IN THE SUPREME COURT OF THE

STATE OF MONTANA

Supreme Court Cause No. DA 09-0484

STATE OF MONTANA, Plaintiff/Appellee, v. DUANE RONALD BELANUS, Defendant/Appellant.	**APPELLANT'S OPENING BRIEF**

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,

LEWIS AND CLARK COUNTY, THE HONORABLE DISTRICT JUDGE

JEFFREY SHERLOCK, PRESIDING

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Submitted: March 9, 2010

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INTRODUCTION

"Don't worry about it . . . Like he said, we all do dumb shit when we're fucked up."[1]

In the 2009 movie *The Hangover*, the ultimate Las Vegas bachelor party goes bad when the groomsmen wake up in their suite at Caesar's Palace with a tiger in the bathroom, a 6-month old baby in the closet, and the groom nowhere to be found. What's more, nobody can remember the previous night's events due to the effects of the alcohol they ingested together with a drug that suppresses memory. While attempting to find the missing groom, the groomsmen discover that they stole the tiger in their bathroom from former professional heavyweight boxer, Mike Tyson, during their drunken revelry. Being no stranger to the problems that can be caused by alcohol, Tyson understands how it can affect one's judgment and forgives them for stealing his tiger.

That is the essence of this appeal.

The facts of this case revolve around Appellant's conduct while intoxicated. The legal question presented is whether a jury – like Mike Tyson in *The Hangover* – should be able to consider evidence of intoxication on the issue of mental state.

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[1] Mike Tyson, *The Hangover*

It calls upon the Court to once again consider the issue presented in *State v. Egelhoff* (1995), 272 Mont. 114, 900 P.2d 260, reversed by *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996), but this time on independent state constitutional grounds. The Appellant asks the Court to:

1. reverse *State v. McCaslin* (2004), 322 Mont. 350, 96 P.3d 722 under an analysis utilizing the express right to defend guaranteed by Sections 3 and 24 of Article II of the Montana Constitution;
2. vacate Appellant's judgment of conviction; and
3. order a new trial with instructions that would allow the jury to consider evidence of intoxication on Appellant's mental state as it relates to the elements of the offense.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the express right to defend guaranteed by Sections 3 and 24 of Article II of the Montana Constitution renders unconstitutional § 45-2-203, MCA's prohibition against allowing a jury to consider an intoxicated condition when determining the existence of a mental state that is an element of the offense.

2. Whether the District Court abused its discretion when allowing a highly inflammatory and prejudicial audio tape to be played to the jury over the Defendant's M.R.E. 403 objection.

STATEMENT OF THE CASE

This case results from a night of heavy drinking and pill popping by Appellant Duane Belanus and his girlfriend, Tracy Chandler. What was supposed to be a nice date night went horribly awry during the early morning hours of August 3, 2008, because they were both extremely intoxicated. Based upon those events, Belanus was charged by Information on August 28, 2008, with the following offenses:

Count 1: Sexual intercourse without consent in violation of § 45-5-503, MCA;

Count 2: An Aggravating Circumstance by inflicting bodily injury upon Chandler in violation of § 45-5-503(3)(a), MCA;

Count 3: Aggravated kidnaping by secreting Chandler or holding her in a place of isolation or by using or threatening to use physical force with the purpose of inflicting bodily injury on her or terrorize her in violation of § 45-5-303(1)(d), MCA;

Count 4: Burglary by knowingly entering or remaining unlawfully in an occupied structure (Chandler's residence) in violation of § 45-6-204, MCA;

Count 5: Theft by exerting unauthorized control over Chandler's truck

by using, concealing, or abandoning it knowing that the use, concealment, or abandonment would deprive the owner of the property in violation of § 45-6-301(1)(c), MCA; and

Count 6: Tampering with or fabricating physical evidence by, while believing that an official proceeding or investigation was pending or about to be instituted, altering, destroying, concealing, or removing a record, document, or thing with the purpose to impair its veracity or availability in violation of § 45-7-207(1)(a), MCA.

Information; Case Register Report, Doc. 2.

