
STATE OF MONTANA,

Plaintiff and Appellee,

v.

KELLY BEVERLY BALL,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable Elizabeth Best, Presiding

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STATEMENT OF THE ISSUE

Arresting Kelly Ball at his home for an alleged threat made on the other side of town, police officer Bob Rosipal described Ball as very agitated and told the jury, “With my past experiences with Mr. Ball, every time I’m there, it’s the same.” The district court sustained defense counsel’s objection but did not strike the testimony and did not instruct the jury to disregard Rosipal’s statement. Did the district court cure the prejudice?

STATEMENT OF THE CASE

Warren Ellis, unhappy with Kelly Ball’s parked vehicle in front of the business, confronted Ball and called law enforcement. (Transcript of 10/20/20 Jury Trial [hereinafter “Tr.”] at 110-111, 116, 164-167.) Ellis testified that Ball had threatened to shoot him during the confrontation. (Tr. 113.) Ball disputed the allegation, explaining he was trying to get his truck out of the lot while Ellis called him a “bitch boy” and threatened to shoot his dogs. (Tr. 166-169.) The State charged Ball with Intimidation, and the case proceeded to a jury trial. (See Doc. 2; 10/19/20 Tr. 6-7.)

Ellis and Ball presented sharply contrasting stories at trial as each accused the other of yelling and making threats about guns. Ball had left the business prior to law enforcement's arrival, so the State called police officer Bob Rosipal—who has served with law enforcement for over 27 years—to briefly explain he had driven to Ball's home to identify and arrest him. (Tr. 116, 132, 141-144, 166.) As his testimony ended, Rosipal told the jury: Ball appeared to be under the influence of “alcohol and/or drugs,” Ball had multiple experiences with Rosipal in the past, and Ball is always very agitated when Rosipal arrives. (Tr. 145, *see also*, App. A.)

Ball objected and the district court sustained the objection. (Tr. 145.) The district court did not order the testimony stricken and did not instruct the jury to disregard Rosipal's remarks. (Tr. 145.) The jury found Ball guilty. (Tr. 206.) Ball did not file a motion for a new trial; instead, Ball filed a timely appeal. (Docs. 54, 56.) The district court sentenced Ball to three years in the Department of Corrections, all suspended, with credit for 50 days served. (Doc. 54.)

STATEMENT OF THE FACTS

In 2019, Kelly Ball was a 52-year-old former diesel mechanic who now worked as a caretaker to his ailing 96-year-old grandmother. (Doc. 52 at 1-2, 5; 12/17/20 Tr. 9.) On September 3, 2019, Ball drove his truck and trailer towards Black Eagle Storage to meet a person who owned one of the storage units. (Tr. 110, 162-164.) Ball did not carry any weapons on him or in the truck. (Tr. 130, 144, 168.) Black Eagle Storage and its neighboring business, CC Pet Warehouse, are both accessed through the same turnoff from the highway. (Tr. 110-111, 118, 150.) Black Eagle Storage is on a hill that overlooks CC Pet. (Tr. 165.)

Ball could not park at Black Eagle Storage because he did not have the code to get through the locked gate, so he parked his truck and trailer near the dumpster outside CC Pet. (Tr. 110-111, 119-120, 164-165.) The parties disputed whether Ball's vehicle blocked CC Pet's loading dock. (Tr. 110-111, 119-120, 164-165.) Warren Ellis, the general manager, saw Ball park but did not take any action to stop him. (Tr. 110-111, 121-122.) Ball stepped out of the truck with his two German Shepards, grabbed a bicycle, and rode up to Black Eagle Storage to meet the storage unit holder. (Tr. 121-122, 165-166.)

About five minutes after reaching the storage site, Ball saw Ellis and Michael Martinez, another CC Pet employee, looking at his truck and writing down the license plate number. (Tr. 123, 147, 166, 168.) Ball got back on his bicycle and rode down with the intention of leaving right away. (Tr. 166.) The trailer belonged to a friend, and Ball was concerned about what might happen if someone called it in. (Tr. 166.) At this point the stories of Ball and Ellis diverged sharply.

