DA 17-0653

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 7

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JEROMEY GLENN JONES,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC 16-627
Honorable Robert L. Deschamps, III, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Alexander H. Pyle, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Mardell Ployhar, Assistant Attorney General. Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Ryan Mickelson, Deputy County Attorney, Missoula, Montana

Submitted on Briefs: October 16, 2019

Decided: January 14, 2020

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 On May 31, 2017, a jury in the Fourth Judicial District Court, Missoula County, found Jeromey Glenn Jones (Jones) guilty of assault with a weapon and aggravated assault. For each count, the District Court imposed a ten-year sentence, with five years suspended, and ran the sentences concurrently. Jones appeals his convictions, raising two issues:

1. *Did the District Court violate Jones's constitutional right to self-representation by refusing his request to represent himself at the February 14, 2017 omnibus hearing, but otherwise allowing Jones to represent himself for the duration of his case?*

2. *Did the District Court err in denying Jones a new trial after the court considered the victim's post-trial recantations and the overwhelming evidence of Jones's guilt produced at trial?*

¶2 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On November 15, 2016, Jones and his girlfriend, Destinee Dietsch (Dietsch), were arguing in their trailer after Dietsch confronted Jones about pornography she discovered on his phone. Jones became violent, punching and kicking Dietsch several times; slamming her head into the trailer wall; and strangling Dietsch, nearly causing her to pass out. Jones used a knife to cut Dietsch's face around her eye and then threatened to kill her, holding the knife to her face. Dietsch escaped and, despite cold weather, ran to the Town Pump a half-mile away without shoes. A Town Pump employee, Ayla Godoy, saw Dietsch come "stumbling through the door" with "blood all over her face." Dietsch was very upset and exclaimed, "he's going to kill me." When a store employee who knew Jones and

Dietsch announced that Jones was coming, Dietsch tried to crawl over Godoy and a table to get away from him. Employees contacted the police and attempted to "close her wounds" so Dietsch was "not bleeding everywhere."

¶4 Law enforcement responded immediately. Officers identified Dietsch, who was distraught and crying. While the officers were talking to Dietsch, Jones entered the store. Jones was defensive and voiced displeasure at law enforcement, clenching his fists and standing in a "bladed" position. Following his arrest, a knife was found in Jones's pocket that matched the description Dietsch gave of the knife used to cut her. Officers also observed Jones had numerous scratch marks up and down his forearms, wrists and elbows, which were consistent with defensive wounds made by a victim trying to escape an assault.

¶5 Dietsch was taken to the hospital for treatment. She had a broken nose; her face was swollen; she had bruising around her neck; and scratches, abrasions, and bruises all over her back. Dietsch explained to a nurse that she was kicked, strangled, and abused by her boyfriend.

¶6 Dietsch gave law enforcement permission to search the trailer where she lived with Jones. Inside, officers observed blood on a sheet and damage to the wall caused by the impact of Dietsch's head during the assault.

¶7 Jones was initially represented by public defender Reed Mandelko (Mandelko). On January 10, 2017, the District Court held an omnibus hearing and Mandelko prepared an omnibus form. Jones indicated he would not sign the form and that he did not want Mandelko to represent him. Jones said he wanted to represent himself. The court

expressed it was reluctant to allow Jones to represent himself and questioned Jones extensively regarding his educational background and legal training. The court warned Jones that other defendants who have chosen to represent themselves "end up making a mess of things" and asked Jones, "[a]re you willing to conform with the rules that I set down on how to proceed in a courtroom?" Jones replied, "[y]es, sir." The court granted Jones's request to represent himself and continued the omnibus hearing one week to allow Jones to read the omnibus form and make any changes he saw necessary.

¶8 On January 17, 2017, the court held another omnibus hearing. Jones represented himself and Mandelko was present as standby counsel. The court asked Jones if he had an omnibus form ready. Jones replied, "I do have the omnibus form but it was what Mr. Mandelko signed and filled out and I do not agree with that." The court responded that "you have the ability, sir, as your own attorney to fill out that omnibus form" and the court tried to go through the omnibus form with Jones. Jones, however, was unresponsive and did not answer the court's questions. Jones kneeled down on the floor of the courtroom, crying. The court expressed concern "in view of this behavior in the courtroom, if we should have the defendant's fitness evaluated." Jones stated, "I'm sorry, your honor, I just got given something that I can't get my head right." Following Jones's emotional behavior, the court concluded, "I don't find that you're at the minimum, competent to represent yourself." Jones replied, "I'm really not sir." As a result, the court reinstated Mandelko as counsel. Jones then indicated, "I want nothing to do with this man."