Both Belanus and Chandler were extremely intoxicated when these things occurred. The specific mental states of "knowingly" and "purposely" were inherent in the charges, and Belanus intended to defend the charges on the ground that he did not know that Tracy Chandler did not "consent" to the same kind of sexual conduct that they had engaged in many times in the past. Belanus sought to introduce evidence of intoxication to rebut the State's claim that he "knowingly" had sexual intercourse with Chandler "without consent," or knowingly kidnaped her, or knowingly committed burglary. Notwithstanding § 45-2-203, MCA (an intoxicated condition may not be taken into consideration in determining the

existence of a mental state which is an element of the offense), Belanus relied upon the Montana Constitution's guarantee of the right to defend as the basis for presenting this evidence and argument at trial.

Accordingly, on May 20, 2009, Belanus filed his motion in limine on the issue of whether the jury could consider evidence of his intoxication when deciding whether he acted "knowingly" – in particular, whether he knew that Tracy Chandler did not consent. Belanus sought the Court's pretrial permission to make that argument to the jury at trial. Case Register Report, Doc. 30.

The State opposed this request and on May 28, 2009, the Court held a hearing on Belanus's motion. *Transcript of Hearing*, 19:19 to 22:22 (May 28, 2009).

On June 5, 2009, the District Court denied Belanus' motion. The District Court specifically ruled:

> Next, Defendant moves to be allowed to introduce evidence of intoxication as it might bear on Defendant's mental state. Defendant suggests that he should be allowed to introduce evidence of intoxication for the jury to consider whether he acted knowingly. Specifically, Defendant suggests that this goes to whether he knew that T.C. was consenting to the acts in question.
>
> The law in Montana, however, is clearly settled that evidence of intoxication cannot be taken into consideration in determining the existence of a mental state. Section 45-2-203, MCA, provides:

> A person who is in an intoxicated condition is criminally responsible for the person's conduct, and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the defendant proves that the defendant did not know that it was an intoxicating substance when the defendant consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.
>
> See also, *State v. McCaslin,* 2004 MT 212, 322 Mont. 350, 96 P.3d 722 (overruled on other grounds). This motion will be denied.

Order on Various Pretrial Motions, Appendix 1; Case Register Report, Doc. 44.

With this pretrial ruling limiting the scope of Belanus' defense, a jury trial was held between June 8 and 12, 2009, without Belanus defending by arguing intoxication as it might bear on his mental state during the events of August 2 and 3, 2008. *Trial Trans*., 721:14-24. The jury returned its verdict of guilty on all counts. Case Register Report, Docs. 46-51.

A sentencing hearing was held on August 13, 2009. Duane Belanus was sentenced to life in prison without parole on Counts 1, 2, and 3; 10 years suspended on Count 4; 6 months Lewis and Clark County Jail on Count 5; and 10 years prison on Count 6. Case Register Report Docs 62; *Sentencing Hearing Trans.*, (Aug. 13, 2009), 95:10 to 97:4.

A written Judgment and Commitment was filed on August 24, 2009. *Judgment and Commitment*, Appendix 2; Case Register Report Docs. 64.

Duane Belanus timely filed his Notice of Appeal to this Supreme Court on August 26, 2009. Case Register Report, Docket No. 66.

STATEMENT OF THE FACTS

Duane Belanus was born and raised in North Dakota. He has an associates degree in automotive service technology and is a master mechanic. He moved to Butte in 2005 to work at Lithia Dodge where he was employed for two years. He then moved to Helena where he worked at J-4 Automotive, Kev's Automotive, and Smith's Transmission, and was able to make more money there than he did at Lithia. After he moved to Helena he met Tracy Chandler, who worked as the receptionist at Associated Dermatology. She called him at work and they began dating. *Trial Trans*., 190:15 to 192:16; 551:23 to 556:23.

Their relationship progressed quickly. They became intimate on the second date, always called each other, wrote little notes to each other, had lunch together, went to movies, dinners, took trips together, and would stay at each others' houses many, many times. They also talked about marriage and having a family together. They both went and looked at rings in many different jewelry stores. *Id.*, 268:1 to 270:16; 557:2 to 558:21. They even gave each other the keys to their residences. *Id.*, 247:6 to 254:19; 559:13 to 560:6.

Their relationship was also highly sexual. They engaged in role playing and

bondage. They purchased and used restraints, lingerie, lubricants, warming and cooling fluids, an anal wand, anal lube, nipple rings, and a vibrating ring from a pornographic store in Bozeman when they took a trip there for a Valentine's Day romantic weekend. They subsequently utilized the anal wand approximately 30 to 40 times during sex.[2] *Id*., 262:22 to 265:1; 270:17 to 282:19; 282:25 to 284:4; 560:7 to 566:14; 676:9 to 677:14.

