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MONTANA FIFTH JUDICIAL DISTRICT COURT
MADISON COUNTY

STATE OF MONTANA, Plaintiff, v. JESSE MICHAEL BOYD, BETHANY GRACE BOYD, CARTER NORMAN PHILLIPS, ERIC ANTHONY TRENT, Defendant(s).	Cause No(s). DC-29-2022-23 DC-29-2022-24 DC-29-2022-22 DC-29-2022-26 **STATE'S REPLY TO DEFENDANT'S RESPONSE TO THIRD MOTION IN LIMINE**

COMES NOW the State of Montana, by and through Assistant Attorney General Thorin A. Geist and Madison County Attorney David Buchler, and hereby replies to the Defendant's *Response to State's Third Motion in Limine* (Ct. Doc. #47).[1]

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[1] For the convenience of the District Court, the State will reference documents numbers as they appear in *State of Montana v. Jesse Michael Boyd,* DC-22-23.

I. Continued discussion.

The Defendants concur that the District Court should issue an *Order in Limine* as requested in the State's *Third Motion in Limine*:

1. Excluding witnesses from the courtroom, except as authorized by law.
2. Precluding speaking objections in the presence of the jury.
3. Precluding lay witnesses from giving legal conclusions or applying the law to the facts.

The Defendants object to the remaining issues in the State's *Third Motion in Limine*, which are each addressed in turn.

a. The District Court should preclude the Defendants from eliciting testimony and/or argument as to the offenses charged.

The State argues that the Defendants should be precluded from eliciting testimony and/or from presenting argument as to the offenses charged. *3rd MIL* at pp. 6-7 (Citing *State v. Beavers*, 1999 MT 260, ¶ 36, 296 Mont. 340, 987 P.2d 371). In response, the Defendants argue that: (1) they have a right to challenge the nature of the investigation by the Madison County Sheriff's Office; and (2) to question why Terrell wasn't charged with "assault and hate crimes." *3rd Response* at pp. 12-13.

i. Madison County Sheriff's Office.

The Defendants argue that they are entitled to show the complete, improper, sloppy, biased, deceptive and slipshod nature of the investigation in this case. *Id.* As authority, the Defendants cite to *Arizona v. Youngblood*, 488

U.S. 51, 109 S. Ct. 333, 102 L. Ed 2d 281, arguing that the "defendants may show bad faith investigations, for example those conducted out of animosity the defense or deceptively secure a conviction."

In *Youngblood*, a kidnapping and molestation case, the police failed to refrigerate a victim's clothing and to perform tests on semen samples that were seized. *Id.* Due to the failure a police criminologist, the police were unable to obtain information about the identity of the victim's assailant. *Id.* The United States Supreme Court found that the failure by the police was, at worst, negligent and that there was no suggestion of bad faith on the part of the police. *Id.*

The Defendants reliance on *Youngblood* is misplaced. The issue in *Youngblood* was not whether evidence of bad faith could be presented to the jury, but whether the case should be dismissed based on a violation of the Defendants due process rights. The Montana Supreme Court has held that the existence of police misconduct as a violation of due process is a question of law for the court to decide. *State v. Haskins*, 255 Mont. 202, 209, 841 P.2d 542, 546 (1992). The presentation of such evidence to the jury would be reversible error.

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ii. The Defendants may not question why Terrell was not charged with "assault and hate crimes."

The Defendant's argue that they have a right under the "Sixth Amendment and the Rules of Evidence" to inquire why others were not charged with similar offenses. *3rd Response* at pp. 12-13. However, neither the Sixth Amendment nor the Rules of Evidence allow for such an inquiry. First, the discretion to charge specific offenses rests solely with the prosecution and are a matter of prosecutorial discretion. *Beavers* at ¶ 36; *Small v. Mont. Fourth Judicial Dist. Ct.*, 395 Mont. 523, 437 P.3d 115 (2019)[2] (Writ of Supervisory Control affirming the Fourth Judicial District Court's decision to declare a mistrial after defense counsel attempted to question the charges.) Second, any such inquiry would be irrelevant to whether the Defendants committed the charged offenses. M. R. Evid. 402.

b. The District Court should preclude either party from commenting on the failure of the other to call a witness.

