly force and the parameters of the use of that force provided by both statutes, and the parties were allowed to present evidence and argue to the jury on their respective theories. The jury could reasonably conclude that Diren "was in the garage not to harm anyone, but to commit a theft or some other minor offense" which was insufficient to justify the use of deadly force. (*Id.* at 18.)

## II. PRETRIAL PUBLICITY AND CHANGE OF VENUE

Before he killed Diren, Kaarma bragged: "I'm not kidding. You're seriously going to see this on the news." (Tr. 635.) Despite his obvious expectation that his actions would land him in the media spotlight, Kaarma moved to change venue a number of times based on the news coverage of his crime--in

July, September, and November of 2014, and again in his motion for new trial. (*See* D.C. Docs. 27, 44, 82, 167.) The State has no reason to dispute, and generally accepts, Kaarma's recitation of facts on appeal relative to the extent and nature of the news coverage about this case. (*See* Br. of Appellant at 4-12.)

In its first order denying change of venue, the district court found and concluded that Kaarma had not met his burden; the publicity thus far had been factual in nature; there had been no public outcry, campaigns to remove judges, angry mobs marching on the courthouse, biased statements by prosecutors, and no carnival atmosphere. (D.C. Doc. 42 at 8-10.) The district court said that it would remain vigilant, but recognized that *voir dire* is the primary method to check prejudice from pretrial publicity. (*Id*. at 11.)

In its second order, the district court again denied the request for change of venue, granted the request to jointly prepare a jury questionnaire/survey, and found no compelling legal basis to set aside its prior order. (D.C. Doc. 45 at 2.) The court also noted that it had sealed the documents and pretrial proceedings relative to Rule 404(b) evidence and motions and denied intervention by a television station. (*Id*.; *see* D.C. Docs. 46, 49.) The court remained committed to "the prerogative and legal duty to protect Kaarma's right to a fair trial and impartial jury. By taking the steps above, as well as by allowing an enhanced juror

questionnaire to further weed out potential bias, the Court is exercising its 'broad discretion' over the control of pretrial proceedings." (D.C. Doc. 45 at 2-3.)

In November 2014, with trial fast approaching, Kaarma filed a second renewed request for venue change regarding a recent *Missoulian* newspaper article, which the district court addressed on the record at a hearing the same day. (D.C. Docs. 82, 83; 11/19/14-Tr. 99-105.) The district court ordered, first, "from this point forward, nobody involved in this matter, including law enforcement, is allowed to speak to the *Missoulian*. There's a Gag Order in effect." (11/19/14-Tr. 100.) Second, the court expressed its concern about Kaarma being able to select a fair and impartial jury, and detailed how it would address the subject during *voir dire*. (*Id*. at 100-03.) The court also granted a protective order preventing the Missoulian from obtaining copies of the 911 tapes. (*Id*. at 104-05.)

Before trial, the parties stipulated to excuse 51 prospective jurors for cause and the district court excluded another 37. (Tr. 13.) The district court denied Kaarma's request for individual *voir dire* of all jurors: even if most of them had become aware of Kaarma's criminal record through media reports, "you can't say that any informed juror is not qualified to sit on the jury in this case, the question is, are they going to be [biased] or prejudiced, if they are, we bounce them." (Tr. 18-20.)

At trial, the district court followed the procedure for *voir dire* which it had outlined, and based on that inquiry excused a single juror based on his mind being set because of the media. (Tr. 9-10, 15, 30-32.) The parties' *voir dire* about pretrial publicity found no concerns about either the media or the fact that the defense had tried to move the trial out of Missoula. (Tr. 170-73, 253, 305-09.) Although almost everybody had seen media reports about the case, they said they would not be swayed by what the media had to say. (Tr. 171, 305-09.) One juror said, "I think the judge thinks that Missoulians and Montanans can be fair jurors, and I think that's very important." (Tr. 172.) Others were critical of the media, saying it was biased, one-sided, and they were "chasing their tail trying to burn surplus ink." (Tr. 307-09.) One juror summed up the issue consistent with the district court's orders: "I would have to be living under a rock not to have heard the media, newspaper, television, radio. But I form my own opinion. I haven't decided. Let the facts speak for themselves." (Tr. 308.)

Later on, during the trial, the *Missoulian* printed an article discussing the "Castle" doctrine, which raised concerns for the defense. (Tr. 1076-79.) The district court conducted individual *voir dire* of each juror and determined that none of them had read that article, although one saw the headline and one's husband warned her about it. (Tr. 1097-1103.) Many of the jurors also reported that they did not get the paper or read the paper, or that a spouse intercepted the paper so the

juror could not read it. (*Id*.) The district court also excused one juror late in the trial, because his wife had been making comments about Kaarma's guilt. (Tr. 2345-55.) Even though the juror himself had not talked to his wife and did not know about her opinion, the court, with the agreement of the parties, erred on the side of caution to keep the record clean. (Tr. 2352-54.)

Finally, the district court denied Kaarma's motion for new trial as it applied to change of venue. (D.C. Doc. 180 at 2-12, 17-18; *see* 2/12/15-Tr. 133-42, 152-55, 168-70.) The court found that while the media coverage was extensive, it was also state-wide and the facts of the case were "going to cause a media storm no matter where the incident occurs." (D.C. Doc. 180 at 4-5.) The court found that although it "has the authority to limit the contact of the parties with the media, which it did in this case, the Court has no authority to stop the press and other media from seeking out news sources." (*Id*.) It also found that this case "certainly had the media's attention, but no more so than other cases that have occurred in the Fourth Judicial District in recent times." (*Id*. at 5.)

Ultimately, the district court reflected that it had denied Kaarma's motions for a change of venue because it believed the Missoula County population of registered voters and driver's license holders was large enough to find 12 jurors and 3 alternates who could be fair and impartial in deciding whether Kaarma was guilty, or not guilty, of deliberate homicide. (*Id*.) It then set forth in detail the

great pains which the court and the parties took to select a fair and impartial jury. (*Id*. at 5-12.)

## III. CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR HUGHES

Kaarma made two distinct challenges to remove prospective juror Kathryn "Kay" Hughes (Hughes) for cause at trial. First, based on the stipulated order to "automatically" excuse any prospective juror "who is in law enforcement, or related to anyone in law enforcement . . . [as] spouse, child, or parent[.]" (*See* D.C. Doc. 50 at 1; Tr. 142-44.) Second, whether Hughes would treat the testimony of police different from that of the defendant. (Tr. 236-38.)

As to the first challenge: Hughes was married, and hence directly related, to a former, retired Missoula police officer and assistant chief, and Hamilton police chief. (Tr. 46, 150.) However, the husband had been retired for over 20 years and, thus, was no longer "in law enforcement" pursuant to the stipulated order. (D.C. Doc. 50 at 1; *see* Tr. 46, 143-44.) Hughes' questionnaire clearly states neither she nor any family member "[a]re . . . involved in law enforcement in any official capacity[.]" (*See* Hughes Questionnaire at 1, D.C. Doc. 167, Ex. K ("NOT IMAGED TOO VOLUMINOUS"), attached hereto as App. 2.) The questionnaire reflected that her husband had "been employed by a law enforcement agency," but was retired. (App. 2 at 1, 3.) It was established on the record, without dispute

from Kaarma, that the purpose of the stipulated order was to eliminate jurors who were related to current law enforcement officers that might know something about the case: "family members of law enforcement were excused because they would know people that were working on this case and possibly heard about this case, and the difference here is that he was retired and doesn't have that." (Tr. 143-44.)