One of Duane's and Tracy's favorite past times was "country cruising," which would involve them buying a 12-pack or sometimes two 12-packs of Corona Light beer with lime juice, and they would drive slowly up into the mountains, going up to Park Lake or elsewhere to enjoy the scenery, especially at night. *Id*., 584:6-17.

During this period of time they wrote numerous love letters to each other and they both had equal status in their relationship. They frequently did drugs and alcohol together. In April or May of 2007, she became pregnant and had an abortion. Thereafter she and Duane entered into a written contract indicating that they would only have children if they were married, and if she became pregnant, then she would have an abortion. *Id.*, 566:15 to 573:1.

The two were also very jealous of each other and had problems when one

[2] Tracy only admitted to using it vaginally.

would see or become romantically involved with another person. Once, when the subject of cheating was addressed, Tracy recorded a telephone conversation between the two. During this conversation Duane, while intoxicated, made threats and ranted against Chandler in an obscenity laced tirade due to her cheating on him. The beginning and the end of the conversation are not recorded, and the only thing that is heard is the part where Duane is angry about the cheating. *Id.*, 573:2 to 577:11; 581:4-23. The vast majority of their problems arose when they were drinking and taking pills and when they became jealous of other people. *Id.*, 254:20 to 259:6; 281:20 to 282:24; 581:18-22; 583:14 to 584:5.

At trial, over Belanus' Rule 403, M.R.Evid., objection, the Court allowed the Prosecution to play this audio recording to the jury. Duane was drunk and made threats, used profanity, and ranted against Chandler. *Id.*, 182:22 to 189:22; 215:17 to 219:12; 239:22 to 247:3; State's Exhibits 19 and 19A. The recording was highly inflammatory and prejudicial and gave the Prosecution the opportunity to argue that Belanus' conduct on August 3, 2008, was consistent with his ranting during the telephone conversation. In particular, the Prosecution used it to prove Belanus' "knowing" and "purposeful" mental state on August 3, 2008.

August 2nd, 2008, was a Saturday, and Tracy and Duane planned to spend Saturday evening together on a nice date. Tracy had spent the previous night at

Duane's house, and they watched a movie, had dinner, and went to sleep. Tracy spent the following day at Duane's house while Duane went to work at Kev's Auto Sales. He worked until about 3:00 or 4:00 p.m. when he returned home. After work Duane wanted to get some parts from Al Rose's junkyard for his car, and so he picked Tracy up at his house and brought her back to her house because they were going to have a nice date night. Tracy went home to get ready. After he got the parts for his car at Al Rose's junkyard, Duane also went home and got cleaned up. He then called Tracy and returned to her house to pick her up. On the way to Tracy's house Duane bought a 12-pack of Corona from the Mini-Basket. He arrived at Tracy's house at around 5:00., and they decided to go for a country cruise like they always did. They drove up to Park Lake, driving slowly and listening to music, drinking and laughing and having fun. On the way back into town they took some pills and drove back through Clancy and the Interstate and went directly to Duane's house north of East Helena. By this time it was approximately 9:30 p.m. They both used the bathroom, took 5 to 6 pain pills (Hydrocodone) each, and then went over to the neighbors' house where they stayed about 10, 15, 20 minutes. They left the neighbor's house and went back to the Mini-Basket and got another 12-pack of Corona. After they went to Walmart to get some lime juice, they proceeded up to the York Bar where they started

drinking. Up until this time they were getting along fine. There was no fighting, no arguing, it was just a regular date night. They were all "lovie dovie" when they went in to the York Bar, holding hands and holding each other. They stayed there until way past closing, about 2:30 or 3:00 a.m. on August 3, 2008. *Id*., 289:20 to 296:25; 586:11 to 597:22.

