IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 15-0214

STATE OF MONTANA,
Plaintiff and Appellee,
v.
MARKUS HENDRIK KAARMA,
Defendant and Appellant.

APPELLANT'S REPLY BRIEF

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

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BACKGROUND STATEMENT

The State hastens to vilify Markus Kaarma to obscure the issues and plug its analytical gaps. It quickly highlights inflammatory events leading up to the shooting to suggest premeditation—but to what end? These same facts are conspicuously absent in its venue analysis, and ignore how these facts invited prejudgment of Kaarma's culpability. Also resorting to hyperbole, it argues Kaarma "bragged" before he "deliberately shot to death the unarmed boy;" he "took no responsibility;" and "there was no evidence that [Dede] . . . threatened . . . violence against Kaarma."[1] The truth though is that Kaarma was at home with his partner and infant son when an unknown intruder sparked an inherently dangerous circumstance by burglarizing Kaarma's pitch-black attached garage.

Thus, Kaarma suggests a departure from these diversions and a return to the law. To this end, the State's arguments fail because:

I. Section 45-3-103, MCA, omits a death or serious bodily harm element for justifying deadly force in an occupied structure; therefore, inclusion of § 45-3-102's death or serious bodily harm instruction misled the jury and caused prejudice to an occupied structure defense.

II. Burglary is a felony in Montana. When a burglary involves the invasion of a home at night, it clearly presents a substantial risk of injury and danger to the occupants of the home and warrants a jury instruction as a forcible felony.

[1] Appellee Resp. Br., pgs. 1-3, 10, 19.

III. Over 450 local news items displaced the judicial process in Missoula County by reporting criminal history, excluded character evidence, premeditation, death threats, sympathy toward the burglar, misstatements of fact, and inflammatory comments by both prosecutors and an incensed populace—requiring a venue change.

IV. A challenge for cause should be resolved in favor of the accused when a juror expresses bias toward law enforcement and has known the lead detective since he was a baby.

V. A gratuitous character statement by the State's witness in its case-in-chief does not open the door to rebuttal character evidence previously excluded, even if the defense explores this testimony on cross-examination.

VI. An officer testifying as a lay witness cannot offer scientific, technical, or specialized opinions on blood spatter evidence to reconstruct a shooting.

ARGUMENT

I. The court erred by instructing the jury on justifiable use of force in defense of a person.

A. Inclusion of defense of person instructions, not tailored to defending an occupied structure, was misleading and prejudicial.

The State explained to the jury that once Kaarma exited his front door, "[h]e can no longer use deadly force to defend against an assault." (Tr., pgs. 2465-66.) On appeal, the State concedes that Kaarma's occupied structure defense is supported by the record and that evidence existed of Kaarma's belief that he was threatened with assault. (Appellee Resp. Br., p. 40-41.)

In turn, the issue facing this Court boils down to a straightforward question of statutory interpretation: In construing a statute, "courts may not insert what has been omitted from statutes or omit what has been inserted." *State v. Archambault*, 2007 MT 26, ¶ 23, 336 Mont. 6, 152 P.3d 698 (citing § 1-2-101, MCA). Section 45-3-103 omits a death or serious bodily harm requirement for justifying deadly force in defense of an occupied structure. Did the lower court err by instructing on § 45-3-102's death or serious bodily harm requirement?

Under § 45-3-102, defense of a person, justifying deadly force requires in part a threat of imminent death or serious bodily harm:

> the person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person or another[.]

Id. This requirement is omitted from § 45-3-103(2)(a), defense of an occupied structure, which merely requires a reasonable fear of assault:

> A person justified in the use of force pursuant to subsection (1) is justified in the use of force likely to cause death or serious bodily harm only if: (a) the entry is made or attempted and the person reasonably believes that the force is necessary to prevent an assault upon the person or another then in the occupied structure[.]

Id.

The State's position can be condensed into two arguments. First, it offers evidence that Kaarma feared for his life in support of instructions on defense of a

person. Citing § 45-3-102, it argues "[t]he record contained evidence [of] Kaarma's belief that deadly force was reasonably necessary to prevent imminent death or serious bodily harm . . . and the State had to disprove that Kaarma was justified in that regard."[2] (Resp. 40-41.) And, "Kaarma's opening statement previewed the evidence that would show his life was threatened--a peculiarly 'self-defense' element."[3] (Resp. 38.)