The district court gave Kaarma the opportunity for further *voir dire* on the matter. (Tr. 144.) However, after inquiring about knowing Detective Baker, about her husband's career, and about whether those facts would impact her decisionmaking in any way, Kaarma chose not to renew his challenge for cause as a direct relative of "anyone in law enforcement." (Tr. 150-51.)

The district court's ruling on this challenge was consistent with treatment of other prospective jurors. Eighty-eight jurors were excused by the court and the parties before trial. (Tr. 13.) Kaarma came to trial with a list of 7 additional jurors with possible relationships to law enforcement which the parties had not yet excused by stipulation: prospective jurors 1, 8, 12, 15 (Hughes), 42, 77, and 109. (*See* Tr. 12-13; D.C. Doc. 103.1.) Three other prospective jurors also chimed in on the issue during *voir dire*: juror numbers 16, 45, 70. (*See* Tr. 46-48; D.C. Doc. 103.1.) Of these 10 prospective jurors with some identified relationship to law enforcement, only those currently employed in Missoula law enforcement or with family currently in Missoula law enforcement were removed for cause. Two were

"no shows" (jurors 1 and 12) (D.C. Doc. 103.1 at 1); two were removed for cause under the stipulated order (jurors 8 (father and uncle were on Missoula SWAT team, husband was Missoula police) and 70 (juror worked in kitchen at Missoula County jail)) (Tr. 46, 48; D.C. Doc. 103.1 at 1, 4); two were seated on the jury (jurors 16 (son was a federal prosecutor), 45 (juror was employed as a meter maid in 1969)) (Tr. 48-49; D.C. Doc. 103.1 at 2-3); one was neither excused nor seated (juror 109 (former 911 dispatcher)) (Tr. 47; D.C. Doc. 103.1 at 5); and three were struck by Kaarma by peremptory challenges (jurors 15 (husband retired police), 42 (brother-in-law attending police academy), and 77 (sister-in-law employed as Missoula County jailer)). (Tr. 46-48; D.C. Doc. 103.1 at 1, 3-4.) Kaarma did not challenge the latter two prospective jurors (jurors 42 and 77) for cause.

Hughes also was questioned during *voir dire* about her ability to be fair and impartial. Hughes testified that her relationship with her retired husband would not interfere with her sitting as a juror. (Tr. 46, 150-51.) She said, "I think I have a fair mind and I can make up my own mind," and "my mind is my mind." (*Id*. at 46, 238.) Having known Detective Baker since he was a baby, or other law enforcement from back in the day, would not interfere either. (*Id*. at 50, 60, 150-51.) Regarding determining motive to tell the truth or not, Hughes said, "I think you have to absolutely listen to all sides. . . . Just simply watch people's facial expressions, listen to their attitude and their voice, listen to all of it." (*Id*.

at 109-10.) Hughes said, "I'm going to listen to both sides, you bet, I'll be very honest." (*Id*. at 238.) She also said she "would not be swayed by what the media has to say." (*Id*. at 171.) Finally, Hughes said she would be a good juror, "because I would come in also with an open mind." (*Id*. at 277.)

As to Kaarma's second challenge, defense counsel established through his questioning that there was a perception, in his words, that the police were "usually telling the truth . . . [b]ut a defendant on trial, we might question." (Tr. 236-37.) Counsel also explained that the law and the judge would tell the jury they have to "treat every single witness the same, unless they give you some reason not to, i.e., they're lying[.]" (Tr. 237.) Then he asked Hughes what she thought about that.

Hughes answered that "on the police investigation, I just believe it's going to be more accurate, true. Whereas the defendant, you know, he's going to fight for his life, so he's going to say something that's maybe not quite true because, you know, he's fighting for his life." (Tr. 237.) Counsel then asked Hughes if she would treat him differently. (*Id*.) Hughes denied that:

> Well, no, oh no, I wouldn't treat it differently. I'm just telling you that I think he's going to be--he would be more apt, maybe, to stretch the truth a little bit, maybe that's what I want to say. **I would not treat it any differently, I'm just looking at his point of view**.

(*Id*. (emphasis added).) At that, Kaarma asked, again, to remove Hughes for cause, this time on the grounds she would treat the defendant's testimony differently than that of law enforcement.

The State responded that Hughes "just said that she would not treat them differently." (Tr. 238.) The State explained that Hughes "simply pointed out that she would understand that the defendant might have a motive to lie or to stretch the truth, were her words." (*Id*.) The State recognized that the district court would instruct the jury regarding considerations of witness credibility, including the motive to lie. (*Id*.; *see*, *e.g.*, Instruction 3, D.C. Doc. 151.2; Tr. 349-50.) Defense counsel had made exactly the same point only minutes before: jurors must treat all witnesses the same "unless they give you some reason not to, i.e., they're lying[.]" (Tr. 237.)

The district court denied the challenge for cause and defense counsel immediately rehabilitated Hughes. Counsel emphasized, again, that "the judge is going to say you've got to treat them the same, there can't be this difference," and then asked, "Are you going to be able to do that?" (Tr. 238.) Hughes responded that she would. (*Id*.) She reiterated, too, that her husband having been a police officer did not make any difference: "No, no, my mind is my mind." (*Id*.) With these statements of fairness and impartiality in response to defense questioning, Kaarma did not renew either one of his challenges for cause of prospective juror Hughes.

## IV. REBUTTAL CHARACTER EVIDENCE

The State called Kaarma's partner, Pflager, to testify during its case in chief. (Tr. 648-836.) The district court, without objection, later allowed the State to treat Pflager as a hostile witness and ask leading questions on redirect examination, due to her obvious alignment with the defendant, as his partner and mother of their son. (Tr. 825; *see* State's Ex. 105, Tr. 1876-77 (jail phone calls with Pflager).) S*ee* Mont. R. Evid. 611(c).

On direct examination, the State asked Pflager about the fear she had "that these burglars were going to come in . . . and they were going to harm you and your family." (Tr. 750.) Given her fear and concern "that they would come in quickly and get stuff," the State wondered why Pflager "left the garage door open and didn't close it." (Tr. 751.) In response to the question about her fears, Pflager explained she was "like a paranoid person . . . looking over my shoulder all the time and very worried all the time." (Tr. 750.) Pflager's primary concern was her son: "I didn't know what these people were after, what they were capable of. The easiest target would be a baby that can't defend itself." (*Id*.) Pflager continued her narrative answer and, without prompting from the State, offered gratuitous evidence about Kaarma's character.[2] "Markus is one of those kind of guys where

[2] Kaarma had previously indicated that he "will introduce evidence of good character." (D.C. Doc. 21 at 4.)

he takes, you know, his family seriously in the fact that, you know, he worries about us. You know, he's like our protector, but he's a new dad. . . . So, you know, he took that job very seriously." (Tr. 751.) The State made no mention of this statement, did not question Pflager about it, or otherwise explore or rebut it on direct examination. (*See* Tr. 751-85.) The State did not argue that this testimony opened any doors for impeachment or the introduction of prior bad acts evidence on either direct or redirect. *See* Mont. R. Evid. 607-08.

