

SUPREME COURT OF MONTANA

State v. Montana Ninth Judicial District Court

375 Mont. 488 (2014) · Decided July 15, 2014

SUMMARY

The Montana Supreme Court granted the State’s petition for a writ of supervisory control concerning whether a criminal defendant could introduce his own unsworn, out-of-court statement to support a claim of justifiable use of force. The Court held that the statement, offered to establish what the defendant knew about the victim’s alleged violent conduct, was hearsay and was not admissible for the proposed purpose. The Court vacated the district court’s order permitting the defendant to use the statement in that manner.

CASE DETAILS

|                       |                                                                                                                                                                                                                                   |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Montana                                                                                                                                                                                                          |
| WRITING FOR THE COURT | Justice Wheat; Justice Cotter; Justice Baker; Justice Rice; Justice McKinnon; District Court Judge Brown, sitting for Justice Laurie McKinnon; District Court Judge Gilbert, sitting for the vacant position                      |
| JURISDICTION          | Montana                                                                                                                                                                                                                           |
| DECIDED               | July 15, 2014                                                                                                                                                                                                                     |
| DISPOSITION           | writ_granted                                                                                                                                                                                                                      |
| PROCEDURAL POSTURE    | The State petitioned the Montana Supreme Court for a writ of supervisory control over a pretrial evidentiary order of the Ninth Judicial District Court in Teton County Cause No. DC 12-009.                                      |
| STANDARD OF REVIEW    | Supervisory control is an extraordinary remedy appropriate when the normal appeal process is inadequate, purely legal questions are involved, and the lower court is proceeding under a mistake of law causing a gross injustice. |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                    |
| PARTIES               | State of Montana v. Montana Ninth Judicial District Court                                                                                                                                                                         |

TOPICS

- criminal procedure
- evidence
- hearsay
- self defense
- appellate procedure

PRACTICE AREAS

## QUESTIONS PRESENTED

1. Whether the Montana Supreme Court should exercise supervisory control over the district court's pretrial evidentiary ruling.
2. Whether Lau's unsworn out-of-court statement recounting what Pfeifer told him about Kline's alleged violence was admissible to establish Lau's knowledge in support of his self-defense claim.
3. Whether Montana's 2009 justifiable-use-of-force statutes displaced or altered the Montana Rules of Evidence.
4. Whether requiring Lau to present admissible evidence of his knowledge violated the statutory burden of proof or his constitutional right to present a defense and remain silent.

## HOLDINGS

1. Supervisory control was appropriate because the State lacked an adequate ordinary appellate remedy, the evidentiary issue presented a purely legal question, and the district court was proceeding under a mistake of law causing a gross injustice.
2. Lau could not introduce his own statement to investigators, insofar as he offered it to prove that Pfeifer told him about Kline's violent acts, because the statement was hearsay and no recognized hearsay exception applied.
3. When justifiable use of force is placed at issue, evidence of specific instances of the victim's conduct may be offered under the Montana Rules of Evidence, but the defendant must establish through admissible evidence that he knew of the conduct and that the knowledge led to the use of force.
4. Sections 46-16-131 and 45-3-112, MCA, did not displace the Montana Rules of Evidence, require disclosure of investigative materials to the jury, or permit admission of otherwise inadmissible hearsay.
5. Requiring Lau to comply with established rules governing hearsay and character evidence did not violate his right to present a defense or his right to remain silent.

## KEY QUOTATIONS

*“Supervisory control is an extraordinary remedy that may be justified when the normal appeal process is inadequate, purely legal questions are involved, and the other court is proceeding under a mistake of law, causing a gross injustice.”* (489)

*“Evidence of the character of a victim of an assault is limited to what the defendant knew at the time [he] used force, and the defendant must show that this knowledge led to the use of force.”* (490)

*“The statute does not mandate disclosure of investigative materials to the jury.”* (491)

*“The admissibility of evidence is a separate issue from determining which party bears the burden of proof.”* (492)

## FACTUAL BACKGROUND

Lau was charged with deliberately killing Donald Kline by shooting him and claimed justifiable use of force in self-defense. During a 911 call shortly before the shooting, Lau referred to Kline as a man who had been abusing Susan Pfeifer and said that Kline was threatening Pfeifer and him. Four months later, Lau gave investigators a transcribed, unsworn statement, accompanied by counsel, in which he recounted what Pfeifer had allegedly told him about Kline's violent acts. Lau sought to introduce that statement to establish his knowledge of specific instances of Kline's conduct without testifying.