At about the time they were getting ready to leave the York Bar, Tracy was on the other side of the bar with the bartender, Jim Swan. They were standing in front of the sink while Swan was doing the dishes. Belanus could see the "X" pattern of their arms as they had their arms around each other, so he stood up on the rim of the chair to get a closer look. He saw Tracy's hand and Swan's hand touching the bottom of each others' butts. Duane got upset and began yelling at Swan, who yelled back at him. In the meantime, Tracy was not really understanding what was going on. Both Duane and Tracy were intoxicated. The bartender also had at least three shots and possibly some mixed drinks as well. They all continued to yell at each other. Finally, Duane and Tracy paid their bill. Swan wanted Duane out of there, but Duane refused to leave without Tracy. As he was standing by the door waiting for Tracy, Duane saw Tracy rubbing Swan's crotch and Swan rubbing Tracy's crotch, and Duane saw Tracy smiling. Seeing this, Duane got really upset and angry. After more yelling, Tracy and Duane

eventually left the bar, and Tracy showed Duane a note that Swan had given her with his telephone number on it and instructions not to answer or leave a message if a girl answers. Duane crumpled the note, but was really upset because Tracy and Swan were touching each other. Duane and Tracy then drove off, but went the wrong way, so Duane returned to the York Bar because he wanted to assault Swan. When it was apparent that Swan was not going to come out, Duane then drove out of York up a country road. Duane then began striking Tracy, backhanding her in the face, hands, arms, and legs. After awhile they both needed to go to the bathroom, so Duane stopped on the side of the road, shut the car off, and the two started urinating. When finished, Duane went to the other side of the car, grabbed Tracy by the shirt, and said, "Why did you do this?" Tracy wasn't done, but she got up, and they both fell down the ditch. She fell backwards and he fell face forward. They were on the edge of a really steep ditch and hit the bottom. Tracy pulled her pants up and complained that she lost her shoe. They then tried to find Tracy's shoe, but couldn't locate it. Tracy couldn't get up the ditch so Duane grabbed her by her hair and tried to pull her up the ditch. That didn't work so he grabbed her under her arms and pulled her up to the top of the road, into the car, and they left. As they proceeded into East Helena, Duane continued to hit Tracy because she kept saying how sorry she was and kept telling him how much

she loved him and how sorry that she was. She just kept saying over and over that she loved him and so he hit her with the backhand in the face and in the arm and in her legs and her hands as he was driving. He did that because he was upset over what she had done with Swan in the bar. *Id.*, 208:20 to 211:13; 297:1 to 308:10; 598:1 to 615:6.

On the way back home Tracy continued to say "Let's make love, Baby, let's make love. I love you. I love you. I want you to marry me. I love you so much." She was trying to give him kisses and telling him to pull over. Finally they made it home. Duane pulled up into the driveway and shut the car off. He got out of the car and went over to the passenger side and helped her get out of the car. They walked up the lane. The way up to the house is all rock so Tracy was having problems walking because the rocks were hurting her feet, so Duane helped her. Then he got the door unlocked and Tracy started screaming again how sorry she was and that she loved him, so Duane choked her because he wanted her to shut up. That lasted about 10 seconds and when she caught her breath she said that she was so sorry and "Let's just make love, let's just make love" and grabbed Duane's hand. They walked into the bedroom and she went into doggie style position. Duane removed her pants, took her tampon out and threw it backwards. They were going to have intercourse, but she was bleeding and there was blood all over.

So Duane told her, "Let's have butt sex." She agreed so Duane got the anal wand and the anal lube and started to do that with her. In the beginning she said, "Not so hard, not so hard." Then she said, "It hurts, it hurts, stop" so he stopped. There was feces all over and Duane saw a laceration on Tracy's anus. Duane said that the anal wand incident lasted about eight seconds, whereas Tracy indicated that it lasted approximately three minutes. They then sat on the floor, crying, and both apologized to each other. Then Tracy got up and went into the bathroom to get cleaned up. After Duane cleaned up the mess in the master bedroom he went into the spare bedroom and laid down on the bed in there. Tracy came in and she tried talking to Duane for awhile, but he told her that their relationship was over. Then Tracy took a shower and came into the spare bedroom again. She asked Duane to join her in the shower, but he refused. Tracy then asked Duane to sleep with her in their bedroom, the master bedroom, but Duane again refused. He was swearing at her some more, telling her how much he hated her. Tracy came back into the spare bedroom a few times and asked Duane to sleep with her, but he continued to refuse. Eventually he fell asleep. He later woke up to find the front door open and Tracy nowhere to be found. His keys were missing and his car was missing too. *Id*., 211:14 to 215:4; 219:25 to 221:3; 233:8 to 238:3; 259:7-12; 615:10 to 622:23.