On cross-examination of Pflager, however, the defense elicited additional testimony about Kaarma's character as it related to his state of mind and actions on the night he killed Diren. (Tr. 817-19.) First, Pflager testified that, with his anxiety disorder, Kaarma's "home was his safe place." (Tr. 817.) She testified that "He is an introvert. . . . He likes to be at home. That is his place. . . . [H]e has to have that safety net, that safety zone where he can go and feel comfortable." (Tr. 817-18.) Pflager agreed with counsel's characterization that "his home is his sanctuary." (Tr. 818.)

Counsel also referred back to her direct examination, where Pflager had "talked about [Kaarma] being the protector of your family." (Tr. 818.) Counsel asked Pflager to expand on that and explain "what his role was in your family." (*Id*.) Pflager explained that Kaarma was very traditional, even "old school," in the way that he was raised. (Tr. 818-19.) What she meant by that was that "the man

does the providing, the protecting. . . . So what he understands as being in a marriage or a family is very traditional values, meaning that he's supposed to be able to protect me from any danger and from any threat, any bad thing." (Tr. 819.) Pflager testified Kaarma "felt like he couldn't protect my son and I because we had been burglarized twice. So he felt like scared that the next time he still wouldn't be able to protect us[.]" (*Id*.)

After Pflager's cross-examination concluded, the State contended that "the defense has opened the door to [Kaarma's] prior partner assault on [Pflager] through her testimony where she talked about how he's the protector, his concern is for the safety of his family, and that could be used to impeach that statement." (Tr. 822.) Evidence of that domestic assault had been previously excluded on stipulation of the parties, "unless the defense 'opens the door' to its admissibility through cross-examination or rebuttal at trial." (D.C. Doc. 70 at 15; *see* D.C. Docs. 51 at 7, 56 at 2, 59 at 3.) Kaarma objected based on the "remoteness" of the prior assault; because the family circumstances had changed; because of unidentified "prejudice" under Mont. R. Evid. 403; and because "I don't view that in any way as opening the door." (Tr. 822-23.) Kaarma did not object on the ground that the State had already "opened the door" on direct or that it was otherwise improper impeachment. (*Id*.)

The State replied that the 2012 assault was not remote, and the substance of cross-examination opened the door to prior act testimony, based as it was on Kaarma's "upbringing and his culture to care for the family." (Tr. 823.) The district court agreed that the "door had been opened," but limited the introduction of the prior assault evidence: "You can get into whether or not in the past they've had confrontations with each other, but not the fact that there's been any criminal charges filed." (Tr. 823-24.)

On redirect, Pflager acknowledged her testimony "about the defendant's role in your family," and that Kaarma was "the protector. . . . He sees himself as the protector[.]" (Tr. 826.) Pflager testified, as she had on cross-examination, that "that was his upbringing[.]" (*Id*.) In accordance with the district court's ruling, the State asked, "Was there an incident in 2012 where he physically assaulted you?" (*Id*.) Pflager answered "yes," and the State moved on to other areas. (Tr. 826-36.) Kaarma did not request a limiting instruction, but the district court did give a more generally applicable "Evidence of Other Acts" instruction at the time the jury was charged. (Instruction 16, D.C. Doc. 151.2; Tr. 2440-41.)

## V. DETECTIVE BAKER'S OPINION AND INTERPRETATION OF BLOOD EVIDENCE

Detective Baker testified to his extensive law enforcement training and experience, including that specifically related to interpreting blood evidence.

(Tr. 1898-1900, 1944-45.) He had been on the force nearly 25 years and a detective for over 14 years. (Tr. 1898.) As a detective, he was assigned to both state and federal investigations of felony offenses. (Tr. 1900.) He had been the lead investigator on more than 750 such investigations--including this one--and had assisted on hundreds of others. (*Id*.)

Detective Baker had 500 hours of basic law enforcement training at the Montana Law Enforcement Academy. (Tr. 1898.) Since his certification, he had 2300 hours of POST-certified training and hundreds of additional hours of in-service training through the police department. (Tr. 1898-99.) He had had about 120 hours of homicide and death investigation training; about 70 hours of interview and interrogation training; and 40 hours of shooting reconstruction. (Tr. 1899.)

In particular, the shooting reconstruction training involved a fair amount of blood spatter analysis and interpretation. (Tr. 1899.) He had also taught training classes on blood spatter evidence to members of his department. (Tr. 1900.) As Detective Baker explained, "Blood spatter is a very good piece of evidence to help recreate the events leading up to the bloodletting, and it's very valuable for refuting or corroborating statements of involved persons." (Tr. 1899.)

Detective Baker testified as follows, without objection from Kaarma, about his observations of Diren's blood at the scene:

> The blood evidence was all in this general area around the trunk, trunk area of the vehicle. There was high-speed spatter on the ceiling. There was high-speed spatter on the east wall above the chest.
>
> There was a blood transfer--and I can explain the high speed, if you want--on the bumper of the vehicle, which would be one form of blood evidence, but there was also high-speed spatter over a void that was on that bumper of the vehicle.
>
> Then on the floor right in this area was a large pool of blood that was fairly fresh, and there were drops, individual drops, that went towards the open door [corresponding with the trail of blood drops leading to the ambulance.]

(Tr. 1911-12; *see* State's Ex. 51.)

Later, over Kaarma's objections, Detective Baker explained and interpreted his observations of the blood on the bumper as it was depicted in Ex. 51--identifying the "blood transfer" onto the bumper from the wound to Diren's arm; the "void" or space on the bumper where the blood did not transfer because the victim's arm was blocking it; and then the "high speed" blood spatter covering the void because Diren must have stood up and taken the shot to the head. (Tr. 1943-48.) Detective Baker summarized his conclusions from his observations, common sense, training and experience, and all the information he had about the incident and the investigation:

> I would say this void right here was left from a crouched position of Diren with his arm injured and bleeding, and that void is there and when he stands up and he's shot with the fatal round the high-speed spatter goes over the top of that void. And it's not truly a void anymore because there's high-speed spatter over the larger blood transfer in the area.

(Tr. 1948, 1987-88, 1991-92; *see* State's Ex. 51.)

The State did not notice Detective Baker as an expert witness. (*See* D.C. Doc. 57.) Detective Baker acknowledged at least four times on cross-examination that he was "not an expert." (Tr. 1956-57, 1965, 1992.) Consistently, in regard to a prior unrelated evidentiary question, the district court had said, "We're not asking them to be experts. They're law enforcement personnel." (Tr. 860.)

Instead, the State inquired whether "[b]ased on your training and experience, can you explain the pattern of blood on that car." (Tr. 1943-44.) Following two objections by Kaarma that Baker was not an expert in blood spatter, the State submitted, again, based on Detective Baker's training and experience that he should "be able to explain the basic detail of what's going on in that photograph." (Tr. 1945.)

As the State explained: "[E]ven if we're not talking about expert blood spatter testimony, Detective Baker has the education and training and experience to make a commonsense observation about the deposition of blood on that bumper." (Tr. 1962.) The State emphasized that "he can say that blood was flowing here, there was a void, and then spatter occurred over the top of it. That's a commonsense observation that he can make based on his training as a detective over the years." (Tr. 1963.) Detective Baker's testimony on cross-examination emphasized the same points: that he "had training in blood interpretation," that his

opinions were based on his "observation from my training and experience," that he formulated his opinion "based on the incident and all the information we had regarding the incident," and that he uses "common sense and my training and experience on being exposed to lots of crime scenes with blood and the transfer of blood to surfaces and my observations." (Tr. 1985, 1987, 1988, 1991-92.)