This argument fails because § 45-3-103 offers a broad defense against threats of personal violence in an occupied structure—including death or serious bodily harm. The Compiler's Comments, *Annotator's Note* to § 45-3-103, states that "[b]ecause the clause 'offer of personal violence' extends to forces which are not likely to inflict great bodily harm the privilege to use deadly force in defense of dwellings is broad." Comparatively, § 45-3-102 does not include an occupied structure element. It would lead to absurd results if § 45-3-103(2)(a) justified deadly force against an assault, but separate instructions were necessary based on a structure occupant's fear of death.

Although the State floods the Court with evidence of "self-defense" presented at trial, it fails to reason how all threats of personal violence were not contemplated in Kaarma's occupied structure defense. (Id. at 13-16, 38-39.)

[2] The State concedes § 45-3-104 defense of other property) is inapplicable to this case despite also having a death or serious bodily harm requirement. (Resp. 40.)

[3] The term "self-defense" is not codified and does not have "elements." It means, "[t]he use of force to protect oneself, one's family, or one's property from real or threatened attack." Black's Law Dictionary, West Publishing Co. 1996.

Kaarma neither "sudden[ly] . . . chang[ed] horses . . . midstream" nor did evidence exist on "both theories of [self] defense." (Id. at 39.) Kaarma was at all times a structure occupant and Diren Dede committed an unlawful entry. (Id.) Because this is undisputed § 45-3-103 controls "self-defense" analysis in this case.

In support of Kaarma's position, persuasive reasoning is found outside of Montana where courts have set apart similar defenses. The Supreme Court of Minnesota held: "If we were to construe 'defense of a dwelling' to require a fear of great bodily harm or death, we would effectively be eliminating the defense, because it would then be synonymous with self defense[.]" *State v. Pendleton*, 567 N.W.2d 265, 269 (1997). Similarly, a New Jersey appellate court held that "inclusion of the general self-defense charge, not tailored to the defense of one's dwelling, could only have been confusing at best, totally misleading at worst. *State v. Bilek*, 705 A.2d 366, 372 (N.J. App. 1998).

To adopt the State's position presents an incurable problem. It would allow the State, in future prosecutions, to usurp the legislature's intent by increasing the threat level necessary for justifying deadly force in an occupied structure. Simply put, the legislature understood what it was doing when it created separate standards for a defense to apply and separate defenses. To find otherwise would override the clear intent of the legislature.

Second, the State argues that Kaarma acquiesced to raising defense of a person, but fails to cite any authority for this new doctrine of acquiescing to an affirmative defense. (Resp. 39.) Nevertheless, this claim is immaterial because pretrial "[n]otice does not place the defense of JUOF at issue during trial." *State v. Daniels*, 2011 MT 278, ¶ 16, 362 Mont. 426, 265 P.3d 623. Jury instructions were settled at the close of evidence when Kaarma withdrew instructions on § 45-3-102 based on evidence presented at trial.

Moreover, Kaarma requested a curative instruction when the State inferred at trial that he was not in an occupied structure. (Tr. 863.) When he tried to illuminate distinctions between the defenses, the court stated: "we've been through this about 10,000 times now. The Court is going to instruct the jury on what the law is in Montana . . . [t]hat's the duty of the Court, so watch it." (Id. at 976.) The court repeatedly warned that prompting legal conclusions would result in fines. (Id. at 959, 1090-91.) Accordingly, there simply was no acquiescence and this Court should reject that position.

B. Instructions on justifiable use of force in defense of a person prejudiced Kaarma's substantial rights.

Self-defense instructions "must be viewed as a whole to determine if they have limited the defense from fairly presenting his theory of defense." *State v. Graves* (1981), 191 Mont. 81, 93, 622 P.2d 203, 210. The State claims that

instructing on both defenses did not prejudice Kaarma's substantial rights. (Resp. 41.) But, prosecutors repeatedly suggested in closing, "[t]he only time you're going to use deadly force is if you reasonably believe that the force is necessary to prevent imminent death or serious bodily harm." (Tr. 2465-2467; *see also* 2459-60, 2474, 2549-50 (emphasis added).)

Then, they insisted that Kaarma waived his occupied structure defense by exiting his front door. (Tr. 2549.) Although this theory is now abandoned, jurors could have reasonably concluded that Kaarma's occupied structure defense did not apply to the facts of this case, eliminating his defense. *See State v. Lucero* (1984), 214 Mont. 334, 344, 693 P.2d 511, 516 (effect of jury instruction is determined by the way in which a reasonable juror could have interpreted it). Finally, if jurors concluded that Kaarma was threatened with assault, but not death—acquittal was required only under § 45-3-103, not § 45-3-102, thereby prejudicing Kaarma.