The State argues that the parties should be precluded from commenting on the failure of the other to call a witness. *3rd MIL* at p.7 (Citing § 46-15-325, MCA). In response, the Defendants argue that there are "numerous aspects of the Madison County investigation which merit severe and vigorous inquiry" and that if the State fails to call a witness, they should be entitled to a missing witness inference instruction. *3rd Response* at pp. 13-14. The Defendants do not

[2] Published in table format.

address § 46-15-325, MCA, and instead cite to *United States v. Ramirez*, 714 F.3d 1134, 1139 (9th Cir. 2013) and *Washington v. Perez*, 430 N.J. 121, 62 A.3d 335 (N.J. Super App. 2013) for authority.

Both *Ramirez* and *Perez* stand for the proposition that:

> A missing witness instruction is appropriate if two requirements are met: (1) the party seeking the instruction must show that the witness is peculiarly within the power of the other party and (2) under the circumstances, an inference of unfavorable testimony [against the non-moving party] from an absent witness is a natural and reasonable one.

Id (Internal quotation marks and citations omitted).

The burden is on the party seeking the missing witness instruction to make a prima fascia showing demonstrating the necessary elements. *United States v. Allison*, 765 Fed. Appx. 252, 253 (2019). However, just because a witness is identified on a witness list does not mean that they are peculiarly within the control of the party. For example, the Ninth Circuit has held that the United States was peculiarly within the control of the government when they caused the witness to be deported. *United States v. Leal-Del Carmen,* 697 F. 3d 964, 975 (9th Cir. 2012). In contrast, a witness was found not to be within the peculiar control of the government where the witness went missing and was equally unavailable to both sides. *United States v. Noah*, 475 F. 2d 688, 691-692 (1973). Similarly, as *Ramirez* makes clear, no "natural and reasonable inference" can be drawn from the mere absence of a government witness. *Ramirez*, 714 F.3d at 1137.

The District Court should preclude either party from commenting on the failure of the other to call a witness at trial pursuant to § 46-15-325, MCA. A missing witness instruction should only be given if the Defendants' can make a prima facie showing meeting the requisite elements outside the presence of the jury.

c. The District Court should preclude either party from presenting argument during their opening statement, and/or from presenting inadmissible evidence.

The State argues that both sides should be precluded form presenting argument during their opening statements, and/or from referring to inadmissible evidence. *3rd MIL* at pp. 8-9 (citing *State v. Otto*, 2014 MT 20, ¶ 14, 373 Mont. 385, 317 P.3d 810; *State v. Martinez*, 188 Mont. 271, 613 P.2d 974 (1980). In response, the Defendants argue, without citation to authority, that they are entitled to "discuss the application of the facts to the law." *3rd Response* at pp. 15.

Montana law does not permit the jury to be instructed on the law until after the close of evidence. § 46-16-401, MCA. As such, a discussion of the application of the facts to the law is **precisely** what defense counsel may not do in opening statements. As the Montana Supreme Court has made clear, "it is improper [for counsel] to expound or argue legal theories or to **attempt** to instruct the jury as to the law of the case in an opening statement." *Otto* at ¶ 14 (Emphasis supplied).

d. The District Court should preclude counsel for either side from acting as a witness in the case.

The State argues that counsel should not be permitted to act as a witness in this case. *3rd MIL* at pp. 9-10 (citing *State v. High Elk*, 2006 MT, ¶ 17, 330 Mont. 359, 127 P.3d 432; *State v. Lehrkamp*, 2017 MT 203, ¶ 18, 388 Mont 295, 400 P.3d 697; *State v. Dobrowski*, 2016 MT 261, ¶ 29, 385 Mont. 179, 382 P.3d 490). The Defendants don't oppose the State's request but argue that counsel should be permitted to make offers of proof during the trial. *3rd Response* at p.15 (citing *Benjamin v. Torgerson*, 1999 MT 216, ¶ 18, 295 Mont. 528, 985 P.2d 734). To be clear, the State's motion in limine was not intended to preclude either party from making an offer of proof, so long as the offer is made outside the presence of the jury in accord with M. R. Evid. Rule 103(c).

e. The District Court should preclude the introduction of defenses, objections, and/or requests that are not identified by the deadline identified in the *Omnibus Conference Order*.