## SUMMARY OF THE ARGUMENT

The district court correctly instructed the jury on the law of JUOF. Kaarma asserted the affirmative defense of JUOF based on the two grounds of defense of person and defense of occupied structure. Evidence of both theories was presented at trial. Instructing the jury on both legal theories was neither error nor an infringement of Kaarma's constitutional right to put on his defense. Furthermore, Kaarma raises for the first time on appeal his objection to the "forcible felony" instruction and his Due Process claim, and those issues are not properly before the Court.

The district court did not abuse its discretion when it denied Kaarma's motions for change of venue. Extensive media coverage alone does not establish a presumption of prejudice. Kaarma has not demonstrated that the publicity in this case rises to the level of the extreme case amounting to a circus atmosphere, lynch mob mentality, or displacement of the judicial process. The district court went to

great lengths to control the courtroom proceedings and ensure that Kaarma was tried by a fair and impartial jury.

The district court did not abuse its discretion when it denied Kaarma's for-cause challenges to prospective juror Hughes. She was not related to any current law enforcement officer with knowledge about the investigation and she affirmed her ability to set aside any misgivings and fairly weigh the evidence.

The district court did not abuse its discretion in its evidentiary rulings. First, the defense opened the door to impeachment of Pflager and admission of Kaarma's prior assault of Pflager by eliciting evidence of Kaarma's character as the protector of his home and family on cross-examination. Second, Detective Baker was an experienced and trained officer who could properly testify to his non-expert opinion and inferences regarding the evidence of Diren's blood.

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY ON THE LAW OF JUOF.

#### A. Standard of Review

This Court reviews a district court's decision regarding jury instructions for abuse of discretion. *State v. Erickson*, 2014 MT 304, ¶ 21, 377 Mont. 84, 338 P.3d 598. A district court's broad discretion is restricted, however, by the overriding principle that the instructions, as a whole, must fully and fairly instruct the jury on

the law applicable to the case. *State v. Daniels*, 2011 MT 278, ¶ 38, 362 Mont. 426, 265 P.3d 623. A district court must only instruct the jury on those theories and issues which are supported by evidence presented at trial. *Daniels*, ¶ 42. To constitute reversible error, the instructions must prejudicially affect the defendant's substantial rights. *Daniels*, ¶ 38.

### B. The District Court Properly Instructed the Jury on Both Defense of Person and Defense of Occupied Structure.

The main thrust of Kaarma's argument is that he was only claiming justification in defense of occupied structure and it was error to instruct on the defense of self or others in addition. That position is not only without merit, it is unsupported by Kaarma's own theory of defense asserted repeatedly in this proceeding and contrary to the evidence of JUOF presented at trial. *See supra* at 2-6.

Kaarma gave notice of the affirmative defense of JUOF "in defense of self, others, home." He proposed jury instructions on both defense of person and defense of occupied structure theories. Kaarma's opening statement previewed the evidence that would show his life was threatened--a peculiarly "self-defense" element. Kaarma's cross-examination of State witnesses elicited testimony about the different theories of justification, including repeated references to "self-defense." The State presented Kaarma's statement to police, describing his state of mind and alleging that he was afraid for his life, thus relating to his belief that he needed to defend himself and use deadly force. The defense case also emphasized "self-defense" and

used an expert to explain a person's responses to life-threatening situations. Even Kaarma's motions to dismiss referenced the uniqueness of a "self-defense" case in which the burden of proof, Kaarma conceded, was shifted to the State by presentation of evidence at trial.

Kaarma's sudden limitation of his defense to occupied structure alone at the settling of instructions--changing horses not just in midstream, but on the other side of trial--is entirely at odds with the position he took throughout this prosecution and the evidence presented at trial. At best, Kaarma actively participated and acquiesced in any claimed error by not clarifying what his defense was until it was too late and too much evidence of both theories of the defense came in. Such participation and acquiescence takes away his right of objecting to it. *See* Mont. Code Ann. §1-3-207; *State v. Micklon*, 2003 MT 45, ¶ 10, 314 Mont. 291, 65 P.3d 559.

In any event, the district court correctly, fully, and fairly instructed the jury on the law of JUOF applicable to this case and supported by evidence presented at trial. *Daniels*, ¶¶ 38, 42. It is well established that "when the defendant has offered evidence of justifiable use of force, the state has the burden of proving beyond a reasonable doubt that the defendant's actions were not justified." Mont. Code Ann. § 46-16-131; *Daniels*, ¶ 15. There is no question here that the burden shifted to the State based on evidence of JUOF in the form of Kaarma's recorded

statements and other testimony. *See Daniels*, ¶ 15 n.3. Not only did Kaarma concede as much (Tr. 2072, 2341), but the district court instructed that evidence of JUOF had been offered and that the State had the burden to prove Kaarma's actions were not justified. (*See* Instructions 31, 31(a), D.C. Doc. 151.2.)

Under Montana law, a "person is justified in the use of force" in three primary situations. *See* Mont. Code Ann. § 45-3-102 (defense of person), -103 (defense of occupied structure), -104 (defense of other property--not applicable under the facts of this case). The elements of the defense of JUOF are questions of fact for the jury. *See* Mont. Code Ann. § 45-3-102 (Annotator's Note: "The clause 'when and to the extent he reasonably believes' . . . is a question of fact for the jury. 'Is necessary to defend himself or another' refers to the proper amount of force . . . again a question to be determined by the jury."). Therefore, the State had to prove beyond a reasonable doubt that Kaarma was not "justified in the use of force"--deadly force at that--either to protect himself, his family, or his home as he asserted. And the jury had to be instructed on the law on those theories so as to decide those questions of fact.

The district court was correct in both regards. The State--as conceded by Kaarma--had the burden to prove, and the judge had the duty to instruct the jury on the law and the elements of JUOF that were put into evidence at trial. (D.C. Doc. 180 at 15-16, 18.) The record contained evidence and instructions relating to

Kaarma's belief that deadly force was reasonably necessary to prevent imminent death or serious bodily harm threatened by Diren against him--and the State had to disprove that Kaarma was justified in that regard. *See* Mont. Code Ann. § 45-3-102. The record also contained--and Kaarma does not challenge this instruction on appeal--evidence and instructions relating to Kaarma's belief that deadly force was reasonably necessary to prevent an assault against him or his family in the occupied structure, or to prevent the commission of a forcible felony in the occupied structure--and the State had to disprove that Kaarma was justified in that regard. *See* Mont. Code Ann. § 45-3-103(2)(a)-(b).

Kaarma does not have a substantial right to omit jury instructions on the law applicable to the evidence that is presented at trial. *See Daniels*, ¶ 38. Kaarma does have a substantial right to offer, or have offered, evidence of JUOF. Once that happens, he has a substantial right for the State to prove beyond a reasonable doubt that he was not justified in his actions. And he has a substantial right for the jury to consider the elements of JUOF as the court instructs based on the evidence presented. Judge McLean was correct on all points when he fully and fairly instructed the jury and when he denied Kaarma's motion for new trial.

### C. The District Court Did Not Err by Not Instructing the Jury That Burglary Was a Forcible Felony.

This Court will not address either an issue raised for the first time on appeal or a party's change in legal theory. *State v. Weaselboy*, 1999 MT 274, ¶ 16,

296 Mont. 503, 989 P.2d 836. This Court will not hold a district court in error when it has not been given an opportunity to correct itself. *Daniels*, ¶ 36.