Ball testified he rode back down the hill with his dogs, and Ellis started cussing at him for his parking. (Tr. 166-167.) Ellis called Ball a “bitch boy.” (Tr. 167.) Ball tried to get out of there as fast as he could while Ellis continued to berate him. (Tr. 166-167.) As Ball worked to load up his bicycle, Ellis threatened to shoot Ball’s dogs if they did not get into the truck. (Tr. 128-129, 167.) This made Ball upset and he “had a little bit of verbal” back at Ellis. (Tr. 166-168.) Ball loaded his dogs into the truck and drove away. (Tr. 167-168.) Ball explained, “I couldn’t get out of there fast enough.” (Tr. 169.) Police officer Bob Rosipal later drove to Ball’s home¹ and arrested him. (Tr. 142-144,

¹ Ball was at his home and had already gotten the dogs into the yard, but he was sitting in his truck in the alley in front of his home when Officer Rosipal arrived. (Tr. 143, 148, 178.)

178.) Police officer Joshua Harris, who had just spoken to Ellis, then drove over to talk to Ball. (Tr. 147-148.) Ball explained his story to Harris. (Tr. 150-151.) Harris asked if Ball had threatened Ellis and Ball denied the accusation, asking why somebody would say something like that. (Tr. 152.)

Ellis conveyed a different version of events. Ellis said he did not say anything at first when he saw Ball park because he thought the man might be friends with CC Pet's owner. (Tr. 121-122.) Ellis said Ball came back ten minutes after he left and loaded the bicycle into his truck. (Tr. 123, 125.) Ellis told him he was in a private business parking lot blocking the loading dock and he needed to move the vehicle. (Tr. 125.) Ellis said Ball responded with lots of profanity and became verbally abusive. (Tr. 111-112, 126-127.) Ellis conceded he was upset at Ball and called him four letter words. (Tr. 126-127.) The yelling between Ball and Ellis agitated the two dogs, who started making circles and getting closer to the loading dock. (Tr. 112-113, 128-129.) Ellis said Ball alluded that he could make the dogs go after him, but later acknowledged Ball didn't have the dogs do anything. (Tr. 126, 128, 138.) Ellis did not feel intimidated by the dogs. (Tr. 126.)

Ellis told Ball there were dogs in CC Pet and if Ball's dogs got inside the warehouse the owner would shoot them. (Tr. 113, 128-129.) Ellis said he was going to call the police. (Tr. 114.) Ellis then said Ball told him he was going to his truck to grab a gun and shoot him. (Tr. 113.) Ellis described Ball going to the truck cab and making a movement that "looked like he was crouching down going into the passenger side of his vehicle." (Tr. 114.) Ellis said, "I believed he was going to shoot me." (Tr. 115.) Ellis never saw a gun nor did he see Ball make a shooting gesture. (Tr. 132.) Ellis backed up to the loading dock door and called 911 as Ball got into his truck and drove off. (Tr. 115-116.) Harris responded to the scene and spoke to Ellis first before driving across town to speak with Ball. (Tr. 147-148.)

As trial approached, the district court told the parties it did not want to hear speaking objections. "No speaking objections – both of you have tried cases with me and we're all on the same page. No speaking objections. I'll ask if there is a question, just state the legal objection, instruct your witnesses to stop talking if an objection is made."

(10/19/20 Tr. 5.)

Given the conflicting stories and the lack of neutral witnesses or

exhibits, the State’s prosecution strategy focused on the attitudes and behaviors of Ellis and Ball as they conveyed their stories to Harris, the lead officer on the case. (See Tr. 147, 149-150, 153, 191-193.) Harris testified Ellis was upset in a “manner of someone who had gone through a frightening experience,” while Ball was upset and agitated at being arrested. (Tr. 149-150.) Ball told Harris it was Ellis, not him, who was agitated, upset, yelling, and making threats to his dogs. (Tr. 150-151.) Martinez did not testify as he could not be served prior to trial. (Tr. 152.) Neither Ellis nor Harris testified anyone was acting under the influence of alcohol, drugs, or other substances.

While settling jury instructions during a break, the district court withdrew its own instruction discussing “Evidence of Other Acts” once the State explained, “The State doesn’t anticipate any 404(b) evidence.” (Doc. 33 at No. 7; Tr. 97.)² The State also said it would not bring in intoxication evidence and moved to withdraw proposed a jury instruction that addressed the subject, explaining “I don’t think it will be relevant, your Honor. And we can withdraw it.” (Doc. 33 at No. 26;

² Following M. R. Evid. 404(b), Ball refrained from bringing up prior crimes or other bad acts committed by Ellis during the trial.

Tr. 101.) Ball's counsel added, "I was not anticipating any testimony on that." (Tr. 101.)