Throughout this entire course of events, Belanus believed that the anal intercourse and use of the anal wand was consensual. *Id.*, 623:25 to 624:7; 673:6-25; 695:15-17.

When Duane woke up at about 6:30, 6:45, he was still drunk. He made a few phone calls in an effort to locate Tracy. Unsuccessful, he got in his Ford Probe and started driving around trying to find her. Tracy had taken Duane's car in the past, and on those occasions, Duane kept Tracy's truck until she gave his car back to him. So he went to her house, opened the door with her key, and got her cell phone because all her friends' telephone numbers were saved in her contacts list on her cell phone. Duane was going to use that to try to call people so he could find her. Then he decided to take her truck and go hide it, which he did behind Woolsey's Tires. At the time he didn't think that he was committing theft. They had gone into each others' houses many times before, and it was a normal thing for them to do. He wasn't stealing her stuff or depriving it from her. He was going to give her truck back when he got his car back from her. Throughout all of this, he was still drunk from the night before. He eventually returned home to find police officers there, and was arrested. *Id.*, 624:8 to 631:17. Duane was later interviewed by Det. Ray Potter and he lied to him, thinking that he was in trouble for beating up Tracy. It never occurred to Duane that he might be in trouble for

rape, kidnaping, burglary, or theft. *Id*., 629:25 to 631:5.

In the meantime, Tracy had gone to a friend's house, Nicole Krott, who called law enforcement. *Id*., 238:3-10. Tracy then went to the emergency room and was examined by Dr. Rabold. The examination showed abrasions and contusions on her body, and a laceration on Tracy's anus in the perianal area, an area away from the anus or the sphincter. *Id*., 40:6 to 68:19.

STANDARD OF REVIEW

Statutes carry the presumption of constitutionality. Therefore the party making the constitutional challenge bears the burden of proving, beyond a reasonable doubt, that the statute is unconstitutional, and any doubt must be resolved in favor of the statute. *State v. McCaslin* (2004), 322 Mont. 350, 353-354, 96 P.3d 722. Because the issue of whether a defendant's right to defend was violated is a question of law, this Supreme Court will review the District Court's conclusion to determine whether its interpretation of the law was correct. *Id*.

A District Court's evidentiary rulings are reviewed under an abuse of discretion standard. An abuse of discretion occurs when a District Court acts arbitrarily without conscientious judgment or exceeds the bounds of reason. *Id*.

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SUMMARY OF ARGUMENT

The express right to defend guaranteed by Sections 3 and 24 of Article II of the Montana Constitution is broader and more encompassing than the right to present a defense which is subsumed within the State and Federal rights to due process of law. § 45-2-203, MCA's prohibition against allowing a jury to consider an intoxicated condition when determining the existence of a mental state that is an element of the offense therefore violates the Montana Constitution's express right to defend and is unconstitutional.

ARGUMENT

Point No. 1:

The "right to defend" is a fundamental right deserving the highest level of scrutiny and protection by the Court.

The "right to defend" is guaranteed by two specific provisions in the Montana Constitution. First, all people in the State of Montana have the inalienable right to defend their liberty:

> All persons are born free and have certain inalienable rights. *They include* the right to a clean and healthful environment and *the rights of* pursuing life's basic necessities, enjoying and *defending their lives and liberties*, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. (Italics added.)

Mont. Const., Art. II, § 3.

Second, all persons accused of a criminal offense have the right to defend all criminal prosecutions:

> In all criminal prosecutions *the accused shall have the right to* appear and *defend* in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same. (Italics added.)

Mont. Const., Art. II, § 24.

The rights included within the "Declaration of Rights" of Article II of the Montana Constitution are "fundamental rights." *Butte Community Union v. Lewis* (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311. Accordingly, the right to defend is a fundamental right. *State v. Roedel*, 2007 MT 291, 339 Mont. 489, 171 P.3d 694, citing *State v. Tapson*, 2001 MT 292, ¶¶ 15, 28, 307 Mont. 428, ¶¶ 15, 28, 41 P.3d 305, ¶¶ 15, 28. Fundamental rights are significant components of liberty, and any infringement of them will trigger the highest level of scrutiny and protection by the courts. *Kloss v. Edward D. Jones & Co.* (2002), 310 Mont. 123, 54 P.3d 1, rehearing denied, on rehearing in part 57 P.3d 41, certiorari denied 123 S.Ct. 1633, 538 U.S. 956, 155 L.Ed.2d 506 (specially concurring opinion of

Justice Nelson for a majority of the Court). The "right to defend" is therefore a fundamental right deserving the highest scrutiny and protection by this Court in this case.