Kaarma did not object to the district court's instructions regarding "forcible felony" or that deadly force is appropriate in cases involving a "violent offense." (Tr. 2368, 2393-95.) Kaarma withdrew his proposed instruction that "burglary is a forcible felony" without objection or argument. (Tr. 2410.) This issue, raised for the first time on appeal, is not properly before this court.

Besides, as burglary is defined by statute, it is not as a matter of law a "forcible felony" based on its plain language. *See* Mont. Code Ann. § 45-6-204(1)(a)-(b) (knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense or knowingly or purposely commits any other offense within that structure); *but see* Mont. Code Ann. § 45-6-204(2) (aggravated burglary includes element of being armed with explosives or a weapon, or inflicts or attempts to inflict bodily injury). In construing a statute, this Court's job is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101. The Court looks first to the plain meaning of the words it contains, and when the language is clear and unambiguous, the statute speaks for itself and the Court will go no further. *State v. King*, 2013 MT 139, ¶ 29, 370 Mont. 277, 304 P.3d 1. Given the plain meaning of the "forcible felony" statute, this Court need not look to Illinois law or

the felony-murder rule to determine the Legislature's intent--as Kaarma suggests, without even alleging the statute is unclear or ambiguous

On the plain language of the statutes, the district court correctly instructed the jury on the definitions of burglary and forcible felony, and allowed the jury to determine the facts in this case. The point being that a burglary, depending on the facts, could be a forcible felony if the offense committed or intended inside the occupied structure after unlawful entry involved "the use or threat of physical force or violence against an individual." Mont. Code Ann. § 45-3-101(2). Here of course, as the district court found and concluded, there was no evidence that Diren was about to, or attempted, or intended to commit a crime of violence inside the garage. (D.C. Doc. 180 at 17.) And it was within the province of the jury to determine whether Kaarma's belief was reasonable that he had to prevent the commission of a forcible felony under the circumstances. Even if Kaarma had requested the instruction, the district court did not err.

### D. The JUOF Instructions Given Did Not Violate Kaarma's Fundamental Rights.

On appeal, Kaarma argues that instructing the jury on defense of person in addition to defense of occupied structure violated his Sixth Amendment right to control his defense and due process. First, as to the due process claim, Kaarma did not raise that issue in the district court, either at trial or in his motion for new trial. (*See* Tr. 2362-2434; D.C. Doc. 167 at 2-3, 19-21.) Again, this Court will not

address either an issue raised for the first time on appeal or a party's change in legal theory, and it will not hold a district court in error when it has not been given an opportunity to correct itself. *Weaselboy*, ¶ 16; *Daniels*, ¶ 36.

The Sixth Amendment claim, however, is simply without merit. The State did not "force" an affirmative defense on Kaarma that he "specifically chose not to advance." (Br. of Appellant at 42-43.) Kaarma had specifically chosen to advance "self-defense" from the beginning and throughout the trial. As discussed above, Kaarma himself advanced this affirmative defense and legal theory that he was justified because his life was threatened and he was protecting himself from Diren. Furthermore, once the burden shifted to the State to prove lack of justification, the State had to prove, the judge had to instruct, and the jury had to determine whether Kaarma lacked justification under any and all applicable legal theories that were supported by evidence in the record. That meant both defense of person and defense of occupied structure. Kaarma's choice to abandon and withdraw one prong of his defense strategy does not a Sixth Amendment violation make.

## II. THE DISTRICT COURT PROPERLY DENIED KAARMA'S MOTIONS FOR CHANGE OF VENUE.

### A. Standard of Review

This Court reviews rulings on a motion to change venue for an abuse of discretion. In exercising that discretion the court must uphold the defendant's

constitutional right to a trial by an impartial jury. *State v. Kingman*, 2011 MT 269, ¶ 40, 362 Mont. 330, 264 P.3d 1104.

### B. Kaarma Was Tried by a Fair and Impartial Jury Unaffected by Presumed or Inherent Prejudice From Pretrial Publicity.

A prosecutor must file a criminal charge in the county where the defendant committed the offense, and the trial must be in the same county unless otherwise provided by law. Mont. Code Ann. §§ 46-3-110(1), -111(1). The Montana and United States constitutions also assure the defendant a right to a fair trial by an impartial jury. Mont. Const. art. II, §§ 17, 24; U.S. Const., Amends. VI, XIV. Accordingly, if there exists "such prejudice that a fair trial cannot be had in the county," then the court is required to transfer the cause to another county, direct that a jury be selected from another county, or take any other action designed to ensure that a fair trial may be had. Mont. Code Ann. §§ 46-13-203(1)-(2).

Kaarma asserted presumed or inherent prejudice, meaning he asked the district court to presume that jurors selected from Missoula County could not be impartial under any circumstances. The bar is very high to prove this assertion. *Kingman*, ¶ 32. Kaarma must demonstrate that "an irrepressibly hostile attitude pervades the jury pool or that the complained-of publicity has effectively displaced the judicial process and dictated the community's opinion as to [Kaarma's] guilt or innocence." *Id*. A court can only find presumed prejudice in extreme circumstances amounting to "a circus atmosphere or lynch mob mentality." *Id*.

Here Judge McLean was "uniquely positioned to assess whether a change of venue [was] called for due to prejudice in the community," and he found Kaarma's claim of presumed prejudice wanting. *Kingman*, ¶ 40. On appeal, Kaarma goes to great lengths explaining the nature and extent of the pretrial publicity, but fails to establish that the populace was incensed; that there was "a circus atmosphere or lynch mob mentality;" that an irrepressibly hostile attitude pervaded the jury pool; or that the complained-of publicity effectively displaced the judicial process and dictated the community's opinion as to his guilt or innocence. *See Kingman*, ¶ 52.

The media coverage of Kaarma's case, though extensive, does not compare to the extreme cases of inherent prejudice recognized by this Court. *Kingman*, ¶ 32 (citing *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963); *Sheppard v. Maxwell*, 384 U.S. 333, 354, 358 (1966); *State v. Spotted Hawk*, 22 Mont. 33, 55 P. 1026 (1899); *State v. Dryman*, 127 Mont. 579, 269 P.2d 796 (1954); and *State ex rel. Coburn v. Bennett*, 202 Mont. 20, 655 P.2d 502 (1982)). The district court properly rejected the comparison in denying Kaarma's motions. (D.C. Doc. 42 at 4-10.) Furthermore, these extreme cases "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975).

Here, the district court went to great lengths to ensure that Kaarma was provided a fair and impartial jury: sealing and closing 404(b) proceedings, ordering an enhanced jury questionnaire, issuing "gag" and protective orders, ensuring liberal excusals on stipulation of the parties and by the court, and full and fair *voir dire*. (11/19/14 Tr. at 100-03; Tr. 9-10, 13, 15, 18-20, 30-32, 170-73, 253, 305-09; D.C. Docs. 45-46, 49.) The court conducted individual *voir dire* when a publicity issue came up mid-trial, and excused a juror whose spouse had been talking about the case. (Tr. 1097-1103, 2345-55.)

Thus, the record shows that the court proceedings were controlled and orderly, as found by the district court. (D.C. Doc. 180 at 8-10.) The district court found that the publicity had been factual in nature; there had been no public outcry, campaigns to remove judges, angry mobs marching on the courthouse, biased statements by prosecutors, and no carnival atmosphere. (D.C. Doc. 42 at 8-10.) While the media coverage was extensive, it was also state-wide and the facts of the case were "going to cause a media storm no matter where the incident occurs." (D.C. Doc. 180 at 4-5.) The court found that although it had "the authority to limit the contact of the parties with the media, which it did in this case, the Court [had] no authority to stop the press and other media from seeking out news sources." (*Id*.) It also found that this case "certainly had the media's attention, but no more

so than other cases that have occurred in the Fourth Judicial District in recent times." (*Id*. at 5.)