#### PROCEDURAL HISTORY

Lau was charged with deliberate homicide and asserted self-defense. The district court ruled that Lau could cross-examine witnesses about his knowledge of specific violent acts by the victim without testifying, and permitted an offer of proof, but the State sought supervisory control to challenge the ruling before trial. The Montana Supreme Court granted supervisory control and vacated the district court's January 21, 2014 order.

#### DISPOSITION

writ\_granted

#### REMAND INSTRUCTIONS

The district court's January 21, 2014 order was vacated. The opinion does not direct a further specific procedure beyond application of the Rules of Evidence consistent with the court's ruling.

#### CASES CITED

- Stokes v. Thirteenth Jud. Dist. Ct., 2011 MT 182, ¶ 5, 361 Mont. 279, 259 P.3d 754
- State v. Dist. Ct. of the Eighteenth Jud. Dist., 2010 MT 263, ¶¶ 30-31, 358 Mont. 325, 246 P.3d 415
- State v. Logan, 156 Mont. 48, 65, 473 P.2d 833, 842 (1970)
- State v. Henson, 2010 MT 136, ¶ 27, 356 Mont. 458, 235 P.3d 1274
- Deschon v. State, 2008 MT 380, ¶ 24, 347 Mont. 30, 197 P.3d 476
- City of Red Lodge v. Nelson, 1999 MT 246, ¶ 19, 296 Mont. 190, 989 P.2d 300
- State v. Montgomery, 2005 MT 120, ¶ 19, 327 Mont. 138, 112 P.3d 1014
- State v. Losson, 262 Mont. 342, 348, 865 P.2d 255, 258-59 (1993)
- State v. Hardman, 2012 MT 70, ¶ 31, 364 Mont. 361, 276 P.3d 839
- Murray v. Talmage, 2006 MT 340, ¶ 16, 335 Mont. 155, 151 P.3d 49
- Vincelette v. Metro. Life Ins. Co., 1998 MT 259, ¶¶ 19-21, 291 Mont. 261, 968 P.2d 275
- Riggs v. State, 2011 MT 239, ¶ 58, 362 Mont. 140, 264 P.3d 693
- State v. Daniels, 2011 MT 278, ¶¶ 23, 33, 362 Mont. 426, 265 P.3d 623
- State v. Mitchell, 2012 MT 227, ¶ 16, 366 Mont. 379, 286 P.3d 1196
- State v. Cooksey, 2012 MT 226, ¶ 37, 366 Mont. 346, 286 P.3d 1174
- State v. Ryan, 166 Mont. 419, 423, 533 P.2d 1076, 1079 (1975)

## OPINION

### PER CURIAM.

\*489OPINION AND ORDER ¶ 1 This matter comes before the Court on the State's petition for writ of supervisory control over the Ninth Judicial District Court in Teton County Cause No. DC 12-009, State v. Martin Vincent Lau. This Court adopted a briefing schedule and conducted oral argument on April 28, 2014.

The matter has now been submitted for decision. ¶2 Lau is charged with deliberate homicide in the fatal shooting of Donald Kline. Lau claims the shooting was an act of self-defense. Trial has been continued to allow resolution of the issues raised in the State's petition, which we now restate as whether the Montana Rules of Evidence permit Lau to offer his own out-of-court statement in support of his claim of justifiable use of force. ¶3 The shooting occurred on August 18, 2012, at the home of Susan Pfeifer.

The State intends to introduce at trial a 911 call in which Lau states he gave Pfeifer a ride home and was confronted by "this guy who has been abusing her," referring to Kline. In that call, Lau also says, "[H]e's threatening her and me and I'm armed and I'm ready to kill him if he attacks me." Approximately seven minutes after making the first call, Lau called 911 again to report shooting Kline. ¶4 On December 17, 2012, four months after the shooting, Lau agreed to be interviewed by Teton County Attorney Joe Coble and Agent Bruce McDermott, a criminal investigator from the state Department of Justice.

Accompanied by his attorney, Lau read from a written narrative he had prepared during the weeks after the shooting. He also responded to questioning by McDermott and Coble. During the interview, Lau said Pfeifer told him about violent acts allegedly committed by Kline.