Point No. 2:

§ 45-2-203, MCA violates the fundamental right to defend and is unconstitutional.

The State had to prove the specific mental states of "knowingly" and "purposely" beyond a reasonable doubt in order to convict Belanus. As to Count 1 (sexual intercourse without consent), Jury Instruction No. 9 instructed the jury in relevant part that the State had to prove beyond a reasonable doubt that "the act of sexual intercourse was without the consent of Tracy Chandler," and that the Defendant acted "knowingly." Instruction Nos. 12 and 13 charged the jury that a person commits the crime of aggravated kidnaping if he "knowingly or purposely" and without lawful authority restrains another person (among other things). Instruction Nos. 15 and 18 stated that a person commits the offense of burglary if the person "knowingly" enters an occupied structure with the purpose to commit an offense therein. Instruction Nos. 19 and 20 also instructed the jury that Belanus had to act "knowingly" in order to commit the offense of theft. Instruction Nos. 23 and 24 told the jury that a person acts "purposely" when it is his conscious

object to cause such a result, and that a person acts "knowingly" when the person is aware there exists the high probability that the person's conduct will cause a specific result. *Trial Trans.*, 724:3-19; Case Register Report Doc. No. 51.5.

It is well established that in order to afford a defendant due process under the Fourteenth Amendment of the United States Constitution, the State must prove every element of the offense beyond a reasonable doubt. *In Re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375. Belanus therefore sought to defend against the mental state elements by utilizing evidence of intoxication to cast doubt upon the state's proof that he acted "knowingly" or "purposely." However, § 45-2-203, MCA, states:

> A person who is in an intoxicated condition is criminally responsible for the person's conduct, and an intoxicated condition is not a defense to any offense and *may not be taken into consideration in determining the existence of a mental state that is an element of the offense* unless the defendant proves that the defendant did not know that it was an intoxicating substance when the defendant consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition. (Emphasis added.)

Belanus contends that the portion of this statute which prohibits a finder of fact's consideration of evidence of intoxication on the issue of mental state is unconstitutional because it violates the Montana Constitution's fundamental "right to defend."

As stated above, in Montana a person has the constitutional rights to defend his liberty and to defend against a criminal prosecution. Mont. Const. Art. II, §§ 3 and 24. The proof at trial established that both Belanus and Chandler were extremely intoxicated. Proof of the mental state element of the offenses charged, in particular sexual intercourse without consent and aggravated kidnaping, also established that they were intoxicated. The Prosecutor relied heavily on the recorded telephone conversation between Duane and Tracy when Duane was drunk and ranted and threatened Tracy. Such evidence was highly relevant to the issue of whether Belanus acted knowingly and purposely. Yet the District Court's order on Belanus' motion in limine precluded him from defending against those elements by arguing that he was drunk and didn't mean what he said and the jury from considering his intoxication for that purpose.

The evidence at trial was that they drank a 12-pack of Corona beer on the way to Park Lake, and then another six pack at another little bar (the Legal Tender in Clancy), and then bought another 12-pack at the Mini-Basket before they went to the York Bar where they were drinking shots and hard liquor. In the meantime, they also took narcotic pills. Both Tracy and Duane were extremely intoxicated both during and after the events at the York Bar. Tracy also testified that Duane's emotional demeanor would change when he used Levitra, alcohol, and pills. *Trial*

Trans., 203:7 to 207:9; 208:16, 17; 281:10 to 282:7; 288:24 to 289:3; 303:23 to 304:2.