Mandelko requested a two-week continuance of the omnibus hearing. The court rescheduled the omnibus hearing, again stating, "I really am concerned about his fitness."

¶9 The record reflects a third omnibus hearing was held February 7, 2017, although Jones has not provided this Court with a transcript. The minutes, however, indicate that Mandelko presented the court with a completed omnibus form, which Jones refused to sign. The court apparently questioned Jones, but he refused to answer. After this omnibus hearing, Mandelko filed a motion requesting a hearing on Jones's desire to represent himself. The court scheduled a hearing for February 14, 2017.

¶10 On February 14, 2017, Mandelko indicated to the court that Jones still wished to represent himself. The court recalled that Jones had previously "melted down" and was concerned that Jones might not be competent to represent himself. Mandelko explained that Jones was emotional because for a brief time there was a question whether Dietsch was alive. Mandelko suspected that Dietsch had committed suicide due to information he discovered on Facebook. Mandelko had been corresponding with an investigator to confirm Dietsch's death. Jones was provided these emails during the omnibus and mistook the contents to indicate that Dietsch had in fact committed suicide. The Court asked Jones, "[w]ell, tell me at this point then, why you want to represent yourself." Jones replied:

> Because, I don't know what to believe, your honor. I recently got a letter from the victim's so-called sister, as well, stating that she is dead and stating that she talked to the district attorney and to my attorney afterwards as well. Tell you the truth, all I want – the best way for me to fight this case is to be on the streets and actually get OR [own recognizance] to fight this case on the streets, to grab my computer and grab all my proof.

The court replied: "Well, that's a separate issue. The question is self-representation." The court stated Jones's answer was "irrelevant" to self-representation and denied Jones's motion to represent himself. After noting an affirmative defense of self-defense had been asserted, the court approved the omnibus form.

¶11 Jones renewed his motion to proceed without counsel and the District Court set another hearing for March 14, 2017. At the hearing, the court informed Jones of his right to an attorney as well as his right to testify. The court asked if Jones understood that the court could not give him help with his proceeding. Jones indicated he understood. The court inquired if Jones was waiving his right to counsel "voluntarily and intelligently" and granted Jones's request to represent himself when Jones confirmed he was. Next, Jones withdrew his affirmative defense of justifiable use of force and indicated he would not be putting on evidence of his good moral character. The court ordered the omnibus form to be modified to reflect these changes. The court instructed Jones, "[e]ven if you're representing yourself, I'm going to prohibit you from having personal contact with the victim. If you're going to contact her for some reason, you're going to have to find some private investigator or attorney or somebody to contact her."

¶12 At trial, the court allowed Jones to interview Dietsch during a recess prior to her testimony. The court stated, "[h]e's representing himself. He has a right to certainly interview the victim." As for the parameters of the interview, the court ruled "it shouldn't be a one-on-one. And I will authorize that not only law enforcement but [the prosecutor] be present during the course of that interview." The prosecutor stated, "I would be

concerned, based on some other correspondence that I have received, that there could be potential for intimidation or other things." The court admonished Jones only to question Dietsch about what her testimony would be and not to intimidate Dietsch. The court also instructed that the interview should be recorded. Jones did not provide a transcript of the interview to this Court.

¶13 Dietsch testified at Jones's trial. At first, she was non-cooperative, indicating she did not want to testify against Jones and did not remember the details of the assault because she "blacked out." Later in the trial, the State recalled Dietsch. This time she testified that Jones hit her, choked her, and threw her around "like a rag doll." She described how Jones hit her head against the wall and held a knife to her face, cutting her eye. Dietsch explained that she ran barefoot in the cold to Town Pump to escape and get help, telling employees that Jones was going to kill her. The state asked Dietsch, "you had said earlier that you didn't remember. Is there a reason you said that earlier?" Dietsch replied, "[b]ecause I still love him." On cross examination, Jones asked Dietsch if she ever made a statement that he was "drugged up by the neighbors." Dietsch replied, "I looked more into it after you sent me letters saying that they did." The District Court sustained the State's objection to this line of inquiry from Jones on the basis that it was hearsay. Referring to her statement to law enforcement, Jones also asked Dietsch, "[w]ho did you tell that they can't use your statement?" Dietsch replied, "anybody who had it." Jones asked Dietsch what her present mental state was, and she replied, "not very well." When Jones asked why, Dietsch replied

"[b]ecause of what I have to deal with every night I go to bed. Because every time I close my eyes I see your face. It's because of the things you did to me."