Ultimately, *voir dire* remains the primary method of demonstrating that "potential jurors have been so affected by pretrial publicity that they would be unable to render a fair and impartial verdict." *Kingman*, ¶ 31. The *voir dire* in this case produced a jury that was fair, impartial, and informed but uninfluenced by the media. In fact, rather than prejudiced by the media, many jurors were critical of the media and clearly did not base any opinions on what had been reported.

The district court did not abuse its discretion and Kaarma has failed to bear his burden to establish error on appeal. Neither of Kaarma's other claimed errors have any bearing on whether the district court abused its discretion denying his claim of presumed prejudice. First, he challenges the district court's order sealing and closing the 404(b) proceedings--however, that was an order in response to Kaarma's own unopposed motion. (*See* D.C. Docs. 46, 49.) Second, he challenges the district court's denial of individual *voir dire* about publicity of Kaarma's criminal history. Individual *voir dire* may be pertinent to an "actual prejudice" claim, but Kaarma has only ever asserted presumed prejudice. This Court should reject these ancillary claims.

## III. THE DISTRICT COURT PROPERLY DENIED KAARMA'S CHALLENGES FOR CAUSE OF PROSPECTIVE JUROR HUGHES.

### A. Standard of Review

This Court reviews a trial court's denial of a challenge for cause for abuse of discretion. *State v. Heath*, 2004 MT 58, ¶ 7, 320 Mont. 211, 89 P.3d 947. A court abuses its discretion in this context if it fails to excuse a prospective juror whose actual bias is discovered during *voir dire*, *Heath,* ¶ 7, or whose statements raise serious doubts about the juror's ability to be fair and impartial. *State v. Allen*, 2010 MT 214, ¶ 25, 357 Mont. 495, 241 P.3d 1045.

### B. The *Voir Dire* of Hughes Did Not Demonstrate Actual Bias and Her Statements Did Not Raise Serious Questions About Her Ability to Be Fair and Impartial.

In a criminal trial, a party may challenge a prospective juror for "having a state of mind in reference to the case or to either of the parties that would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party." *Allen*, ¶ 25 (quoting Mont. Code Ann. § 46-16-115(2)(j)). Although Kaarma has not cited or relied upon this statute as a basis for relief on appeal, this rule is rooted in the fundamental right of criminal defendants to be tried by an impartial jury. *Allen*, ¶ 25 (citations omitted).

This Court has noted, however: "In reality, few people are entirely impartial regarding criminal matters[.]" *Allen*, ¶ 26. Therefore, a district court is not

required to remove a prospective juror for cause "if the juror convincingly affirms [her] ability to lay aside any misgivings and fairly weigh the evidence." *Allen*, ¶ 26. Whether a prospective juror can do this is a determination that a district court makes based on the totality of the circumstances. *Allen*, ¶ 26. District courts, able to observe the disposition of prospective jurors, are best placed to make this qualitative determination, for which the Court grants them deference. *Allen*, ¶ 26.

Kaarma made two distinct challenges to remove Hughes for cause. He based his first challenge on the stipulated order to "automatically" excuse any prospective juror "who is in law enforcement, or related to anyone in law enforcement . . . [as] spouse, child, or parent[.]" (*See* D.C. Doc. 50 at 1; Tr. 142-44.)

Kaarma, however, raises for the first time on appeal Hughes' general "ties to law enforcement" as the basis for this first cause for challenge. He bases this claim on allegations that the judge was a personal friend of Hughes' husband; the judge used Hughes' familiar name, "Kay"; Hughes knew Detective Baker since he was a baby, and Baker was sitting at counsel table; and her husband had worked in law enforcement with Detective Baker's father. (*See* Appellant's Br. at 30, 60-61.) While these may be facts that arose in *voir dire*, they were not the basis for any challenge for cause by Kaarma and he may not change his legal theory now on appeal. The Court should reject these new bases for appeal. *See Weaselboy*, ¶ 16;

*State v. Brown*, 1999 MT 339, ¶ 23, 297 Mont. 427, 993 P.2d 672 (failure to challenge prospective juror for cause waives the issue for appeal).

Turning to the preserved basis for challenging Hughes, Kaarma does not dispute on appeal, and must concede, that the stipulated order did not apply to jurors related to any person that "was"--past tense--in law enforcement, as Hughes testified about her husband in her questionnaire and at *voir dire*. (App. 2 at 1, 3; Tr. 46.) Kaarma did not dispute that "family members of law enforcement were excused because they would know people that were working on this case and possibly heard about this case, and the difference here is that he was retired and doesn't have that." (Tr. 143-44.)

The district court consistently exercised its discretion as set forth in the stipulated order. Of the ten prospective jurors with some identified relationship to law enforcement, only the two currently employed in Missoula law enforcement or with defined family members currently in Missoula law enforcement were removed for cause. Others with "ties" to law enforcement were no shows, seated on the jury, neither seated nor excused, or excused by preemptory challenge. *See supra* at 25-26. Kaarma used three peremptory challenges to remove Hughes and two others who had relationships with law enforcement that did not meet either the currently-employed or defined-relationship requirements of the stipulated order: Hughes; juror 42; and juror 77. Kaarma did not challenge the latter two

prospective jurors for cause. While Kaarma's strategy obviously meant to cleanse the jury of all ties to law enforcement, that was not the wording or intent of the stipulated order and it was not a challenge that Kaarma ever raised.

Finally on this point, Hughes "convincingly affirm[ed] [her] ability to lay aside any misgivings and fairly weigh the evidence." *Allen*, ¶ 26. As Kaarma correctly notes on appeal, "The mere fact that a prospective juror is connected with law enforcement does not, without more, necessitate a finding that he or she would not be an impartial juror." *State v. Deschon*, 2004 MT 32, ¶ 41, 320 Mont. 1, 85 P.3d 756. Hughes was questioned during *voir dire* about her ability to be fair and impartial, despite her relationship with her retired husband and having known Detective Baker. (Tr. 46, 50, 60, 150-51.) She said, "I think I have a fair mind and I can make up my own mind," and "my mind is my mind." (*Id*. at 46, 238.) Hughes said, "I think you have to absolutely listen to all sides." (*Id*. at 109-10.) Hughes said, "I'm going to listen to both sides, you bet, I'll be very honest." (*Id*. at 238.) Finally, Hughes said she would be a good juror, "because I would come in also with an open mind." (*Id*. at 277.)

Kaarma's second challenge was whether Hughes would treat the testimony of police differently from that of the defendant. (Tr. 236-38.) The basis for the challenge was counsel's question: "So you would treat him differently." (Tr. 237.) On appeal, however, Kaarma has morphed the basis for the challenge

into the assertion that Hughes "was more inclined to believe law enforcement than the accused." (Appellant's Br. at 30, 61.) That, of course, is not what Hughes or defense counsel said. Kaarma's changing theories on appeal constitute "misstatements of fact and allegations taken out of context" of the record, which this Court should reject. S*ee State v. Raugust*, 2000 MT 146, ¶ 37, 300 Mont. 54, 3 P.3d 115; *State v. Hall*, 203 Mont. 528, 536, 662 P.2d 1306, 1310 (1983) (noting concerns where the record is misstated and sentences are taken out of context); *Weaselboy*, ¶ 16; *Brown*, ¶ 23.

