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ADMISSIBLE EVIDENCE: WHO NEEDS IT IF THEY HAVE A JUSTIFIABLE USE OF FORCE DEFENSE?

Thomas J. Bourguignon

No. OP-14-0096
Montana Supreme Court

State of Montana, Petitioner v. Montana Ninth Judicial District Court, Teton County, the Hon. Robert Olson, District Judge, Respondent

Oral Argument: Monday, April 28, 2014, at 10:00 a.m. in the Strand Union Building, Ballroom A on the campus of Montana State University, Bozeman, Montana

I. QUESTION PRESENTED

Can a criminal defendant offer evidence of justifiable use of force by offering a statement made out of court in lieu of testimony—in other words, does Montana's justifiable use of force statute of necessity nullify some of the rules of evidence?

II. FACTUAL AND PROCEDURAL BACKGROUND

The facts[1] are these: Martin Vincent Lau shot and killed Donald Kline at the residence that Kline shared with his girlfriend, Susan Pfeifer. There were no other witnesses to the shooting. Lau called 9–1–1 afterward and admitted to the killing. Lau indicated to the police that he shot Kline in self-defense.

The State charged Lau with felony deliberate homicide. Lau properly provided notice that he would raise the defense of justifiable use of force ("JUOF") and indicated that he was a possible witness at trial.

Four months after the incident, Lau voluntarily read to police officers a typed statement (the "Statement"), prepared with the assistance of his attorney, in which Lau asserted all of the elements necessary for a JUOF defense. The Statement also included allegations about the violent character of the victim—but without any allegations that Lau relied on that violent character when he acted in self-defense.

In the Statement, Lau claimed that Kline had committed about fifteen violent acts against Pfeiffer and her property. Lau alleged that he shot

[1] The facts presented here are drawn from two documents: (1) Atty. Gen.'s Pet. for a Writ of Supervisory Control, Mont. v. Mont. Ninth Jud. Dist. Ct., Teton Co., the Hon. Robert Olson, Dist. Judge at **2–5 (Mont. Feb. 11, 2014) (No. OP-14-0096); and (2) Response of Def. Martin Vincent Lau to Atty. Gen.'s Pet. for Writ of Supervisory Control, Mont. v. Mont. Ninth Jud. Dist. Ct., Teton Co., the Hon. Robert Olson, Dist. Judge at **6–9 (Mont. Mar. 20, 2014) (No. OP-14-0096).

Kline after being punched by Kline. Lau further alleged that, while brandishing his 9mm Carbine, he had warned Kline at least three times not to approach him and had fired a warning shot into the ground before firing a single shot that struck Kline.

Prior to trial, the State filed motions in limine seeking (1) to prohibit Lau from offering the Statement as evidence in lieu of taking the stand and (2) to require Lau to lay foundation before offering evidence of the victim's violent character. Lau argued that this would unconstitutionally require him to testify.

The District Court issued an Amended Order (the "Order") before trial, ruling in Lau's favor and permitting the use of the Statement in lieu of testimony and permitting Lau to offer evidence of Kline's violent character without needing to testify to lay foundation. The Order also ruled that Lau could allow the Statement to infer, without testifying, that he had in fact relied on his knowledge of Kline's violent character.

Prior to trial, the State filed a Writ of Supervisory Control with the Montana Supreme Court, asking the Court to prevent the "gross injustice" of allowing the trial to occur pursuant to the Order.

III. ARGUMENTS FROM THE PARTIES' BRIEFS

The State of Montana's argument on appeal:

1. The Order permits Lau to offer the Statement, which is inadmissible hearsay, as evidence. The Statement is offered in order to "prove the truth of the matter asserted," thus it is hearsay.[2] The District Court was wrong as a matter of law to conclude that the Statement is offered to show "state of mind" because the Statement includes statements of "memory or belief to prove the fact remembered or believed."[3] According to the State, the jury should not be required to assess the reliability of the Statement.

2. The Order permits Lau to offer evidence of the victim's character for violence without laying foundation to make it admissible. There are three elements for admission of evidence of victim's prior violent conduct: (1) self-defense must be at issue; (2) the defendant must lay foundation for the evidence with admissible testimony; and (3) the defendant must present evidence that he relied upon that evidence in defending himself.[4] The State concedes the first issue but argues that the second and third are not met; in fact, the State argues that Lau never alleged the third element, reliance, at all. The State argues that the Order was incorrect to permit the jury to infer the third element; according to

[2] Mont. R. Evid. 801(c).
[3] Mont. R. Evid. 803(3).
[4] Mont. R. Evid. 405; *State v. Daniels*, 265 P.3d 623, 633 (Mont. 2011).

the State, this goes against statutory law[5] and prior caselaw[6] and abdicates the judge's duty to rule on admissibility.