¶14 The State called several other witnesses who substantiated that: Dietsch was barefoot when she ran into the Town Pump; she came into the store terrified, bloody, and injured; Dietsch told officers and medical personnel Jones had beaten her; there was blood on a sheet and damage to the wall of their trailer; and Dietsch sustained a broken nose, cuts, and bruising. Jones did not testify.

¶15 After trial, Dietsch called the prosecutor to inform him that she "made it up," referring to her allegations against Jones. She told the prosecutor she went off "the cliff," which caused her injuries, and she lied in order to prevent Jones from moving to California without her. The prosecutor assigned an investigator to follow up with Dietsch. The investigator interviewed Dietsch on June 13, 2017 and reported that "[Dietsch] wanted to go to court and lie at sentencing in an effort to get Jones the lightest sentence possible." The investigator related that Dietsch believed that if she told the judge it had not happened, he would let Jones out of jail sooner. Dietsch confirmed she was "terrified" during the attack.

¶16 At sentencing, the Court addressed Jones's "Notice of Appeal and Motion for a New Trial" in which Jones argued for a new trial based on Dietsch's inconsistent statements and recantations. Jones's motion stated: "I have statement by alleged victim saing [sic] 'she made it up' 'lied to all the hearsay witnesses' 'and self inflicted [sic] the injuries' and 'I was asleep when this occurred. . . .'" In response to Jones's allegations, the court

acknowledged Dietsch's recantations, stating "I know that she's made various inconsistent statements. She actually made various inconsistent statements during the course of this trial." However, the District Court found Jones's argument unpersuasive, concluding that the evidence against Jones was overwhelming. The District Court denied Jones's motion for a new trial.

STANDARDS OF REVIEW

¶17 The validity of a *Faretta*[1] waiver is a mixed question of law and fact reviewed de novo. *State v. Barrows*, 2018 MT 204, ¶ 9, 392 Mont. 358, 424 P.3d 612 (citation omitted). Before a court may grant a request for self-representation, it must first determine that the defendant's waiver of the right to counsel is unequivocal, as well as voluntary, knowing, and intelligent. *State v. Langford*, 267 Mont. 95, 99, 882 P.2d 490, 492 (1994). Denial of the constitutional right to self-representation on the basis that a defendant could not adequately represent himself constitutes reversible error. *State v. Swan*, 2000 MT 246, ¶ 18, 301 Mont. 439, 444, 10 P.3d 102, 105 (citation omitted).

¶18 This Court reviews a district court's denial of a motion for a new trial for an abuse of discretion. *State v. Chavis*, 2019 MT 108, ¶ 7, 395 Mont. 413, 440 P.3d 640. A trial court's interpretation of the law, however, is reviewed de novo. *State v. Johnson*, 2000 MT 290 ¶ 13, 302 Mont. 265, 14 P.3d 480.

[1] *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975).

DISCUSSION

¶19 *1. Did the District Court violate Jones's constitutional right to self-representation by refusing his request to represent himself at the February 14, 2017 omnibus hearing, but otherwise allowing Jones to represent himself for the duration of his case?*

¶20 Jones first asked to proceed without counsel at the January 10, 2017 omnibus hearing. The District Court granted his request and continued the omnibus hearing to allow Jones time to prepare. At the second omnibus hearing on January 17, 2017, the District Court, based on Jones's irrational and emotional behavior during the hearing, reappointed counsel and questioned whether Jones was fit to proceed. Jones was unresponsive to the court's questions and highly distraught. His demeanor and actions justified the court's concern. Based on the record, we have no difficulty concluding that the District Court was correct in appointing counsel and proceeding cautiously forward.

¶21 Thereafter, Jones again requested to waive counsel and the District Court set a hearing on his request for February 14, 2017. Jones contends that during its *Faretta* colloquy at this hearing the District Court improperly included inquiries regarding Jones's "lawyering skills and education" and that Jones properly waived his right to counsel. Jones contends this ultimately resulted in reversible error unsusceptible to harmless error review.