The district court's denial of this challenge for cause was not an abuse of discretion and the court was not required to remove Hughes where she "convincingly affirm[ed] [her] ability to lay aside any misgivings and fairly weigh the evidence." *Allen*, ¶ 26. Hughes said "that she would not treat [law enforcement and the defendant] differently . . . [but] simply pointed out that she would understand that the defendant might have a motive to lie or to stretch the truth, were her words." (Tr. 237-38.) Such considerations of witness credibility, including the motive to lie, are clearly within the province of the jury and were expressly raised by defense counsel: jurors must treat all witnesses the same "unless they give you some reason not to, i.e., they're lying[.]". (*Id.*; *see*, *e.g.*, Instruction 3, D.C. Doc. 151.2; Tr. 349-50.)

The district court was in the best position to observe Hughes' questioning and responses, and its observations and determinations must be given deference on appeal. Even more compelling in this case, the defense went on to expressly rehabilitate Hughes after the challenge was denied. Thus, the juror's own words and Kaarma's questioning removed any suggestion of impartiality or unfairness.

## IV. THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE OF KAARMA'S PRIOR ASSAULT OF PFLAGER AND THE TESTIMONY OF DETECTIVE BAKER ABOUT THE VICTIM'S BLOOD.

### A. Standard of Review

This Court reviews a district court's rulings on the admissibility of evidence for abuse of discretion. *State v. Hayden*, 2008 MT 274, ¶ 16, 345 Mont. 252, 190 P.3d 1091. A district court has broad discretion to determine whether evidence is relevant and admissible. *State v. Duffy*, 2000 MT 186, ¶ 43, 300 Mont. 381, 6 P.3d 453.

### B. Kaarma Opened the Door to Introduction of the Prior Assault When the Defense Elicited Detailed Testimony From Pflager About Kaarma's Character as the Protector of the Family.

Evidence of a defendant's character or character trait generally is not admissible in a criminal case to prove that the defendant acted in conformity with that trait. Mont. R. Evid 404(a). One exception is "[e]vidence of a pertinent trait

of character offered by an accused, or by the prosecution to rebut the same." Mont. R. Evid 404(a)(1). In addition, the credibility of witnesses may be attached pursuant to the Rules of Evidence. *See* Mont. R. Evid. 607-08.

The State, of course, may not open its own door. *State v. Gowan*, 2000 MT 277, ¶¶ 11, 13-14, 18, 26, 302 Mont. 127, 13 P.3d 376 (gratuitous character statement by defense witness on cross-examination by State did not "open the door" to rebuttal character evidence). But if a defendant "by his own accord" first opens the door by entering evidence of good character, the State may present rebuttal evidence of bad character. *Hayden*, ¶ 22. If the defendant raises an issue when cross-examining a witness, the prosecution may reexamine the witness to elaborate and explain what is already in evidence. *Hayden*, ¶ 22 (citing *Duffy*, ¶¶ 43-44).

Thus, in *Hayden*, once defense counsel raised defendant's "successful completion of a drug rehabilitation program . . . the prosecutor was free to ask [the witness] on redirect examination whether the rehabilitation program had indeed been successful in enabling Hayden to cease using methamphetamine." *Hayden*, ¶ 24 (citing *Duffy*, ¶¶ 43-44). Evidence of Hayden's positive drug test was therefore allowable during redirect examination, and the district court did not abuse its discretion. *Hayden*, ¶ 24.

The right to a full cross-examination of a defendant's character traits, once placed at issue, is not limitless, however. *Gowan*, ¶ 18 (citing *State v. Eklund*, 264 Mont. 420, 430, 872 P.2d 323, 329 (1994) (reversible error for State to cross-examine defendant's character witness about the defendant's prior murder charges); *State v. Heine*, 169 Mont. 25, 29, 544 P.2d 1212, 1214 (1976) ("the accused's entire life should not be searched in an effort to convict him.")); *see also State v. Nolan*, 2003 MT 55, ¶¶ 17-20, 23, 314 Mont. 371, 66 P.3d 269 (once door was opened, prosecutor went beyond permissible cross-examination and ended up trying defendant's character).

The district court here properly determined that Kaarma had opened the door to the evidence that he had previously assaulted Pflager. (Tr. 822-24.) The State offered the rebuttal character evidence only on redirect examination in response to the defense cross-examination of Pflager eliciting testimony about Kaarma's character as the protector of his family and his "sanctuary," based on his traditional upbringing. (Tr. 817-19, 822.) Such reexamination of the witness by the State to elaborate and explain an issue that the defense raised and put into evidence when cross-examining a witness is clearly proper under the law and the discretion of the district court. *Hayden*, ¶ 22.

In addition, the State did not go beyond permissible rebuttal, once the door was opened. The State did not search "the accused's entire life," like *Heine* or

*Nolan*, *supra*. Instead, the redirect examination was brief and entirely on point to the issue. (Tr. 826.) The State obtained a ruling before questioning of Pflager and followed the district court's limitations on the evidence. (Tr. 823-24.) There was no elaboration or belaboring of the prior acts evidence, and the State swiftly moved on to other topics. In fact, Kaarma has not even raised any improper scope of examination argument on appeal. Nor did he ask for a cautionary instruction at trial--which was given anyway. (*See* Instruction 16, D.C. Doc. 151.2; Tr. 2440-41.)

Kaarma's basic argument on appeal is that the State elicited the character evidence on direct examination, opening the door when the defense had no control over the witness. First, the State did not ask any question of Pflager about Kaarma's character--she was asking about why Pflager left the garage door open if she was so afraid of the burglars coming back into their home. The statements about Kaarma's worry for the family and his being the "protector" were entirely volunteered by Pflager, nonresponsive to the question asked, and gratuitous to the line of inquiry the State was pursuing. While that testimony undoubtedly came out on direct examination, it was not deliberately "elicited" by the State[3]. And there is certainly no evidence that the State was intentionally fishing for such evidence for the purpose of opening the door. *See Gowan*, ¶ 36 (Nelson, J., dissenting) ("There

[3] Contrast that with the defense question on cross-examination which specifically inquired about Kaarma as "protector of your family." (Tr. 818.)

is not one scintilla of evidence in the record that the prosecution devised any strategy to elicit or to open the door to the testimony that [the witness] offered.").

Second, the State ignored the statement, proceeded with its direct examination, and did not pursue any inquiry or line of questioning about Kaarma's character on direct examination. This is not a case like *Gowan*, where as soon as the gratuitous character evidence came out the State "pounced on this opportunity to introduce evidence of bad character." *Gowan*, ¶ 25.

Third, Kaarma had total control over the course of Pflager's cross-examination and chose to offer evidence of his character, his anxiety disorder, his home as his safe place and sanctuary, his upbringing, and his protection of the family. (Tr. 817-19.) *See Gowan*, ¶ 26 (total control over the witness). Contrary to Kaarma's assertion on appeal that the cross-examination was "substantially identical testimony to that on direct" (Br. of Appellant at 63), the defense deliberately "expand[ed] on that" and went into much greater detail than Pflager's gratuitous statement on direct. The direct testimony said nothing about Kaarma's anxiety disorder, the home as his safe place and sanctuary, or his traditional upbringing. Whereas Pflager said on direct that Kaarma was "like our protector," without more, on cross she went into much greater detail about his character of protecting and providing for his family. This Court should, again, discount Kaarma's version of the record, and not base its

decision on "misstatements of fact and allegations taken out of context" of the record. *See Raugust*, ¶ 37; *Hall*, 203 Mont. at 536, 662 P.2d at 1310.