The interview was transcribed. It was not a formal deposition and Lau was not under oath. The interview will hereafter be referred to as the statement. ¶5 The State moved in limine to prohibit Lau from introducing evidence of specific instances of violence by Kline without first offering proof that he knew of those instances and relied on that knowledge at the time of the shooting.

In response, Lau explained that he intended to place his statement in evidence during his cross-examination of McDermott in order to show what he knew and relied upon at the time of the shooting. Lau said his knowledge was based on what he had been told by Pfeifer, as described in his statement.

The State then moved in limine to prohibit Lau from introducing the statement on hearsay grounds. Lau argued that exclusion of his statement would limit his ability to put forth a defense, and claimed the State was \*490attempting to force him to testify. ¶6 The District Court ruled that Lau could make an "offer of proof" prior to trial and raise the issue of justifiable use of force in his opening statement.

The District Court said Lau would be permitted to cross-examine McDermott and Pfeifer about specific acts of violence by Kline and Lau's knowledge of those acts, as contained in his statement. The District Court said Lau would not be required to testify in order to establish his knowledge of specific instances of conduct by Kline. ¶7 Supervisory control is an extraordinary remedy that may be justified when the normal appeal process is inadequate, purely legal questions are involved, and the other court is proceeding under a mistake of law, causing a gross injustice.

M. R. App. P. 14(3); *Stokes v. Thirteenth Jud. Dist. Ct.*, 2011 MT 182, ¶ 5, 361 Mont. 279, 259 P.3d 754. The State may appeal a criminal case only in narrow circumstances, none of which are applicable here. Section 46-20-103, MCA.

Thus, the normal appeal process is not available to the State to address this matter. *State v. Dist. Ct. of the Eighteenth Jud. Dist.*, 2010 MT 263, ¶ 30, 358 Mont. 325, 246 P.3d 415. Evidentiary rulings based on the interpretation of statutes or rules present purely legal issues. *Eighteenth Jud. Dist. Ct.*, ¶ 31.

We have therefore determined to exercise our power of supervisory control. For reasons described below, we conclude the District Court is proceeding under a mistake of law, causing a gross injustice. ¶8 This matter comes to us before trial, and we cannot say with certainty what evidence will be introduced, by whom, or for what purpose. Whatever evidence Lau seeks to introduce at trial, however, must be admissible and relevant under the Rules of Evidence.

Proof of specific instances of the victim's conduct may be offered "where the character of the victim relates to the reasonableness of force used by the accused in self defense...." M. R. Evid. 405(b). Specific instances of the victim's conduct are relevant and admissible only where justifiable use of force has been placed at issue in the case. *State v. Logan*, 156 Mont.

48, 65, 473 P.2d 833, 842 (1970). Where justifiable use of force has been placed at issue, "[e]vidence of the character of a victim of an assault is limited to what the defendant knew at the time [he] used force, and the defendant must show that this knowledge led to the use of force." *State v. Henson*, 2010 MT 136, ¶ 27, 356 Mont. 458, 235 P.3d 1274 (citing *Deschon v. State*, 2008 MT 380, ¶ 24, 347 Mont.

30, 197 P.3d 476; *City of Red Lodge v. Nelson*, 1999 MT 246, ¶ 19, 296 Mont. 190, 989 P.2d 300); see also *State v. Montgomery*, 2005 MT 120, ¶ 19, 327 Mont. 138, 112 P.3d 1014. The State acknowledges that justifiable use of force will be raised as an issue through its \*491introduction of the 911 calls. Provided Lau can do so through the introduction of admissible evidence, he may be able to argue before the jury that his knowledge of specific instances of conduct by Kline led him to use deadly force. ¶9 Lau says he intends to offer his statement to prove that at the time of the shooting, he knew of specific instances of violence by Kline.

In the statement, Lau says Pfeifer told him about these instances. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. M. R. Evid. 801(c); *State v. Losson*, 262 Mont. 342, 348, 865 P.2d 255, 258-59 (1993).

The Rules of Evidence prohibit the admission of hearsay, unless an exception applies. M. R. Evid. 802; *State v. Hardman*, 2012 MT 70, ¶ 31, 364 Mont. 361, 276 P.3d 839. As Lau proposes to use his statement, it would be offered to prove the truth of the matter asserted: namely, that Pfeifer told him about alleged violent acts by Kline.