The State argues that the District Court should preclude the introduction of defenses, objections, and/or requests that are not identified by the deadline in the *Omnibus Conference Order*. *3rd MIL* at pp. 11-12 (Citing § 46-13-101, MCA). In response, the Defendants argue that they have the right to raise issues at any time without citation to authority, and that the issue is premature. *3rd Response* at pp. 16.

First, the State is entitled to a fair trial and seeks to hold the Defendants to the requirements of § 46-13-101, MCA. Defenses, objections, and requests which are not asserted by the requisite deadlines are waived and cannot be introduced **unless** the Defendants **first** obtain relief from their waiver upon a showing of good cause. Defendants counsel has twice asserted in open court an unfamiliarity with Montana law, and such ignorance does not constitute good cause to grant relief from a waiver. "Good cause" is defined as a "legally sufficient reason" and refers to "the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused." *City of Helena v. Roan*, 2010 MT 29, ¶ 13, 355 Mont. 172, 226 P.3 601 (Citing *Black's Law Dictionary* 251 (Bryan A. Garner ed., 9th ed., West 2009)). The State has no objection to being held to the same standard.

Second, the State's motion in limine is not premature. As with many of the issues presented in the State's three motions in limine, the Defendants appear to be ignorant of the requirements of Montana law. Remedying this ignorance early promotes judicial economy and will allow the parties to efficiently prepare for trial if the case cannot be resolved beforehand.

f. The District Court should preclude witnesses from commenting on the credibility of another witness.

The State argues that the District Court should preclude the Defendants from eliciting testimony as to the credibility of another witness. *3rd MIL* at p. 13 (Citing *State v. Hayden*, 2008 MT 274, ¶ 26, 345 Mont. 252, 190 P.3d 1091;

State v. Byrne, 2021 MT 238, ¶ 23, 405 Mont. 352, 495 P.3d 440). In response, the Defendants agree that they may not bolster a witnesses' testimony but argue that they may impeach the credibility of a witnesses pursuant to Montana Rule of Evidence 607(a). *Response* at pp. 16-17 (citing *State v. McGee,* 2021 MT 193, ¶¶ 18-19, 405 Mont 121, 492 P.3d 518).

The Defendants reference to Rule 607(a) is misplaced. The State's motion in limine was made to prohibit "testimony that a witness believes one witness over another, thinks a defendant is wrongly charged, or otherwise has an opinion on the proceedings..." *3rd MIL* at p. 13. As noted by the Defendants, Rule 607(a) allows for the impeachment of a witness through cross examination "to prove that a fact which the witness asserted or relied upon in [his or her] testimony is not true." *3rd Response* at pp. 16-17 (citing *McGee* at ¶¶ 18-19). Rule 607(a) does serve as a mechanism for a defendant to introduce improper opinion testimony regarding the credibility of a witness.

g. The District Court should preclude lay witnesses from giving legal conclusions or applying the law to the facts.

The State argues that lay witnesses should be precluded from giving legal conclusions or applying the law to the facts. *3rd MIL* at pp. 12-13 (Citing M. R. Evid. 701). The Defendants' do not oppose the State's request, but argue that the State should be held to the same standard. *3rd Response* at p. 16. The State has no objection to this request.

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h. The District Court should preclude the Defendants from introducing improper character evidence.