¶22 A defendant has a right to represent himself in a state criminal trial upon a defendant's waiver of his Sixth Amendment right to counsel and an unequivocal invocation of the right to self-representation. *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541. This is generally referred to as a *Faretta* waiver. To effectuate a *Faretta* waiver the invocation of the right to self-representation must be unequivocal, voluntary, knowing, and intelligent.

Barrows, ¶ 20. "The competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." *Godinez v. Moran*, 509 U.S. 389, 399, 113 S. Ct. 2680, 2687 (1993). Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541 (citation omitted).

¶23 When addressing the sufficiency of the District Court's colloquy, we find our prior holding in *State v. Swan*, 2000 MT 246, 301 Mont. 439, 10 P.3d 88, is instructive. In *Swan*, during a *Faretta* colloquy, the district court inquired as to why Swan wished to represent himself, to which Swan replied he wanted different counsel and "access to the law library in my own defense." *Swan*, ¶ 10. The district court responded that representation by an attorney did not come with access to the law library. The court instructed, "[i]f you proceed on your own, you're going to be held to the same standards that an attorney would be held. Now, if you want access to-Primarily, you'll be given limited access to a law library, but you'll not be represented by an attorney. Do you understand that?" *Swan*, ¶ 10. Swan indicated he did. The court asked Swan if he wished to represent himself. Swan responded that he did. *Swan*, ¶ 10. The court expressed doubt that Swan was capable of representing himself and, further, expressed that experienced counsel was needed due to the "nature and seriousness of the offense. . . ." *Swan*, ¶ 11.

¶24 This Court affirmed the district court's denial of Swan's request of self-representation, holding:

> While it is true that the District Court expressed doubt about the wisdom of Swan's wish to represent himself, those comments were not made, and the court did not deny the request, until after Swan had clarified that what he actually wanted was to have different counsel appointed to represent him and to be given access to the law library to assist in his own defense. What the District Court did not say in making its ruling, but what is apparent from the record, is that Swan's was an in-the-alternative request for self-representation.

Swan, ¶ 19. The Court explained that although Swan asked to be allowed to represent himself, what he actually hoped for was that new counsel would be appointed to represent him and that he would be allowed to use the law library. The "record as a whole" revealed that Swan's request for self-representation was "anything but unequivocal." *Swan*, ¶ 25.

¶25 Here, as in *Swan*, the District Court expressed doubt that Jones was capable of representing himself. The record indicates the District Court did not believe Jones possessed the requisite education and legal skills to effectively defend himself. It is true this ultimately "has no bearing upon his competence to *choose* self-representation." *Godinez*, 509 U.S. at 400, 113 S. Ct. at 2687. (Emphasis in original.) However, as in *Swan*, the District Court did not express these doubts, nor deny Jones's request, until after Jones clarified plainly his misguided motivation for waiving his right to counsel. Specifically, Jones expressed he wished to represent himself because he could not ascertain whether Dietsch was alive, and further that all he wanted was to "get [out on his own recognizance] to fight this case on the streets," a fact this Court agrees with the District Court is not relevant to waiver.

¶26 We conclude Jones's response to the District Court's question of why he wanted to represent himself demonstrated Jones did not understand the right he was relinquishing. Montana law requires District Courts to "ascertain[] that the waiver [of the right to counsel] is made knowingly, voluntarily and intelligently." Section 46-8-102, MCA. Here, it is apparent from the record that Jones perceived a correlation between self-representation and being released from jail, where in fact there was none. Thus, his waiver could not be said to be "knowingly" made. The record demonstrates that the District Court correctly ascertained Jones had not made a valid waiver. Accordingly, the District Court did not violate Jones's right of self-representation when it denied his request at the February 14, 2017 omnibus hearing.

¶27 Moreover, when Jones renewed his request of self-representation, the District Court set another hearing on March 14, 2017. At that hearing, the District Court found Jones had intelligently, knowingly, and voluntarily waived his right to counsel and granted Jones's request of self-representation. Thereafter, Jones represented himself for the duration of the proceedings. Accordingly, we conclude, based on the entire record, that Jones's right of self-representation was not violated.