C. Instructing on defense of a person violated Kaarma's fundamental rights.

The State argues that Kaarma did not raise his due process claim at trial or in his motion for a new trial. (Resp. 43); *but cf. State v. Butler* (1995), 272 Mont. 286, 290, 900 P.2d 908, 910 (due process issues can be raised without expressly citing Fifth Amendment). This fails because Kaarma objected to the State's diminished level of proof several times. (*See* tr. 2383; D.C. 167, p. 20; 2/12/15 tr.

146-47.) Also, Kaarma's Sixth Amendment claim is warranted because Kaarma raised § 45-3-103, not § 45-3-102. So, the State illegally forced a separate affirmative defense on Kaarma over his objection. Another smokescreen by the State this Court should reject.

II. The court erred by declining to instruct that burglary is a forcible felony.

Kaarma did not waive this error at trial or raise this issue for the first time on appeal. (*See* Resp. 41-42.) "[W]hen a party proposes an instruction which is rejected by the trial court, that party has made a sufficient objection for purposes of § 45-16-410, MCA, and has no duty to make a further objection for the record." *State v. Grimes*, 199 MT 145, ¶ 39, 295 Mont. 22, 982 P.2d 1037. At trial, Kaarma made several arguments for including burglary as a forcible felony. (D.C. 89, pgs. 15-19; tr. 403, 1088.) The court repeatedly held that "whether [burglary] is a forcible felony is a question for the jury." (D.C. Docs 110, pgs. 4-5, 113, pgs. 4-5; tr. 405, 1088.)

During the settling of jury instructions—after the court already ruled on this issue—the defense "withdrew our 32, burglary is a forcible felony." (tr. 2410.) But, the court had already rejected instruction 32 and offered, *sua sponte*, to replace it with what was later instructed as 31(b).[4] Stating, "I'll refuse [defense

[4] Instruction 31(b) is cited as 31A in transcripts before being renumbered; it was offered *after* the court overruled Kaarma's objections to instructions on § 45-3-102. (Tr. 2411.)

instruction 32] as offered," but "if you want to offer [32(b)] in lieu of it, I'll give it." (Tr. 2393-95.) The clerk advised the court, "[31(b)], you told them to prepare this. You refused 32." (Tr. 2410.) Thus, it was clearly raised and properly preserved for appeal.

As to the substance of the State's argument for not including burglary as a forcible felony, well that fails for two reasons. (Resp. 42-43.) First, it is inconsistent with this Court's decision in *State v. Daniels*. There, the trial court correctly denied the defendant's request to instruct burglary as a forcible felony absent an unlawful entry into the occupied structure. *Daniels*, ¶ 46. This Court did not, however, hold that the plain language in § 45-3-101(2), defining forcible felony, precludes inclusion of burglary as a forcible felony. Logically, had an unlawful entry occurred in *Daniels*, as it did here, including burglary as a forcible felony was proper. *See also* § 45-5-102(b) (felony-murder rule includes burglary as forcible felony).

Second, this Court follows the general rule of also adopting the construction of a statute by the highest court of the sister state from which it is adopted. *State v. Tower* (1994), 267 Mont. 63, 67, 881 P.2d 1317, 1319. The Commission Comments to § 45-3-101 state the definition of "forcible felony comes from § 2-8 of the Illinois source." This Court also turned to Illinois law in *State v. Sorenson*

to interpret § 45-3-103's unlawful entry requirement. 190 Mont. 155, 169, 619 P.2d 1185, 1193-94 (1980).

Under Illinois law, burglary is a forcible felony. "*[R]esidential* burglary belongs among the forcible felonies because 'there is a considerably greater chance of injury and danger to persons in the home context (emphasis included)." *People v. McCormick*, 774 N.E.2d 392, 496 (App. Ct. Ill. 2002) (internal citation omitted). "Any intruder is a physical menace because one never knows what the intruder will do. Burglaries commonly go bad. People panic . . . the innocent get hurt." *Id*. at 497. "[I]t is a quintessentially legislative decision whether the danger is great enough to qualify it as a forcible felony." *Id*. at 496.