Finally, to the extent Pflager's gratuitous testimony--neither intended nor acted upon by the State on direct--was improper in any way, it was Kaarma's choice to offer the additional and expanded character evidence on cross-examination. On direct, the State either missed the "protector" statement entirely or simply chose to leave it alone. But Kaarma had complete control over the questioning on cross and he chose to develop his character as protector. Thus, Kaarma himself acquiesced and actively participated in any error in opening the door to evidence of Kaarma's character, which takes away his right of objecting to it. *See* Mont. Code Ann. § 1-3-207; *Micklon*, ¶ 10. It is manifest on the record that the State took no action to rebut Kaarma's character as a "protector" of home and family until Kaarma "by his own accord" put that evidence into issue through Pflager's testimony on cross-examination.

### C. Detective Baker Was Qualified Through His Extensive Law Enforcement Training and Experience to Render Opinions and Inferences Regarding Blood Evidence.

Karma concedes on appeal that Detective Baker testified as a nonexpert, lay witness and gave his opinion regarding the blood evidence at issue. (Br. of Appellant at 1-2, 31, 64-66.) Kaarma asserts, to his detriment, that no expert reports were disclosed to the defense and the defense had not obtained a rebuttal

blood spatter expert. (*Id*. at 64, 66-67.) Thus, he recognizes on appeal that Detective Baker was offered, approved, and testified as a lay witness, but wants this Court to impose the requirements of an expert witness upon him.

The Rules of Evidence provide for the admission of opinion testimony by lay witnesses:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Mont. R. Evid. 701. This Court has repeatedly held that law enforcement officers may testify to matters about which "they have extensive experience and are properly qualified through training and experience." *State v. Dewitz*, 2009 MT 202, ¶ 40, 351 Mont. 182, 212 P.3d 1040 (quoting *State v. Frasure*, 2004 MT 305, ¶ 17, 323 Mont. 479, 100 P.3d 1013 (officer testimony as to whether a criminal defendant possessed drugs with an intent to sell, based on their training and experience as to the methods used in the illicit drug trade)); *see State v. Zlahn*, 2014 MT 224, ¶¶ 33-36, 376 Mont. 245, 332 P.3d 247 (officer testifying about inferences drawn from extensive experience dealing with criminals and administering gunshot residue testing); *Hislop v. Cady*, 261 Mont. 243, 249, 862 P.2d 388, 392 (1993) (officer testimony regarding the cause of an accident based on the officer's experience in accident investigation); s*ee also State v. Henderson*,

2005 MT 333, ¶ 16, 330 Mont. 34, 125 P.3d 1132 (firefighter's testimony about "pour patterns" in analyzing cause of a fire).

Applying these standards from the Rule and case law, it is apparent on the record that the district court did not abuse its discretion by allowing Detective Baker to testify to his nonexpert opinions and inferences about Diren's blood spilled in the garage, as shown in State's Ex. 51. (*See* Tr. 1943-48.)

First, although his objections at trial were that Detective Baker was not an expert, Kaarma now concedes that Detective Baker was "not testifying as an expert." Mont. R. Evid. 701. Therefore Rule 701 applies, not the rules related to expert witnesses under Rule 702. The record is clear that he was not noticed or offered as an expert, and did not claim to be an expert. The district court never determined that he was an expert. Rather, the court ruled that the State "certainly has established his qualifications to render an opinion on the blood spatter. If you choose to impeach him through the testimony of your experts, so be it." (Tr. 1961; *see also* Tr. 1944-45, 1947, 1962, 1963 (overruling Kaarma's objection multiple times).) Kaarma had ample opportunity to vigorously cross-examine Detective Baker and attack his qualifications and the basis of his opinion. (Tr. 1956-58, 1985-92.)

Second, Detective Baker testified to his extensive experience and training regarding crime scene investigations and in particular regarding the interpretation

of blood evidence--over 24 years on the force, 750 lead investigations, and thousands of hours of POST-certified training, including hundreds of hours on homicide-specific training. (Tr. 1898-1900, 1944-45.) Even the defense commented on his 24 years of experience and that his training amounted to "a lot of hours." (Tr. 1993-94.) During his testimony, he consistently emphasized that he had reached his conclusions in part based on his experience and training. (Tr. 1943-45, 1985, 1987, 1991-92.)

Third, Detective Baker's opinions or inferences were rationally based on his perceptions and observations, and helpful to a clear understanding of his testimony and the determination of a fact in issue. *See* Mont. R. Evid. 701(a)-(b). During his testimony, Detective Baker consistently emphasized that he had reached his conclusions in part based on his observations and the overall investigation. (Tr. 1911-12, 1943, 1945, 1987-88, 1991-92.) In addition, Detective Baker explained that blood spatter is a "very good piece of evidence to help recreate the events leading up to the bloodletting, and it's very valuable for refuting or corroborating statements of involved persons." (Tr. 1899.) Even the defense agreed with Detective Baker that "blood distribution spatters can often provide us with valuable information." (Tr. 1990.)

Under these circumstances, Judge McLean did not abuse his discretion. Detective Baker's opinion and interpretation satisfied the requirements of Rule 701

and the extensive training and experience requirement established in this Court's opinions. Whether Detective Baker was, or could have been, qualified as a blood spatter "expert" under Rule 702 is beside the point.

Because Detective Baker did not testify as an expert witness--as Kaarma concedes--there was no requirement to disclose any expert's report under Mont. Code Ann. § 46-15-322(1)(c), and there was no need to *voir dire* for his expert qualifications, as Kaarma argues on appeal. Kaarma did not even ask about a blood spatter report on cross-examination. Kaarma did not establish, and does not argue on appeal, that the State did not disclose Detective Baker as a witness or give the opportunity to interview him. (*See* D.C. Docs. 3, 73.) Kaarma, likewise, does not argue that the State failed to disclose any evidence or information from the investigation that might have been relied upon by Detective Baker, or that he and his experts did not have access to all evidence pertinent to the blood in the garage. Karma himself admitted on the record that he had been provided with "all materials, including statements, police reports, videos, [and] all documentation as far as the discovery from both the State and the defense." (Tr. 2342.) Ultimately, the district court gave Kaarma great latitude to cross-examine Detective Baker about his qualifications, his investigation, and his opinion. Kaarma has not met his burden on appeal to establish that the district court abused its discretion in allowing Detective Baker's testimony. *See State v. Deshaw*, 2012 MT 284, ¶ 30, 367 Mont.

218, 291 P.3d 561 (Court has consistently held that the appellant bears the burden of establishing error on appeal).

## CONCLUSION

This Court should affirm Kaarma's judgment of conviction for the deliberate homicide of Diren Dede.

Respectfully submitted this 19th day of July, 2016.

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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 15,797 words, excluding certificate of service and certificate of compliance.

*/s/ Jonathan M. Krauss*
JONATHAN M. KRAUSS

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 15-0214

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

MARKUS HENDRIK KAARMA,

Defendant and Appellant.

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# APPENDIX

## CERTIFICATE OF SERVICE

I, Jonathan Mark Krauss, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-19-2016:

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