Furthermore, the Prosecutor's cross-examination of Belanus centered primarily on Belanus' recorded drunken rant and threats to Tracy that were played to the jury. The Prosecutor focused on Belanus's statements, which were made while he was intoxicated, as evidence of his mental state and intent on August 3, 2008. *Trial Trans*., 632: 14 to 634:22; 652:7-12; 655:13 to 666:5. Belanus attempted to explain that "[s]ome people say things that they don't mean when they're not in the right [frame of mind]" (*id.,* 664: 14, 15) and that it was not something he would have done had he been sober (*id.*, 665:17-20). Even later, he said that there were many things going through his mind then because he was still messed up. *Id.*, 696:16-20. However, the District Court's pretrial ruling prevented him from going any further and defending against the Prosecution's mental state proof. That evidence was presented by the State to establish that Belanus acted "purposely" or "knowingly" on August 3, 2008. Subject to Belanus' Rule 403 objection, such evidence was considered by the jury in its determination of whether or not he acted "purposely" or "knowingly." However, Belanus was prohibited from defending against such evidence with rebuttal evidence and argument that his level of intoxication precluded him from forming

the requisite mental state. As a result of this prohibition, the Prosecution's burden of proof for the element of mental state was reduced and Belanus was effectively prevented from defending against that reduced burden of proof. This is a denial of the right to defend.

In *State v. Egelhoff* (1995), 272 Mont. 114, 900 P.2d 260 the Montana Supreme Court unanimously held that § 45-2-203, MCA violates due process. However, in *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) a divided United States Supreme Court (5-4) reversed the Montana Supreme Court. Justices O'Connor, Stevens, Souter, and Breyer dissented and agreed with the Montana Supreme Court's reasoning that due process sets a limit on the restrictions that may be placed on a defendant's ability to raise an effective defense to the State's accusations. To impede the defendant's ability to cast doubt on the State's case, § 45-2-203 removes from the jury's consideration a category of evidence relevant to determination of mental state where that mental state is an essential element of the offense that must be proved beyond a reasonable doubt. Because this disallowance eliminates evidence with which the defense might negate an essential element, the State's burden to prove its case is made correspondingly easier. The justification for this disallowance is the State's desire to increase the likelihood of conviction of a certain class of defendants who might

otherwise be able to prove that they did not satisfy a requisite element of the offense. In the dissenting views of Justices O'Connor, Stevens, Souter, and Breyer, § 45-2-203's effect on the criminal proceeding violates the federal right to due process arising under the Fourteenth Amendment.

This issue was again addressed by the Montana Supreme Court in *State v. McCaslin* (2004), 322 Mont. 350, 96 P.3d 722 under Montana's right to due process guaranteed by Article II, Section 17 of the Montana Constitution. Noting that Montana's right to due process is textually identical to the federal right, this Court followed the majority's reasoning in *Montana v. Egelhoff*, supra., and held that the Montana Legislature redefined the mental state element of criminal responsibility by extracting the subject of voluntary intoxication from the mens rea inquiry. Therefore, voluntary intoxication is legally irrelevant and has no exculpatory value in establishing the requisite mental state. *McCaslin*, 322 Mont. at 356 and 357. For the reasons stated in his special concurrence in *State v. Egelhoff* and the dissent in *Montana v. Egelhoff*, Justice Nelson dissented, joined by Justice Cotter.

Thereafter in *State v. Smith* (2005), 329 Mont. 526, 127 P.3d 353, and again relying on the reasoning stated in *State v. Egelhoff*, Justices Nelson and Cotter stated:

> I concur in our decision, noting, however, my continuing disagreement with the matter discussed in Issue 2. See *State v. McCaslin*, 2004 MT 212, ¶ 51, 322 Mont. 350, ¶ 51, 96 P.3d 722, ¶ 51 (Nelson, J., dissenting and concurring). I also agree with Justice Cotter's dissent and concurrence in that same case. See *McCaslin*, ¶ 52 (Cotter, J., dissenting and concurring). At such point in time as there are two other votes to reconsider this issue, I stand ready to overrule *McCaslin* and proceed in accordance with our decision in *State v. Egelhoff* (1995), 272 Mont. 114, 900 P.2d 260, reversed by *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996), but on independent state grounds.

This case presents those independent state constitutional grounds. They are different from the due process ground upon which *McCaslin* was decided. Those independent state grounds are the specific and express right to defend guaranteed by the Montana Constitution. The Montana Constitution's right to defend is broader and more encompassing than the right to present a defense subsumed within due process. *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973), ("[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.") Whereas the due process right to defend arises by implication as a "fair opportunity," the Montana Constitution expressly grants the right to defend. It is more than just a fair opportunity. It is an express right to defend one's liberty and against a criminal prosecution. Accordingly, where the crime requires a particular mental state – as in this case "knowingly" or "purposely" – it is proper

for Belanus to defend against the State's proof relating to mental state by showing any state or condition that is adverse to the proper exercise of his mind – including voluntary intoxication. That right is guaranteed by the Montana Constitution.