III. The court erred by denying Kaarma's motions to change venue.

A. Inflammatory publicity displaced the judicial process in Missoula County.

The State reveals its approach by debuting an ostensibly impossible standard for establishing presumed prejudice. Citing *State v. Kingman*, it argues "presumed or inherent prejudice [means] . . . that jurors selected from Missoula County could not be impartial *under any circumstances* (emphasis supplied)." (Resp. 45); 2011 MT 269, ¶ 32, 362 Mont. 330, 264 P.3d 1104. The standard for demonstrating presumed prejudice is concededly high; but, *Kingman* does not suggest it is utterly

hopeless. *See Kingman*, ¶ 32 ("the court is being asked to *presume* that jurors . . . cannot be impartial") (emphasis supplied).

Importantly, "[t]he 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." (Resp. 20.) So, it concedes that:

- Over 450 news items were published in Missoula County.
- *Missoulian* hard-copy circulation of 117 news items was 66,700 on weekdays and 75,900 on weekends.
- *KPAX* and *KECI* had roughly 60,000 and 55,00 nightly viewers, respectively. They published approximately 165 news items.
- From October 29, 2014 (one month before trial), through December 25, 2014 (shortly after trial), roughly 200 local media items were published.

(Appellant's Opening Br. p. 54.)

The State largely ignores *Kingman*'s presumed prejudice factors, offering scant support of its conclusory argument on community sentiment:

> [K]aarma fails to establish that the population 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 guilt or innocence.

(Resp. 46); *See also Kingman*, ¶ 42.

In truth, almost ninety percent of the venire knew about this case and fifty-six percent had formed an opinion on Kaarma's culpability. (Opening Br. 53.)

The *Missoulian*, *KPAX*, and *KECI*, all urged citizens to donate to the Dedes. (Opening Br. 55); *but cf. Kingman*, ¶ 50 (defendant failed to establish media encouragement of fundraising). The Dedes were given substantial support: German Consul General lunched with Governor Bullock to thank him for the "outpouring of empathy and compassion for [Dede's] parents[.]" (D.C. 167, ex. G.12; *see also* Opening Br. 8.)

Adverse community sentiment was evidenced throughout trial. Seeking an increased bond, the State argued "many of [Kaarma's] neighbors have contacted our office, and expressed serious concerns about neighborhood safety . . . they are scared of him[.]" (5/21/14 tr., p. 8.) "[H]e is aggressive, violent, and irrational." (Id.) Covering the verdict, the media reported "[a] collective cry erupted" in the "packed courthouse." (D.C. 167, ex. J.1, art. 16.) "The courtroom's enthusiasm for the verdict was only tempered by sobs coming from Kaarma's mother[.]" (Id.) And, "[c]heers echoed throughout the courtroom after the guilty verdict was read. (Id. at J.3, art. 9.) Not to mention, a juror that was actually seated in this case was removed due to his wife's inflammatory statements to co-workers during the trial. (Tr. 2347-49.)

In moving for a new trial, Kaarma argued "[w]here demonstrations previously took place on courthouse lawns, today, a community's lynch mob mentality is measurable online." (D.C. 174, p. 7.) For example, innumerable

online comments included "Kaarma is cold blooded murderer" and "Krazy killer kaarma WAITED UP to kill little diren." (D.C. 27, ex. I, pgs. 1, 9.)

Detective Baker testified that Kaarma and Pflager received death threats. *See State ex Rel. Coburn v. Bennet* (1982), 202 MT 20, 28, 655 P.2d 502, 506 ("[v]andalism occurred and threats were made against [the defendant]."). "Fuck you Asshole" was spray-painted across Kaarma's attorney's building and a bullet shot at his home. *See id*.; (Opening Br. 9.) German flags and colors swamped Kaarma's neighborhood. (Opening Br. 8.)

Still, the State offers a second conclusory argument that "[t]he media coverage of Kaarma's case, though extensive, does not compare to extreme cases of inherent prejudice recognized by this Court." (Resp. 46 citing *Kingman, Rideau v. Louisiana*, *Sheppard v. Maxwell*, *State v. Spotted Hawk*, *State v. Dryman*, and *State ex rel. Coburn v. Bennett* (citations omitted).) The State fails to distinguish these cases from Kaarma's.