The State argues that the Defendants should be precluded from introducing improper character evidence that is not related to a witness's reputation for truthfulness at trial, and that they should be required to obtain a ruling on the admissibility of any such evidence outside the presence of the jury. *3rd MIL* at pp. 13-14 (Citing M. R. Evid. 608). In their response the Defendants don't contest the State's request, but suggest that the State is somehow attempting to deprive them of their right to a fair trial by not seeking to apply the rule to itself. *3rd Response* at pp. 17-18. To the contrary, the State has no objection to being held to the same standard.

i. The District Court should preclude either party from eliciting testimony or presenting argument on the level of offense charged, including the ramifications of punishment.

The State argues that both sides should be precluded from eliciting testimony and from presenting argument on the level of offense charged, including the ramifications of punishment. *3rd MIL* at pp. 14-15 (Citing *State v. Brodniak*, 221 Mont. 212, 226-227, 718 P.2d 322 (1986); *State v. Zuidema*, 157 Mont. 367, 373-374, 485 P.2d 952, 955 (1971); *State v. Martin*, 2001 MT 83, ¶¶ 66-67, 305 Mont. 123, 23 P.3d 216; *Small v. Mont. Fourth Jud. Dist. Court*, 395 Mont. 523, 437 P.3d 115 (2019)). In response, the Defendants argue that they have been improperly charged and that it would be a "due process"

violation to prohibit them from presenting this issue to the jury. *3rd Response* at p.18.

The Defendants' argument is devoid of analysis or citation to pertinent authority, and it is neither the role of the District Court nor the State to do the Defendants' analysis for them. Suffice it to say that the issue of whether the Defendants' have been properly charged is a question of law that cannot be presented to the jury. *State v. Tichenor*, 2002 MT 311, ¶ 18, 313 Mont. 95, 60 P.3d 454; § 26-1-201, MCA (All questions of law...must be decided by the court).

j. The District Court should preclude the Defendants from arguing that they were ignorant of the law.

The State argues that the District Court should preclude the Defendants from arguing that they were ignorant of the law, including Montana's JUOF statutes. *3rd MIL* at ¶¶ 15-16 (citing *State v. Payne*, 2011 MT 35, ¶ 22, 359 Mont. 270, 248 P.3d 842). In response, the Defendants appear to argue that they should be permitted to make such an argument. *3rd Response* at pp. 18-19. As authority, the Defendants rely on *Morrissette v. United States*, 342 U.S. 246, 250-52, 72 S. Ct. 240, 96 L. Ed. 288 (1952), but fail to analyze the case.

In *Morrissette*, the defendant was charged with stealing government property after he took spent bomb cases from an Air Force bombing range. *Id* 342 U.S. at 247-63. At trial the defendant admitted that he took the property but argued that he thought the bomb cases were abandoned and that he did

not have the intent necessary to steal government property. *Id.* The trial court refused to instruct on the issue of intent concluding that the crime was ostensibly a strict liability offense. *Id.* The defendant was convicted at trial, which was thereafter affirmed by the Sixth Circuit Court of Appeals who noted that Congress failed to include the element of criminal intent when it enacted the law. *Id.*

The United States Supreme Court granted *certiorari* and reversed the conviction holding that Congress' failure to include an intent element could "not be construed as eliminating that element from the crime denounced." *Id.* Addressing the requirement of intent, the Supreme Court held:

> The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.

Id, 342 U.S. at 252.

The Defendants' reliance on *Morrissette* is misplaced because the Supreme Court did not deal with the defendant's ignorance of the law. Instead, *Morrisette* dealt with the absence of a mental state requirement in the charged

offense. Unlike *Morrissette,* the Defendants' have been charged with the offense of assault with a weapon, which contains the mental state requirement that the person acted "purposely or knowingly." § 45-5-213(1), MCA; *State v. Dr. Chris Arthur Christensen*, 2020 MT 237, ¶ 107, 401 Mont. 247, 472 P.3d 622 (Beginning in 1973, the Montana Legislature modified the mens rea culpability requirements, adopting "purposely" and "knowingly" to embody "intent."); *State v. Sharbono*, 175 Mont. 373, 393, 563 P.2d 61, 72 (1977).

