

1 Ed McLean, District Court Judge
2 Department No. 1
3 Fourth Judicial District
4 Missoula County Courthouse
5 Missoula, Montana 59802
6 Telephone: (406) 258-4780

FILED MAR 06 2015

SHIRLEY E. FAUST, CLERK
By *Laura M. Russell* Deputy

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA
8 COUNTY

9 STATE OF MONTANA,
10 Plaintiff,

11 vs.

12 MARKUS HENDRIK KAARMA,
13 Defendant.

Dept. No. 1

Cause No. DC-14-252

**OPINION AND ORDER RE:
MOTION FOR A NEW TRIAL**

14 Defendant Markus Kaarma filed three alternative motions in close
15 proximity to sentencing:

- 16 1. Motion for new trial because of adverse publicity;
- 17 2. Motion to have the court reduce the jury verdict of deliberate
18 homicide to mitigated deliberate homicide; and
- 19 3. Motion for new trial as the court included in the instructions, the
20 instruction on justifiable use of force against a person when the
defense strategy was the lesser burden of use of force in
defense of an occupied structure.

The Defendant's motion for a new trial was denied in its entirety in open

1 Court prior to orally-imposing sentence, with this written Opinion to
2 follow.

3 **Motion for New Trial because of Adverse Publicity**

4 The Defendant seeks a new trial, pursuant to MCA § 46-16-
5 702(1), based on the Defendant's argument that he was deprived of a
6 fair trial because prejudicial, inflammatory media coverage so saturated
7 the community that the Court should have "*presumed*" inherent
8 prejudice, and a reasonable apprehension that a fair trial was not
9 possible in Missoula County as a matter of law.

10 **Presumed Prejudice As a Matter of Law**

11 The Sixth and Fourteenth Amendments guarantee "a fair trial by a
12 panel of impartial, indifferent jurors." Hayes v. Ayers, 632 F.2d 500, 507
13 (9th Cir. 2011). The Defendant alleges that the issue in this case is
14 whether prejudicial, inflammatory publicity about this case so saturated
15 the whole Missoula County community, so as to warrant a presumption
16 that an impartial jury could not be drawn as a matter of law. State v.
17 Kingman, 2011 MT 269, ¶ 42, 362 Mont 330, 264 P.3d 1104.

18 Where circumstances are not so extreme as to warrant a
19 "*presumption*" of prejudice, a Defendant may claim "*actual prejudice*"
20 exists which would satisfy the Defendant's burden of proof that the

1 Defendant cannot be given a fair trial in the local community of potential
2 jurors. Kingman at ¶ 25. Actual prejudice exists when voir dire reveals
3 that the jury pool harbors actual partiality, or hostility against the
4 Defendant. Id. Actual prejudice manifests itself at jury selection when
5 voir dire reveals that the effect of pretrial publicity is so substantial as to
6 taint the entire jury pool. Id. The voir dire testimony, and the record of
7 publicity must reveal "the kind of wave of public passion" that would
8 make a fair trial unlikely by a jury impaneled from that community. Id.
9 The question in a claim of actual prejudice is not whether there has been
10 an abundance of pretrial publicity, but whether there are enough
11 members of the jury pool to be able to select a jury panel from the pool
12 that will honor an oath to set aside any preconceived opinions on the
13 guilt or innocence of the Defendant, and be able to consider only the
14 evidence presented to them at trial during deliberations, and reach a fair
15 and impartial verdict.

16 On the other hand, to establish "*presumed prejudice*", the
17 Defendant must "demonstrate that an irrepressibly hostile attitude
18 pervades the jury pool, or that the complained-of publicity has effectively
19 displaced the judicial process, and dictated the community's opinion as
20 to the Defendant's guilt or innocence which cannot be overcome."

1 Kingman, at ¶¶ 32, 52. To justify a presumption of prejudice under this
2 standard, the publicity must be both extensive and sensational in nature.

3 Kingman at ¶ 21. This requires a conclusion by the Court that there are
4 not enough members of the Missoula County community that can be
5 trusted to act as fair and impartial jurors which support a finding of
6 presumed prejudice.

7 Prior to impaneling a jury, and during the trial itself, the Defendant
8 raised several motions for a change of venue based on the Defendant's
9 belief that the media had so aroused the Missoula County community's
10 passions against the Defendant, that there was no hope of selecting a
11 fair and impartial jury.