Consider *Rideau v. Louisiana* where the defendant's right to a fair trial was violated when the community was three times exposed to the defendant's personal confession. 373 U.S. 723, 726 (1963). Articles on this case similarly published statements inviting prejudgment of Kaarma's culpability: Kaarma "announc[ed] that he was waiting up at night to 'shoot some (expletive) kid (D.C. 27, ex. H, p.

1.);"[5] Pflager told police she "intentionally placed a purse in the garage 'so they would take it (Id. at p. 2);'" Kaarma said he "stayed up three nights waiting to shoot a kid (D.C. 44, ex. E, p. 2.);" and "Kaarma intentionally baited the burglars by leaving the door open and placing a purse inside (D.C. 27, ex. K, p. 2.)." The charging document—made available by the *Missoulian* online—stated Kaarma admitted "No. I'm seriously going to kill some fucking kids." (D.C. 1, p. 16.)

The media even compared this case to that of convicted murderer Byron Smith, who recorded himself killing victims lured into his basement. (D.C. 44, ex. E.) The article asked, "[d]o laws that allow private citizens to protect their property also let them set a trap and wait for someone to kill?" (Id.) The president of the Association of Prosecuting Attorneys answered, "it doesn't sound to me that a reasonable person is going to shoot through a garage door." (Id.) The lobbyist credited with crafting Montana's "castle doctrine" stated during trial in the *Missoulian* that Kaarma was guilty. (D.C. 167, ex. G.4.)

The State ultimately fails to reveal how the "extreme cases of inherent prejudice" it cites are inapposite to this case's volcanic flow of inflammatory media coverage:

[5] Comments included: "Kaarma . . . admitted they set up a trap;" and "[He] confessed to the police it was a trap[,] read the statement." (D.C. 27, ex. I, pgs. 25-26, 9.)

- False allegations that Kaarma had a domestic violence and child abuse conviction that were not part of the trial record.[6] The court conceded that **"[e]verybody on the jury probably knows there's a criminal record** (emphasis inserted)." (Tr. 20.)

- Prosecutor stating that "[Kaarma] actually sought out Dede by essentially trapping him in the garage . . . every gun instructor tells students to identify the target before firing."[7]

- False reports that a purse lured Dede into the garage or that Kaarma knew the garage was open;[8] stating, "Kaarma . . . intentionally baited would-be burglars by displaying a purse in the garage."[9]

- Sealed "road rage" allegations: "Neighbor recounts scary encounter with Missoula shooter;" Kaarma appeared "high," "looked ready to fight," "yelled gibberish," was "foaming at the mouth," and yelling "[s]low the fuck down!"[10] (Opening Br. 7.)

Overlooking these comparisons, the State instead relies on the trial court's misplaced findings; such as "this case 'certainly had the media's attention, but no more than so many other cases that have occurred in the Fourth Judicial District in recent times.'" (Resp. 49.) Yet, the State does not cite a single Montana case addressing this level of media attention.

Although the State also claims that *voir dire* produced a fair and impartial jury (Resp. 48.); this Court reiterated in *Coburn* that the venire answering the

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[6] *See State v. Dryman* (1954), 127 Mont. 579, 581-83, 269 P.2d 796, 797-98 (publishing defendant's prior conviction for robbing a liquor store contributed to presumed prejudice); *State v. Furhmann* (1996), 278 Mont. 396, 410, 925 P.2d 1162, 1170-71 (criminal history is inflammatory unless devoid of editorializing and part of standard news accounts of court events and filed information).

[7] *See Coburn*, *supra*, at 32, 655 P.2d at 508 (extrajudicial comments by county attorney are prejudicial).

[8] *Compare with State v. Bashor* (1980), 188 Mont. 397, 404, 614 P.2d 470, 475 ("a misstatement of facts in a single newspaper article does not necessarily constitute sufficient grounds to change venue").

[9] (D.C. 44, ex. D, p. 2); *see also* (D.C. 27, ex. H, p.1, ex. I, pgs. 28, 29, 34, 42, 47, 51, ex. J. p. 2, ex. K, p. 2; D.C. 44, ex. C, p. 2, ex. D, p. 2, ex. P, p. 2; D.C. 167, ex. J.1, art. 49, p. 3.)

[10] *See Dryman*, 127 Mont. at 589, 269 P.2d at 801 (media coverage "tended to fan the flame of high feeling against the defendant rather than quench it.")

statutory requirements "is not at all conclusive upon the question of [presumed prejudice]." 202 Mont. at 34, 655 P.2d at 509 (internal citation omitted).