The Defendants have indicated that they will rely on the affirmative defense of JUOF at trial. As the Montana Supreme Court has repeatedly held, "a defendant who relies upon the defense of justifiable use of force concedes that he acted purposely or knowingly." *State v. St. Marks*, 2020 MT 170, ¶¶ 20-22, 400 Mont. 334, 467 P.3d 550 (citing *State v. Nick*, 2009 MT 174, ¶ 13, 350 Mont. 533, 208 P.3d 864; *State v. Houle*, 1998 MT 235, ¶ 15, 291 Mont. 95, 966 P.2d 147; *State v. Sunday*, 187 Mont. 292, 306, 609 P.2d 1188, 1197 (1980); *People v. Joyner*, 50 Ill. 2d 302, 278 N.E.2d 756, 760 (Ill. 1972)). The Defendants cannot concede the issue of mental state while at the same time claiming to be ignorant of it.

k. The District Court should clarify that the State is not required to disclose rebuttal witnesses, except for those called to directly rebut an affirmative defense.

The State argues that Montana law does not require the disclosure of rebuttal witnesses who are **not** called to rebut an affirmative defense. *3rd MIL*

at pp 16-17 (Emphasis supplied, citing *State v. Torres*, 2021 MT 301, ¶ 25, 406 Mont. 353, 498 P.3d 1256, *State v. Weitzel*, 2000 MT 86, ¶¶ 31-32, 299 Mont. 192, 998 P.2d 1154; *State v. Hildreth*, 267 Mont. 423, 430-31, 884 P.2d 771, 775-76 (1994)). In response, the Defendants argues that: (1) the requirement should not apply to the witnesses called to rebut the affirmative defense of JUOF; (2) they are entitled to notice of all rebuttal witnesses; and (3) they are entitled to a proffer before the impeachment witness may testify. *3rd Response* at pp. 19-20.

First, the State has **not** sought an order clarifying that the disclosure requirement should **not** apply to witnesses called to rebut the affirmative defense of JUOF. Montana law requires that such witnesses be disclosed within five days of trial, and the State has already confirmed that it "will identify rebuttal witnesses who will be called to directly rebut the affirmative defense." *3rd MIL* at pp. 16-17.

Second, the Defendants argue that they are entitled to notice of all rebuttal witnesses if the testimony offered is capable of "prejudice to the defendant." *3rd Response* at pp. 19-20. (Citing *Weitzel* at ¶ 33). However, *Weitzel* neither contains such a quote nor stands for such a proposition. Under Montana law, including *Weitzel*, the State has no obligation to disclose rebuttal witnesses who are called for purposes other than to rebut a declared affirmative defense.

Third, the Defendants argue that they are entitled to a proffer outside the presence of the jury before the rebuttal witness may testify. *Response* at pp. 19-20. However, the Defendants' have failed to provide the District Court with authority to support their argument, and their request should therefore be denied.

II. Conclusion.

Based on the foregoing, the State of Montana respectfully requests that the District Court issue and *Order in Limine*:

1. Excluding witnesses from the courtroom, except as authorized by law.
2. Precluding either party from presenting argument during their opening statement, and/or from presenting inadmissible evidence.
3. Precluding counsel for either side from acting as a witness in the case.
4. Precluding speaking objections in the presence of the jury.
5. Precluding the introduction of defenses, objections, and or requests that are not identified by the deadline set forth in the *Omnibus Conference Order*.
6. Precluding lay witnesses from giving legal conclusions or applying the law to the facts.
7. Precluding witnesses from commenting on the credibility of another witness.
8. Precluding the Defendants from introducing improper character evidence.
9. Preclude either party from eliciting testimony or presenting argument on the level of offense charged, including the ramifications of punishment.

10. Precluding the Defendants from arguing that they were ignorant of the law.

11. Clarifying that the State is not required to disclose rebuttal witnesses, except for those called to directly rebut an affirmative defense.

DATED this 27 day of February, 2023.

By: _____
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CERTIFICATE OF SERVICE

I, Thorin Aidan Geist, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply to the following on 02-27-2023:

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