¶28 As a final consideration of Jones's right of self-representation, the record here compels certain observations. The U.S. Supreme Court has recognized a defendant's choice of self-representation is not "wise, desirable or efficient." *Martinez v. Court of Appeals*, 528 U.S. 152, 161, 120 S. Ct. 684, 691 (2000). Yet in *Faretta,* the Supreme Court upheld it as a fundamental right out of "respect for the individual. . . ." *Faretta*, 422 U.S.

at 834 95 S. Ct. at 2540. The defensibility of this policy justification may be diminished, however, when the defendant is no longer the only soul "who bears the personal consequences" of his choice to self-represent. *Faretta*, 422 U.S. at 835 95 S. Ct. at 2541. Enforcement of the self-representation right may become problematic where it affords a defendant the opportunity to personally intimidate or interrogate the victim.

¶29 Here, the District Court had the unenviable task of ensuring Jones, who stood accused of brutally beating Dietsch, "had a fair chance to present his own case in his own way," including interviewing Dietsch. *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S. Ct. 944, 950 (1983). At trial, the court allowed Jones to interview Dietsch during a recess prior to her testimony. The court stated, "[h]e's representing himself. He has a right to certainly interview the victim." However, the court also recognized, "[e]ven if you're representing yourself, I'm going to prohibit you from having personal contact with the victim. If you're going to contact her for some reason, you're going to have to find some private investigator or attorney or somebody to contact her." As for the parameters of the interview, the court ruled "it shouldn't be a one-on-one. And I will authorize that not only law enforcement but [the prosecutor] be present during the course of that interview." The court further admonished Jones, "[y]ou've got a right to question her about what her testimony will be. You don't have a right to intimidate her."

¶30 Other measures may also be suitable to protect a defendant's right of self-representation and to protect a victim from further abuse. The appropriateness of any

particular measure will depend on the facts and circumstances of each case.[2] We only observe, that here, the District Court foresaw the need for some measures to be taken and appreciated the competing interests of protecting a victim from further abuse by her perpetrator, while nonetheless protecting a defendant's right of self-representation.

¶31 *2. Did the District Court err in denying Jones a new trial after the court considered the victim's post-trial recantations and the overwhelming evidence of Jones's guilt produced at trial?*

¶32 Section 46-16-702(1), MCA, authorizes a trial court to "grant the defendant a new trial if required in the interest of justice." To prevail on a motion for a new trial grounded on newly discovered evidence, the defendant must satisfy a five-part test: (1) the evidence must have been discovered since the defendant's trial; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial has a reasonable

[2] By way of example only, some courts have upheld appointment of standby counsel to question victims in order to avoid having victims endure questioning from their alleged attacker. *See Fields v. Murray*, 49 F.3d 1024, 1034-36 (4th Cir. 1995) (affirming the trial court's refusal to allow the self-representing defendant to question children that he sexually abused as well as the decision to appoint an attorney to pose the questions that the defendant wished to ask); *Applegate v. Commonwealth*, 299 S.W.3d 266, 273 (Ky. 2009) ("Even if a defendant is granted the right to cross-examine witnesses, there is no constitutional right to personally cross-examine the victim of his crimes."); *Partin v. Commonwealth*, 168 S.W.3d 23, 28-29 (Ky. 2005) (approving the refusal to allow the self-representing defendant to personally cross-examine his wife, twenty-year-old son, and other adult victims whom the defendant held at gunpoint). Other courts have held standby counsel's participation in this capacity during trial infringes on the defendant's self-representation right. *See State v. Folk*, 151 Idaho 327, 336-39, 256 P.3d 735, 744-47 (Idaho 2011) (reversing a conviction for lewd conduct with a child where defendant was required to write down any questions he had for the alleged victim and have standby counsel read them because this practice destroyed the jury's perception that the defendant is representing himself).

probability of resulting in a different outcome. *State v. Clark*, 2005 MT 330, ¶ 34, 330 Mont. 8, 125 P.3d 1099.

¶33 Jones contends that the *Clark* factors are satisfied and a new trial is required. Jones further contends that because the District Court did not analyze the post-trial recantations under *Clark*, the court erred by denying his motion for new trial. The State "acknowledges" that the District Court did not cite to *Clark* in its denial of a new trial but asserts "it is unnecessary to remand the case to the District Court because the court explained its reasons for denying the motion" and these reasons "demonstrate that Jones's new evidence does not satisfy the fifth element of the *Clark* test." We agree with the State.