More recently, the State filed with this Court a Notice of Supplemental Authority, *State v. Griego*, relevant to this particular issue. 2016 MT 207. There, this Court found the defendant's arguments for a change of venue wanting. *Id*. at ¶ 35. *Griego* is distinguishable from this case: only eleven articles were published pre-arrest, and "various news" reports post-arrest; no extra-judicial commentary outside the investigation was made by the county attorney; reporting on the investigation was factual in nature, serving a legitimate community safety concern; only a "smattering" of article commentary was demonstrated; and law enforcement refused to release more detailed information to protect the investigation. *Griego*, ¶¶ 12, 17, 32-33.

Lastly, although the State here argues that the trial court's denial of individual *voir dire* was merely an "ancillary claim (Resp. 48)[;]" this Court noted in *Griego* that individual voir dire of eighty potential jurors in part gave the defendant "the opportunity to ferret out any actual prejudice caused by the alleged inflammatory pretrial publicity[.]" *Griego*, ¶ 35. Kaarma got no such opportunity.

B. In sealing proceedings, the court made relevant venue findings.

The State argues Kaarma challenges his own motion to seal 404(b) proceedings on appeal. (Resp. 48.) In truth, Kaarma backs his venue argument by

offering the trial court's findings that intense media coverage of this case presented a clear and present danger to trial fairness. Once evidence deemed too prejudicial for open proceedings (i.e. criminal history) was published, the court acted arbitrarily by later diminishing its impact. Based on its own findings a reasonable possibility existed that Kaarma would not receive a fair trial. (*See* Opening Br. 56.)

In denying KECI's efforts to intervene, the court made relevant venue findings based on existing media coverage that publishing inflammatory character evidence would violate Kaarma's right to a fair trial; and that Montana's population "is relatively small" with media outlets reaching a "vast number of potential jurors." (D.C. 49, pgs. 5-6.)

IV. Denying Kaarma's challenge of juror Hughes was structural error that requires no additional analysis or review.

As a preliminary matter, three of the State's claims must first be disposed of, which merely divert attention from substantive analysis of this issue. First, Kaarma correctly relied upon § 46-16-115(2)(j), MCA, in his opening brief by citing *State v. Allen* to challenge Hughes' ability to be fair and impartial based on statements made during *voir dire*. (Resp. 49; Opening Br. 59 (citation omitted).) "Cases under § 46-16-115(2)(j), MCA, remain constant: whether a prospective juror's statements have demonstrated a 'state of mind' affecting his or her ability to

be impartial and act without prejudice to either party[.]" *State v. Golie*, 2006 MT 91, ¶ 18, 332 Mont. 69, 134 P.3d 95.

Second, Kaarma properly objected to Hughes' general "ties to law enforcement" during *voir dire*; arguing, "we talked about law enforcement, Juror Hughes is directly related to law enforcement, her husband was law enforcement, her husband was chief of police[.]" (*See* Resp. 50; tr. 143.) And, "Judge, she knew a couple [witnesses from law enforcement including Baker] . . . she is the most familiar with law enforcement . . . we just wanted to make our challenge for cause on the record." (Id.)

Third, the State accuses Kaarma of taking the record out of context by stating Hughes "was more inclined to believe law enforcement than the accused." (Resp. 53.) This accusation is undeserved because Hughes stated: "Well, [Kaarma is] fighting for his life and we're – on the police investigation, I believe it's going to be more accurate, true." (Tr. 237.) Followed by, "[w]hereas 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[.]" (Id.)

Turning to its legal analysis, the State is correct that a connection to law enforcement, without more, does not necessitate a finding that a juror would not be impartial. (Resp. 52.) Additionally, a juror should not be removed merely because

she voices a concern about being impartial. *See State v. Cudd*, 2014 MT 140, ¶¶ 8-9, 375 Mont. 215, 326 P.3d 417.

Collectively, though, the State's argument fails because Hughes had both substantial ties to law enforcement and expressed bias against Kaarma. Hughes' husband was retired, but his life was devoted to law enforcement for twenty-five years. Hughes said, "I've known Guy Baker Since he was a baby" and his "dad was on the police force the same time as my husband was." (Tr. 50, 150.) Hughes discussed the sway of raising children "with a police officer as a daddy[.]" (Tr. 187-88.)