12 While it is undeniable that there was extensive media coverage
13 both before, and during the trial, and information was released that was
14 held not to be admissible at trial, this media coverage was not only in
15 Missoula, but state-wide and was being covered in newspapers,
16 television and social media in Germany and other places. It is common
17 practice for the media to interview interested parties to the contested
18 matter before the Court. While the Court has the authority to limit the
19 contact of the parties with the media, which it did in this case, the Court
20 has no authority to stop the press and other media from seeking out

1 news sources. This case before the Court certainly had the media's
2 attention, but no more so than other cases that have occurred in the
3 Fourth Judicial District in recent times. The deceased was a 17 year old
4 foreign exchange student from Germany caught inside a garage and
5 shot to death and that, in and of itself, is going to cause a media storm
6 no matter where the incident occurs.

7 The Court denied the motions for a change of venue because the
8 Court believed the Missoula County population of registered voters and
9 driver's license holders was large enough to find 12 jurors and 3
10 alternates who could be fair and impartial in deciding whether the
11 Defendant was guilty, or not guilty, of Deliberate Homicide.

12 In this case, the Court and the parties took great pains to select a
13 fair and impartial jury. The jury pool of 300 potential jurors was
14 composed of registered voters in Missoula County, and holders of
15 Montana driver's licenses living in Missoula County. It is fair to say that
16 the pool of potential jurors in Missoula County consists of more potential
17 jurors than several counties in Montana.

18 The first 150 members of the jury pool was to be voir-dired the first
19 day of trial, and the second 150 members of the jury pool was to be voir-
20 dired the second day. The Court allowed the parties to develop a six-

1 page supplemental questionnaire that was sent to the 300 potential
2 jurors making up the jury pool drawn in Missoula County in this case.
3 The supplemental questionnaire directed potential jurors not to conduct
4 any independent research on the case, or the parties involved.

5 The questionnaire asked potential jurors if they had formed an
6 opinion as to Defendant's guilt or innocence. It asked potential jurors if
7 there was any reason that would make it difficult for them to be fair and
8 impartial. The Court allowed the parties to stipulate upon the excusal of
9 any potential juror, prior to jury selection, based on their answers in the
10 supplemental questionnaire.

11 In November of 2014, the parties met and went through all of the
12 potential jurors who had returned their questionnaires, and stipulated to
13 the excusal of all those who had already formed an opinion of
14 Defendant's guilt or innocence, and all of those who cited a reason why
15 it would be difficult for them to be fair and impartial. Of the 150
16 questionnaires that were distributed for the first day of voir dire, 117
17 were returned to the Court. The Court had already excused several
18 potential jurors from service. The parties then culled all the remaining
19 jurors who had already formed an opinion, and on the first day of voir
20 dire the pool had been reduced to about 46 potential jurors.

1 It was from these 46 potential jurors that the parties were able to
2 successfully seat a fair and impartial 12 member jury and three
3 alternates. The Defendant was given wide latitude and sufficient time to
4 thoroughly question potential jurors during voir dire regarding media
5 coverage of the case up to that date, and whether or not it affected their
6 ability to sit as impartial jurors. The Defendant moved to excuse for
7 cause only a few of the remaining potential jurors, which constitutes
8 further evidence that the potential jurors in the jury pool were not so
9 prejudiced by pre-trial media coverage that a fair and impartial jury could
10 not be seated.

11 Each juror swore upon oath that he, or she, would decide the case
12 based only on the evidence presented at trial, and would not read
13 anything or watch TV pertaining to this case, engage in computer or
14 other research, or discuss the case with anyone, including one another,
15 before the case was submitted to the jurors for deliberation.

16 Furthermore, when it came to the Court's attention that one of the
17 juror's spouse was making comments about her belief as to the
18 Defendant's guilt, her prediction as to what the jury would decide, the
19 Court called the juror into chambers and questioned him. The juror
20 indicated that he had very limited contact with his spouse during the trial,

1 had not talked to his wife about the case, and did not know she had
2 reached an opinion on the Defendant's guilt, what the jury's verdict was
3 going to be, and was vocalizing it to other people in the community.
4 Nevertheless, the Court excused the juror and seated the first alternate
5 in the juror's place.