¶34 The State concedes the first four *Clark* factors are met and, accordingly, focuses its analysis on the fifth factor. "The fifth element, pertaining to reasonable probability of a different outcome, is most likely to be the crux of any district court's evaluation of new trial motions based on new evidence." *Clark*, ¶ 36. Further, it is understood that the recanting witness lacks credibility by virtue of the fact that he has already lied at least once, (citation omitted), but the function of the district court in this instance is to examine how the recanting witness's credibility may affect a new jury's verdict. *Clark*, ¶ 37.

¶35 Although the District Court did not reference the *Clark* factors in its denial, here, in contrast to *Clark*, we are able to "glean from the record the District Court's reasons for denying the motion for a new trial." *Clark*, ¶ 42. Importantly, the District Court heard testimony from Dietsch during trial that she loved Jones, was trying to protect Jones, and did not want to testify against him. The state asked Dietsch, "you had said earlier that you

didn't remember. Is there a reason you said that earlier?" Dietsch replied, "[b]ecause I still love him." As a result, Dietsch testified inconsistently about the circumstances of the assault, first testifying she could not remember but then later stating Jones hit her, choked her, and threw her around "like a rag doll." She testified he hit her head against the wall and held a knife to her face and cut her eye. Because it is "understood that the recanting witness lacks credibility," *Clark*, ¶ 37, the weight of Dietsch's post-trial recantation is diminished when considered in light of the inconsistencies of her trial testimony.

¶36 Also, the State's investigator interviewed the victim on June 13, 2017, and Dietsch again recanted stating "she wanted to go to court and lie at sentencing in an effort to get Jones the lightest sentence possible. She believed that if she told the judge it had not happened, he would let Jones out of jail sooner." Thus, the weight of Dietsch's post-trial recantation was further diminished. Lastly, Jones contends this report was "unsigned and unsworn" and therefore "meriting little if any weight." However, Jones's statements to the prosecutor indicating she "made it up" were similarly "unsworn."

¶37 In addressing Jones's motion, "the function of the district court [was to] examine how the recanting witness's credibility may affect a new jury's verdict." *Clark*, ¶ 37. The court stated it knew that Dietsch had made "various inconsistent statements." These statements included the inconsistent statements at trial; Dietsch's first post-trial recantation that she "made it up"; and the second recantation contained in the investigator's follow-up report, that she did not make it up and was "terrified." After considering the evidence at trial, the new evidence, and the State's response to the new evidence, the court's task was

to "examine how the recanting witness's credibility may affect a new jury's verdict" using the "reasonable possibility" standard. *Clark*, ¶ 34. "[T]he reasonable probability standard adopted [in *Clark*] properly leaves to the trial judge determinations of weight and credibility of the new evidence, and to consider what impact, looking prospectively at a new trial with a new jury, this evidence may have on that new jury." *Clark*, ¶ 36.

¶38 To this point, the District Court stated, "I want to say that the evidence against you appeared overwhelming." "The court does not pass on the ultimate truthfulness of the recanting testimony [. . .] the court leaves this determination to the fact-finder." *Crosby v. State*, 2006 MT 155, ¶ 21, 332 Mont. 460, 139 P.3d 832. However, it follows from the District Court's observation that the trial evidence "appeared overwhelming," that two post-trial and inconsistent recantations from Dietsch, who had already testified inconsistently at trial, would have a low impact on a new jury. The record shows the state's case was in no way dependent on the reliability of the testimony of Dietsch. Rather, there was extensive forensic evidence depicting Dietsch's injuries; defensive injuries to Jones; damage to the inside of the trailer; video footage of Jones's interaction with law enforcement; and testimony from witnesses at the Town Pump, investigating officers, and medical personnel at the hospital where the victim was treated. "[R]easonable probability" called for the District Court to look to all the evidence in the case for its weight and credibility and determine, given the addition of new evidence, what "impact" the new evidence would have on the jury. *Clark*, ¶ 36. The District Court did not specifically find on the record that the evidence did not indicate "a new trial ha[d] a reasonable probability

of resulting in a different outcome." *Clark*, ¶ 37. However, the District Court still reached the correct conclusion that the evidence "appeared overwhelming" and that a different outcome, following a new trial, was highly unlikely. This Court concludes the District Court did not abuse its discretion in denying Jones's motion for a new trial. *Chavis*, ¶ 7.

CONCLUSION

¶39 We conclude that Jones's right of self-representation was not violated. We further conclude the District Court correctly applied the law and did not abuse its discretion in denying Jones's motion for a new trial.

¶40 Jones's convictions are affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ JIM RICE