Baker was not just a police detective; he was identified as an "[a]dvisory witness" for the prosecution assisting in the State's preparation of the case. (D.C. 100.) The defense even asked Baker "[y]ou're part of the prosecution team, right?" (Tr. 1985.) Baker answered, "[y]es." (Id.) He alone sat with prosecutors during *voir dire* and trial. (Id.).

Hughes' instinct was to identify with law enforcement: "we're on the police investigation – I just believe it's going to be more accurate, true." She stated that Kaarma would "say something that's maybe not quite true" and "be more apt, maybe, to stretch the truth a little bit." (Tr. 237.)

The State countered at trial that "[Hughes] simply pointed out that she would understand that the defendant might have a motive to lie or stretch the truth, were

her words." (Tr. 238.) Jurors can consider "motive to lie as one of their considerations as to credibility, so I would absolutely object." But, the fact that a defendant stands accused of a crime is plainly not, in itself, a justification for characterizing the accused a liar. *See State v. Racz*, 2007 MT 244, ¶ 36, 339 Mont. 218, 168 P.3d 683 (attorney characterizing the defendant as a liar invades the jury's province and is highly improper). Accordingly, forcing Kaarma to use a preemptory challenge on the former assistant-chief of police's wife, who expressed bias against Kaarma and had long-standing and strong ties to Baker, constitutes reversible error.

V. The State improperly opened its own door to admitting previously excluded rebuttal character evidence.

The State concedes that the prosecution cannot open its own door to admitting rebuttal character evidence. (Resp. 55.) It contends, however, that the defense placed Kaarma's character at issue. (Id.) The testimony cited by the State at trial to introduce rebuttal character evidence is specific and unambiguous:

> testimony where [Pflager] talked about how [Kaarma] is the protector, [and] his concern is for the safety of the family[.]

(Tr. 822) (emphasis added). So, the question is one of timing—which party raised this issue at trial?

During direct-examination Pflager testified about burglary concerns and stated "Markus is one of those kind of guys [who] takes . . . his family very

seriously . . . he worries about us. You know, he's like our protector[.]" (Tr. 750-51.) On cross-examination, the defense asked, "[a]nd back on direct you talked about him being the protector of your family. Can you just expand on that a little bit more, what his role was in the family?" (Id. at 818.)

Although Pflager expanded her testimony, Kaarma's character was already raised, if at all, on direct-examination. Particularly, Kaarma's role as the family protector. The door was not opened—as argued by the State—to impeach Kaarma's anxiety disorder or "home as his safe place and sanctuary." (Resp. 56, 58.)

Regardless, Kaarma had the right to re-examine Pflager on issues already in evidence. *See State v. Hayden*, 2008 MT 274, ¶ 22, 345 Mont. 252, 190 P.3d 1091 ("If a defendant raises an issue when cross-examining a witness, the prosecution may re-examine the witness to elaborate and explain what is already in evidence.") Evidence of a domestic assault was highly prejudicial, and its effect compounded by the State's closing argument: "Janelle said that the defendant was a protector, but he's actually assaulted her in the past." (*See* Resp. 57; tr. 2475.) This was a clear effort to prejudice the jury on prior bad act evidence that was not admissible because the defense only expanded on testimony originally given on direct.

VI. Baker was a lay witness, unqualified to offer specialized opinions on serology.

Rule 701, M.R. Evid., authorizes lay opinion testimony that is rationally based on the person's perception and helpful to a clear understanding of the person's testimony or determination of a fact at issue. It does not allow opinion testimony about "scientific, technical, or other specialized knowledge" provided for in Rule 702, M.R. Evid.

The State correctly points out that law enforcement may offer lay opinion testimony on matters about which they have extensive experience and are properly qualified through training and experience. (Resp. 60.) It cites *State v. Henderson*, where a firefighter's lay testimony on "pour patterns" in analyzing the cause of a fire did not "[cross] over into the realm of expert testimony[.]" (Resp. 60-61); 2005 MT 333, ¶ 19, 330 Mont. 34, 125 P.3d 1132. There, the firefighter testified without objection about pour patters, and the defense was allowed to *voir dire* the witness prior to testifying. *Id*. at ¶¶ 12-13. Here, Kaarma's objections were overruled several times and his request to *voir dire* Baker was denied. (Resp. 61; tr. 1945.)