It is important to note that reasonable minds can differ and this issue is hardly set in stone. It was a closely divided (5-4) opinion in *Montana v. Egelhoff* on the due process issue, and this Court initially ruled in *State v. Egelhoff* that § 45-2-203 does indeed violate due process. Because this case rests on the independent state ground of the constitutional right to defend, the United States Supreme Court majority's reasoning in *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) does not apply here. Under the express right to defend, the dissent's reasoning in *Montana v. Egelhoff* is more sound, as well as this Court's reasoning in *State v. Egelhoff* (1995), 272 Mont. 114, 900 P.2d 260. The analysis occurs under the express right to defend guaranteed by Sections 3 and 24 of Article II of the Montana Constitution, rather than the state and federal rights to due process of law.

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Point No. 3:

The District Court abused its discretion and erred when it allowed the highly inflammatory and prejudicial audio recording of Belanus' drunken rant to be played to the jury, yet prohibited him from arguing intoxication on the issue of mental state.

It was against this backdrop that the District Court allowed the Prosecutor to play to the jury the audio recording that Tracy had made of Duane's drunken rant to her over Belanus's Rule 403 objection. The Prosecutor used this rant, uttered in late June, as evidence of Belanus' mental state and intent to injure Tracy Chandler on August 3, 2008. *Trial Trans.*, 662:9 to 666:5. Belanus was drunk when he made these statements and they were laced with profanity and were prejudicial and inflammatory. As Belanus commented during cross-examination, "some people say things that they don't mean when they're not in the right [frame of mind]" (*id.,* 664: 14, 15), and that he would have handled this situation differently if he had been sober. *Id*., 665:17-20. Even with this evidence, Belanus was not permitted to defend against the State's proof relating to mental state by showing any state or condition that was adverse to the proper exercise of his mind. The District Judge should have therefore sustained the Defense 403 objection and not permitted the Prosecution to play this drunken rant to the jury as evidence of his intent and

mental state on August 3, 2008. Instead, the District Court overruled the objection, allowed the Prosecution to play the audio tape, but hobbled Belanus's defense by refusing to allow him to argue intoxication to the jury on the issue of mental state. This constituted an abuse of discretion and the District Court's evidentiary ruling should be reversed.

CONCLUSION AND PRAYER

"Alcohol loosens your tongue, and makes you act, speak, and behave in a way that is not you."[3]

It is no secret that alcohol consumption affects human behavior. From dancing on a table with a lampshade on one's head to the utterance of words that would have never escaped one's lips when sober, alcohol has caused many people to do and say things that they later sorely regret. Alcohol works as a depressant on the brain. It decreases the activity of the nervous system. It causes people to become less inhibited. It tends to emphasize the mood of the user. If one is sad, alcohol may make him sadder. If one is happy, alcohol may make her happier. The psychological make-up of an individual also becomes important since alcohol may diminish some controls which keep the person functioning well under usual

[3] Mel Gibson commenting on his arrest for DUI during which time he made anti-Semitic comments toward the arresting officer. Interview with Diane Sawyer, October 12, 2006.

circumstances. Loss of those controls can lead to aggression and other unwanted behaviors. Mike Tyson was aware of this in *The Hangover* and was able to forgive. Similarly, this is something that a jury should be able to consider on the issue of mental state in the courts of the State of Montana. Duane Belanus therefore asks the Court to:

1. reverse *State v. McCaslin* (2004), 322 Mont. 350, 96 P.3d 722;
2. vacate Appellant's judgment of conviction; and
3. order a new trial with instructions that would allow the jury to consider evidence of intoxication on Appellant's mental state as it relates to the elements of the offense.

DATED this 9th day of March, 2010.

RESPECTFULLY SUBMITTED:

By:_____

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to M.R.App.P. 11(d) that this brief is doubly and proportionately spaced, using 14 point, Times New Roman typeface, and the word count is 7,003.

DATED this 9th day of March, 2010.

By:_____
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Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and correct and accurate copy of the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing upon each attorney of record as follows:

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DATED THIS 9th day of March, 2010.

By:_____

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