6 Other than this incident, nothing occurred during trial which would
7 have raised a red flag to suggest that any of the jurors in this case
8 violated the Court's Orders, and dishonored their oaths regarding their
9 duties to remain fair and impartial, and only consider the evidence that
10 was presented at trial.

11 The fact that observers in the courtroom, primarily supporters of
12 the decedent's German (*Turkish?*) birth family, decedent's Montana host
13 family, Defendant's neighbors, and high school students, teachers and
14 coaches, who had a vested interest in the case, reacted by clapping and
15 sounding their approval of the jury's verdict when given. While that may
16 have been disconcerting to the Defendant, it had no impact on the
17 verdict the jury handed down, nor did the audience's clapping when the
18 decedent's parents entered the courtroom to make their victims'
19 statements under oath the following day. Likewise, the audience's
20 reaction to the Court's sentence had no prejudicial impact on the jury's

1 verdict. Prior to announcing the verdict, observers in the courtroom
2 during trial, including the media, maintained proper courtroom decorum
3 by being quiet, attentive, and non-reactive.

4 The Court took control of the impact the media could make on the
5 jurors in the courtroom at trial by allowing only local media to film the
6 trial, and instructing the media prior to the start of trial how the Court
7 expected the media to maintain courtroom decorum that would be as
8 non-obtrusive as possible. The Court appointed its Judicial Assistant,
9 Katie Quam, as media liaison to insure that the media/audience
10 behavior was appropriate and not intrusive on the jury, or the jury space.

11 One of Department 1 rules during courtroom proceedings is that all cell
12 phones and electronic devices be silenced while on the same floor as
13 the courtroom. The only exception to this rule is for the attorneys to be
14 allowed to use their devices for research, and electronic communication
15 with their staff and attorneys concerning the matter before the Court. In
16 the matter at hand, media were allowed to text media content to their
17 place of business. The Court disallowed media to use the electronic
18 devices to photo, or video the proceedings. If the national networks
19 wanted video of the proceedings, they had to make arrangements with
20 the local affiliates or with an independent firm that was recording the

1 trial. Judicial Assistant Quam coordinated the daily proceedings with the
2 media, and the result was no interference with the jury, or the witnesses.
3 Such activity was not readily obvious in the courtroom, and this Court
4 has no reason to suspect that jurors were even aware of it, much less
5 influenced by it.

6 During the course of the trial, there was not one emotional
7 outburst from any witness, nor from anyone in attendance at the trial.
8 After the verdict was read, there was some discomfort caused by an
9 emotional outburst from family, friends and supporters of Diren Dede,
10 the deceased, but the emotional outburst was for a matter of a few
11 seconds, and was after the verdict was announced. In further
12 proceedings, the audience or gallery was admonished about any type of
13 expression within the courtroom, and there were no further incidents.

14 A post-trial motion for a new trial may be filed where events raise
15 new concerns regarding juror impartiality, or the ability to receive a fair
16 trial. Kingman at ¶ 33. With respect to post-trial evaluations of whether
17 prejudice existed, the question is whether jurors' actions ultimately ran
18 counter to a presumption of innocence until proven guilty. Whether the
19 trial proceedings violated the Defendant's constitutional right to the
20 solemnity and sobriety that he is entitled to in a system that subscribes

1 to any notion of fairness and rejects the verdict of a mob, the reviewing
2 court must find that the publicity, in essence, displaced the judicial
3 process, thereby denying the Defendant his constitutional right to a fair
4 trial. Kingman at ¶ 24.

5 Our whole criminal justice system relies on the trust inherent in the
6 jury system, and that the impaneled jurors will set aside any
7 preconceived ideas about the trial process and the Defendant's guilt,
8 and shroud the Defendant with the veil of innocence until such time as
9 the State has met its burden of proof beyond a reasonable doubt. The
10 jurors took an oath that they would not listen to, read, research, or talk
11 about the trial until the case was given to the jury. In the Court's opinion,
12 the jury honored their oaths, and rendered a fair and impartial verdict.

13 The Defendant's arguments require the Court to conclude that the
14 potential jurors in the jury pool were untruthful on their questionnaires,
15 and during the voir dire process, about their prior knowledge of the case
16 and whether they could set aside anything they may have heard about
17 the case and decide the case, based entirely on the evidence presented
18 to them during trial. It also requires a conclusion that the jurors failed to
19 honor their oaths to do so. The Court refuses to do so. The Court
20 believes that the jury in this case was not deceitful, and honored the

1 oath to decide the case fairly and impartially. Thus, the Court concludes
2 the media coverage in this case did not thwart the judicial process.