The State also cites *Hislop v. Cady*, where an accident occurred after the plaintiff/decedent exited a vehicle parked on the highway in the passing lane and was struck by the defendant's vehicle. 261 Mont. 243, 862 P.2d 388 (1993). The plaintiff objected to officer testimony that "the cause [of the accident] was a pedestrian in dark clothes behind a set of headlights [who] was not visible to

oncoming traffic." *Id*. at 246, 862 P.2d at 390. The officer based his opinions on "measurements and witness statements." *Id*.

Here, Baker offered opinions on remarkably more than simple measurements and interpreting witness statements. He reconstructed this shooting based on a blood stain on the bumper of Kaarma's garaged vehicle. It was neither tested nor measured. (Tr. 1990.) He said that the distribution of blood spatter is valuable information, but no height or distance measurements were taken from the source. (Id.) Shot trajectories were not examined at the scene. (Id. at 1210-11.) He also failed to identify a benzidine test (used to determine if blood is present), electrophoresis (movement of particles through fluids such as blood), and hemoglobin. (Tr. 1985-87.) Nevertheless, the State argues that Baker's opinions were rationally based on his observations under Rule 701, M.R. Evid. (Resp. 62.)

Baker was not even certified to instruct other officers on serology. (Tr. 1900.) Yet, he testified to "high-speed spatter transfer," stating "blood acts consistent with physics, and force acting upon blood is consistent."[11] (Tr. 1946.) Then, he offered detailed testimony on blood spatter measurements, stains, voids, transfers, and velocity to recreate all of Dede's theoretical movements in the garage (Tr. 1945-48.):

[11] Baker testified that low-speed spatter is 4 millimeters or greater, medium spatter is 1 to 4 millimeters in size, and high-speed even smaller. (Tr. 1946-47.) No measurements were done at the scene. (Id.)

> "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 when he stands up and he's shot with a fatal round the high-speed spatter goes over the top of the void."

(Tr. 1948.); *compare with State v. Stout*, 2010 MT 137, ¶ 60, 356 Mont. 468, 237 P.3d 37 (officer provided largely intuitive testimony that evidence was tampered with because blood was found under objects that had to be moved).

Baker testified on the *physics* of blood spatter despite admitting he had no advanced training in *physics*. (Tr. 1957.) The State does not argue, in the alternative, that this error was harmless. In truth Baker's theory was not otherwise in evidence. Kaarma had no opportunity to retain a rebuttal witness because Baker's scientific opinions were previously undisclosed.

In closing, citing Baker's knowledge of "blood evidence work," the State argued "you don't have to be a scientist to know that blood flows downhill and that there is a void where someone's arm might have been. (Tr. 2544.) Followed by, "[Baker] told you that there's high speed spatter that was superimposed over the top of that blood evidence on the bumper . . . he knows how blood reacts to a shotgun cartridge." (Id.) Finally, "Diren is crouched down. He has got his elbow on the bumper" and the defendant "adjusts his aim so he can shoot him right in the head." (Id.) Back-dooring expert testimony through a lay witness to theorize a stunningly favorable recreation of events for the State was clearly prejudicial and bore through the heart Kaarma's defense. This cannot stand.

CONCLUSION

Markus Kaarma was entitled to a fair trial, to fully and fairly present his occupied structure defense, unbiased jurors, and the exclusion of inadmissible evidence—of which he was afforded none.

The record accounts for over 450 media items in Missoula County brimming with inflammatory publicity. In response to Kaarma's fact-driven argument, the State leaves *Kingman*'s factors wanting, instead resting idly on the high standard for establishing presumed prejudice. While "lynch-mobs" are a relic of the past, the media coverage of this case demonstrated that mentality. Indeed, its effect was so impactful that the trial judge simply conceded that every juror falsely believed Kaarma had a criminal record.

Kaarma therefore respectfully requests this court reverse his conviction and remand this case for a new trial in an alternate venue.

DATED this 1st day of September, 2016.

/s/ Nathaniel S. Holloway
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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2016, I electronically filed a true and accurate copy of the foregoing APPELLANT'S REPLY BRIEF, and have provided copies to each attorney of record as follows:

1) Office of the Attorney General, Tim Fox, via E-service, and;

2) Office of the Missoula County Attorney, Attn. Kirsten Pabst, via email delivery.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that Appellant's Reply Brief is printed with a proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for footnotes, lengthy quotations, or indented material; and consistent with this Court's August 23, 2016, Order granting Appellant's motion to file an over-length brief, it is less than 6,000 words, at 5,993 as calculated by Microsoft Word software.

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I, Nathaniel S. Holloway, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 09-01-2016:

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