3. The Order misinterprets the state and federal constitutional rights to remain silent[7] and to put on a defense.[8] The State argues, in brief, that whatever evidence a defendant chooses to offer in his defense must be admissible; further, there is no violation of a defendant's constitutional rights if the defendant feels he has no choice but to testify in order to fully present his defense.

Defendant Lau's argument on appeal:

Lau's arguments are each somewhat less nuanced and may be enumerated in brief: (1) by arguing that Lau must testify in order to present his evidence, the State seeks to strip Lau of his constitutional right not to testify and his constitutional right to put on his case; (2) the State has the burden, under Montana law,[9] of proving that Lau was *not* justified in using force; (3) Lau's conduct at the time of the killing falls squarely within the JUOF provision; (4) Lau has cooperated with law enforcement; (5) the district court was right to rule that the Statement is not hearsay because it is not offered to prove the truth of the matter; and, perhaps most important, (6) the rules of evidence cannot apply in their normal sense to the JUOF statute because that would result in an impermissible shifting of the burden of proof onto a criminal defendant.

Amicus MTACDL's argument on appeal:

MTACDL further refined that final argument of Lau's. According to MTACDL, as long as a defendant puts on *any* evidence of JUOF, the State must then prove beyond a reasonable doubt that the use of force was *not* justified.[10] The amicus cited two Montana cases to support its position.[11]

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[5] Mont. Code Ann. § 45–2–103(3) (2013) (the "existence of a mental state may be inferred" by facts and circumstances; however, the State argues, the jury cannot be asked to infer Lau's reliance on his knowledge of Kline's violent character from the *fact* of Lau's knowledge alone).

[6] According to the State, the Order would "nullify" the State's jurisprudence on Mont. R. Evid. 405; *Daniels*, 265 P.3d at 633 (the fact that the State bears the burden of proof "does not eliminate the need [for a defendant] to satisfy foundational requirements for the admissibility of evidence pursuant to the Rules of Evidence").

[7] U.S. Const. amend V; Mont. Const. art. II, § 25.

[8] U.S. Const. amend VI; Mont. Const. art. II, § 24.

[9] Mont. Code Ann. § 46–16–131.

[10] Mont. Code Ann. § 46–16–131.

[11] *Daniels*, 265 P.3d 623 (requires criminal defendant to lay foundation for admitting evidence of justifiable use of force—but the amicus asserts that this evidentiary holding is limited to the facts in *Daniels*); *State v. Rogers*, 306 P.3d 348 (Mont. 2013) (defendant has to testify and lay foundation before cross-examining victim about the victim's character for violent acts. The Court in *Rogers* declines to review the constitutional issue).

IV. ANALYSIS

It is difficult to say why Lau has chosen in this case not to testify. After all, the facts of the case appear to place him squarely within the JUOF defense: there is evidence that the victim had a history of violence, that the victim showed up, angry and unstable, and Lau warned him not to approach several times and fired a warning shot into the ground before shooting the victim. It is even somewhat surprising, given how strong Lau's alleged JUOF defense appears on its face, that the State has chosen to bring this prosecution. Perhaps Lau and his counsel fear that his version of events would fall apart during cross-examination; perhaps the State believes that it could reveal inconsistencies or errors in Lau's version of events memorialized in the Statement.

Nonetheless, although Lau's defense on the merits appears to be strong, his constitutional and evidentiary arguments appear rather weak. Lau's argument that the JUOF statute should cancel out the operation of select rules of evidence is a stretch, to put it mildly. The State correctly points to the policy reasons behind the rule against hearsay: to ensure that only reliable evidence, subject to cross-examination, is presented before a jury. Lau's constitutional argument is equally infirm: yes, Lau has a right not to testify, but the right not to testify does not come with a corresponding right to offer evidence that would only be admissible if he testifies. If you choose not to testify, you may have to leave that evidence behind.

Finally, there is little reason to anticipate that this case will not fall under the facts of *Daniels* and *Rogers*, both of which required the defendant to lay foundation before presenting evidence. This author would be most surprised if the Court follows Lau's invitation to hold that a criminal defendant may present a case comprised entirely of inadmissible evidence simply because he prefers not to testify.

Lower Court: Teton County Cause No. DC 12-009; Honorable Robert Olson, District Court Judge of the Ninth Judicial District, Teton County.

Attorney for Petitioner: Jonathan M. Krauss, Assistant Attorney General, State of Montana.

Respondent: Honorable Robert Olson, District Court Judge of the Ninth Judicial District, Teton County, pro se.

Attorney for Defendant Martin Vincent Lau: Kenneth R. Olson, Olson Law Office, P.C., Great Falls, Montana.

Attorney for Amicus: Jason T. Holden, Faure Holden Attorneys at Law, P.C., Great Falls, Montana; President of Montana Association of Criminal Defense Lawyers (“MTACDL”).