3 The Court rejects the Defendant's argument that he was denied a
4 fair and impartial trial based on extensive prejudicial media publicity, and
5 alleged community-wide hostility against the Defendant that inherently
6 precluded the ability of the parties to pick a fair and impartial jury in
7 Missoula County.

8 The motion for a new trial is **DENIED**.

9 **Lesser-Included Defense of Mitigated Deliberate Homicide**

10 The second issue the Defendant raises moves the Court, pursuant
11 to MCA § 46-16-702(3), to modify or change the verdict by finding
12 Defendant guilty of the lesser-included offense of Mitigated Deliberate
13 Homicide, based on proof at trial that the Defendant was under extreme
14 emotional stress at the time of the shooting following two prior burglaries
15 of his garage, his mental social anxiety diagnosis, and his sincere belief
16 that he had the right under Montana law to use deadly force to protect
17 his home and his family.

18 Title 25-15-19 MCA, Rule 7(d) of the Uniform District Court Rules
19 provides:

20 (d) Requests for special findings by jury. Whenever a party

1 requests special findings by a jury he/she shall file with the court
2 and serve a copy on all opposing parties, in writing, the issues or
3 questions of fact upon such findings are requested, in proper form
4 for submission to the jury.

5 The State alleged that Markus Kaarma committed the offense of
6 deliberate homicide which includes the lesser-included offense of
7 mitigated homicide. However the state did not consider the offense of
8 mitigated deliberate homicide an issue and the defense strategy was to
9 go for an acquittal on the charge of deliberate homicide and not offer the
10 lesser included verdict form on mitigated deliberate homicide or it would
11 have offered or requested the verdict form. If either party would have
12 requested jury instructions and verdict on the lesser-included charge of
13 mitigated deliberate homicide, the Court would have done so. Neither
14 side did so because of strategic reasons. The defense team, which
15 consisted of five experienced attorneys, two of which, to the Court's
16 knowledge, have defended deliberate homicide cases, deliberately
17 decided not to raise the issue of mitigated deliberate homicide prior to
18 trial, during the trial, or in the offering of instructions. Defense counsel
19 decided the State failed, to reach its high burden of proof that the
20 Defendant was guilty of deliberate homicide beyond a reasonable doubt,

1 and would acquit the Defendant. The defense strategy of "all or nothing"
2 did not pan out when the jury gave them the "all" by way of a guilty
3 verdict to deliberate homicide. Defense cannot now chastise the Court
4 for not interfering with that strategy. The Court consciously did not
5 interfere with that strategy and it disturbs the Court that the defense
6 would now act as though it were an oversight. It was evident to all the
7 parties what the strategy was. To now argue the Court should have
8 intervened, and interfered with that strategy by presenting a verdict for
9 mitigated homicide would interfere with the Defendant's strategy in
10 pursuing his right to a fair and impartial trial. Defense counsel knew what
11 they were doing in this matter, and to now act otherwise is, quite simply,
12 not appropriate, nor proper, and is the proverbial "second bite at the
13 apple."

14 To now argue to the Court that the five attorneys did not know
15 what they were doing, or that the Court should have interfered with their
16 strategy, is without merit. It was evident throughout the trial to everyone
17 involved what the defense strategy was. The motion to reduce the
18 verdict to Mitigated Deliberate Homicide is **DENIED**.

19 Use of Self-Defense Jury Instructions

20 The Defendant's third issue is the argument that the Court erred

1 when the Court gave jury instructions on both use of force statutes.

2 The two relevant statutes raised in the argument are:

3 §45-3-102 MCA. Use of force in defense of person.

4 A person is justified in the use of force or threat to use force
5 against another when and to the extent that the person reasonably
6 believes that the conduct is necessary for self-defense or the
7 defense of another against the other person's imminent use of
8 unlawful force. However, 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 or
to prevent the commission of a forcible felony.

9 §45-3-103 MCA. Use of force in defense of occupied structure. (1) A
10 person is justified in the use of force or the threat to use force against
11 another when and to the extent that the person reasonably believes that
the use of force is necessary to prevent or terminate the other person's
unlawful entry into or attack upon an occupied structure.