The statement, offered for this purpose, is hearsay. M. R. Evid. 801(c); *Murray v. Talmage*, 2006 MT 340, ¶ 16, 335 Mont. 155, 151 P.3d 49 (hearsay excluded where there was “no point” for offering statement “except to establish the truth of what he asserted”). Lau has offered no recognized hearsay exception that would allow for admission of the statement. While Pfeifer’s statements to Lau could potentially be offered to show their resulting effect on Lau’s state of mind, Lau’s statement to McDermott and Coble, given four months after the event, has no similar non-hearsay purpose.

*Vincelette v. Metro. Life Ins. Co.*, 1998 MT 259, ¶¶ 19-21, 291 Mont. 261, 968 P.2d 275. The State may offer Lau’s statement as the admission of a party-opponent, but it may not be offered as proposed by Lau. M. R. Evid. 801(d)(2); *Riggs v. State*, 2011 MT 239, ¶ 58, 362 Mont. 140, 264 P.3d 693. ¶10 Lau and amicus Montana Association of Criminal Defense Lawyers claim changes to the law of justifiable use of force enacted in 2009 have rendered the Rules of Evidence outdated and inapplicable to the present case.

We disagree. The statutes cited by Lau, §§ 46-16-131 and 45-3-112, MCA, do not include any language altering or amending the Rules of Evidence. We have already determined that, even after the 2009 legislation, “the Montana Rules of Evidence still apply and ‘govern all proceedings in all courts in the state of Montana....’” *State v. Daniels*, 2011 MT 278, ¶ 23, 362 Mont.

426, 265 P.3d 623 (quoting M. R. Evid. 101(a)). ¶11 Specifically, Lau argues that § 45-3-112, MCA, which provides that an investigation of an incident involving justifiable use of force “must be conducted so as to disclose all evidence,” requires that evidence — in this case, Lau’s statement — be disclosed to the jury.

We have held that § 45-3-112, MCA, is consistent with existing obligations of prosecutors and law enforcement to disclose evidence to the defense. *State v. Mitchell*, 2012 MT 227, ¶ 16, 366 Mont. 379, 286 P.3d 1196; *State v. Cooksey*, 2012 MT 226, ¶ 37, 366 Mont. 346, 286 P.3d 1174.

The statute does not mandate disclosure of investigative materials to the jury. ¶12 Lau also argues that requiring him to produce admissible evidence establishing his knowledge of specific acts of violence by Kline violates § 46-16-131, MCA.

Under that statute, “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.” Section 46-16-131, MCA. Nothing in the language of the statute entitles the defendant to introduce hearsay evidence of specific instances of conduct by the victim.

The admissibility of evidence is a separate issue from determining which party bears the burden of proof. Daniels, ¶ 33. To the extent Lau chooses to present evidence in his defense, requiring him to do so in accordance with the Rules of Evidence does not shift the burden of proof in violation of § 46-16-131, MCA. Daniels, ¶ 33. ¶13 Lau and amicus claim that requiring Lau to comply with the Rules of Evidence will effectively compel him to choose between his right to present a full defense and his right to remain silent.

They point to no authority for the proposition that a defendant is entitled to circumvent well-established rules regarding the admissibility of hearsay and character evidence. Furthermore, “[a] defendant, in the course of defense, must necessarily make a number of hard decisions many of which bear on the exercise or waiver of constitutional rights. Often, as here, the choice is a difficult one.

However, it does not follow that such choices cannot be constitutionally required.” State v. Ryan, 166 Mont. 419, 423, 533 P.2d 1076, 1079 (1975). ¶14 Therefore, ¶15 IT IS ORDERED that the State’s petition for writ of supervisory control is GRANTED.

The District Court’s order of January 21, 2014 is VACATED. ¶16 The Clerk of Court is directed to provide copies of this Opinion and Order to counsel for the State, counsel for the defendant in Teton County Cause No. DC 12-009, counsel for the Amicus Curiae Montana Association of Criminal Defense Attorneys, and the Honorable Robert Olson, presiding District Judge.

Dated this 15th day of July, 2014. /s/mike McGrath We Concur: \*493/S/JUSTICE WHEAT /S/JUSTICE COTTER /S/JUSTICE BAKER /S/JUSTICE RICE /S/DISTRICT COURT JUDGE BROWN, sittingfor Justice Laurie McKinnon /S/ DISTRICT COURT JUDGE GILBERT, sitting for the vacant position