12 (2) A person justified in the use of force pursuant to subsection (1)
13 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; or

14 (b) the person reasonably believes that the force is necessary to
15 prevent the commission of a forcible felony in the occupied structure.

16 The defense takes the position that these two statutes are
17 inconsistent and cannot be read together and by giving them both the
18 court has interfered with defense strategy. The Court respectfully
disagrees in two ways.

19 First, it is the court's duty to instruct the jury on the law that applies
20 to the case, not on the defense or prosecution strategy. If the jury were

1 to conclude that Mr. Kaarma was not reasonable in his belief that "the
2 force was necessary to prevent an assault" § 45-3-103(2)(a) MCA upon
3 his person or another then in the occupied structure then Mr. Kaarma
4 was only justified if he acted pursuant to the confines of § 45-3-102
5 MCA.

6 Second, the court does not discern an inconsistency between the
7 two statutes. § 45-3-103 (2)(a) MCA requires that "the person
8 reasonably believes that the force is necessary to prevent an assault
9 upon the person or another then in the occupied structure," while § 45-3-
10 102 MCA requires that in other circumstances the use of "use of force
11 likely to cause death or serious bodily harm only if the person
12 reasonably believes that the conduct is necessary to prevent imminent
13 death or serious bodily injury."

14 In short, neither statute gives one the authority to take the life of
15 another who is committing a burglary unless the person believes that he
16 or another is about to be assaulted or at risk of death or serious bodily
17 injury. One is not allowed to use deadly force because he feels that
18 someone in the commission of a burglary is going to steal something
19 from his garage. Neither statute allows the use of deadly force to
20 prevent the commission of what is commonly called a property crime.

1 The distinction is drawn when one is concerned about the threat of
2 bodily injury and the degree of that threat. However, if the jury were to
3 conclude that the purpose of the intruder was not for the threat of bodily
4 injury and that the defendant was not reasonable in that apprehension,
5 but rather the purpose of the burglary was for a theft of property or
6 merely a trespass then §45-3-102 would be the controlling statute on the
7 justifiable use of force. The jury reasonably concluded and believed that
8 the young man was in the garage not to harm anyone, but to commit a
9 theft or some other minor offense which did not include an assault upon
10 a person and Mr. Kaarma was not acting as a reasonable person when
11 he decided to take the life of Diren Dede. His person nor that of his
12 loved ones were at risk of an assault. The jury had to be instructed on
13 the applicable law as to when deadly force was justified.

14 Based on the foregoing Findings of Fact and Conclusions of Law,
15 IT IS HEREBY ORDERED that:

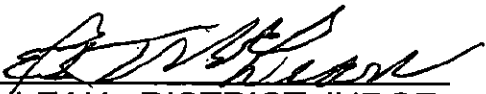
16 (1) The Defendant's Motion for a New Trial (Ct.Doc.167) is
17 **DENIED** as it pertains to Defendant's argument that pursuant to MCA §
18 46-16-702(1), the Defendant was deprived of a fair trial because
19 prejudicial, inflammatory media coverage so saturated the community
20 that the Court should have "presumed" inherent prejudice and a

1 reasonable apprehension that a fair trial was not possible in Missoula
2 County as a matter of law;

3 (2) The motion for a new trial or for the Court to reduce the jury
4 finding of deliberate homicide to mitigated deliberate homicide is
5 **DENIED** for the reasons stated above; and,

6 (3) The jury was properly instructed on the use of deadly force
7 likely to cause death or serious bodily injury and the parameters of the
8 use of that force provided by both statutes and the parties were allowed
9 to present evidence and argue to the jury on their respective theories.
10 The motion for new trial based upon improperly instructing the jury on
11 justifiable use of force is **DENIED**. The jury reasonably concluded that
12 Mr. Kaarma believed that the young man was in the garage not to harm
13 anyone, but to commit a theft or some other minor offense which did not
14 include an assault upon a person and the jury had to be instructed on
15 the applicable law as to when deadly force was justified.

16 DATED this 6th day of March, 2015.

17 
18 ED McLEAN, DISTRICT JUDGE

19 cc: Paul Ryan, Esq.
20 Andrew Paul, Esq.
Nate S. Holloway, Esq.
Brian C. Smith, Esq.

Katie Lacny, Esq.
Lisa Kauffman, Esq.

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