The State called Rosipal to the stand. (Tr. 141.) Rosipal described himself as a patrol lieutenant who had been employed at the Cascade County Sheriff's Office for almost 28 years. (Tr. 141.) He testified to being up-to-date on all his trainings. (Tr. 141.) Rosipal learned the location of Ball's vehicle and drove to Ball's house across town. (Tr. 142-143, 150, 170.) On cross, Rosipal testified he patted down Ball, found no weapons, and arrested him. (Tr. 144.)

On re-direct, the State asked Rosipal what Ball's demeanor was at the time. (Tr. 145, *see also*, App. A.) Rosipal answered, "Very agitated." (Tr. 145.) The State asked, "In what sort of way?" (Tr. 145.) Rosipal responded, "It was like he was under the influence of alcohol and/or drugs. But he was agitated that we were even there." (Tr. 145.) The State said, "Okay." (Tr. 145.) Rosipal then told the jury, "With my past experiences with Mr. Ball, every time I'm there, it's the same." (Tr. 145.)

Counsel immediately objected, saying, "Objection, judge." (Tr. 145.) The district court responded, "Sustained." (Tr. 145.) The district

court did not order the testimony stricken or instruct the jury to disregard what Rosipal had just said. (Tr. 145.) With the prior bad acts evidence now before the jury, the State stopped its questioning and Rosipal stepped down. (Tr. 145.) The jury found Ball guilty. (Tr. 206.)

STANDARDS OF REVIEW

“Our standard of review of a trial court’s discretionary rulings is whether the trial court abused its discretion.” *State v. Ahmed*, 278 Mont. 200, 206, 924 P.2d 679, 683 (1996). However, a trial court’s discretion must be guided by the rules and principles of law. *State v. Davis*, 2016 MT 102, ¶ 29, 383 Mont. 281, 371 P.3d 979. “To the extent a discretionary ruling is based upon a conclusion of law, review is de novo.” *Davis*, ¶ 29.

Claims of ineffective assistance of counsel are mixed questions of law and fact, therefore, review is de novo. *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

SUMMARY OF THE ARGUMENT

Rosipal’s deliberate, inadmissible attack on Ball’s character to use alleged past conduct as evidence of committing the charged crime was highly damaging evidence that deprived Ball’s right to a fair trial.

Counsel promptly objected but the prejudice that reeked from Rosipal's inflammatory remarks was not cured. To cure the prejudice, the district court must sustain the objection, strike the evidence from the record, and instruct the jury to disregard. *State v. West*, 252 Mont. 83, 91, 826 P.2d 940, 945 (1992).

The district court did not cure the prejudice arising from Rosipal's testimony—it did not strike Rosipal's statement from the record and did not otherwise instruct the jury to disregard the remarks. The mere word “sustained” did not remove the sting of inadmissible past allegations of Ball's behavior and previous involvement with law enforcement. Alternatively, counsel was ineffective for not filing a motion for a new trial or for not moving for a mistrial outside the jury's presence.

Rosipal relied on his 27 years of law enforcement experience to present himself as a credible witness for the State to deliver a blow to Ball's credibility that labeled him as a repeat agitator and a drunk. In a trial centered on the credibility between Ball and Ellis over what happened, Rosipal's attack on Ball's character had a devastating impact. The jurors were instructed to consider all the evidence and

presumptively did not disregard Rosipal's remarks. The district court's failure to cure the prejudice deprived Ball of a fair trial. This Court must reverse and remand for a new trial.

ARGUMENT

The district court failed to cure the prejudice heaped onto Ball from police officer Rosipal when the court did not strike Rosipal's inadmissible testimony and did not instruct the jury to disregard Rosipal's highly damaging statement.

A. Rosipal's character attack violated Rule 404(b) and prejudiced Ball's ability to defend against the Intimidation charge.

Rosipal's testimony violated M. R. Evid. 404(b) and prejudiced Ball by calling back to years or even decades of prior law enforcement involvement, mixing in spurious allegations of alcohol or drug use, and catching defense counsel off guard in a trial for Intimidation, where threatening communication forms the core of the charge.

"The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Michelson v. U.S.*, 335 U.S. 469, 475 (1948). Courts reject this character inquiry not because character is

irrelevant, to the contrary, character evidence weighs too heavily on the jury and unduly persuades jurors to prejudge someone with a bad record, denying the defendant a fair opportunity to defend against a particular charge at a particular time. *Michelson*, 335 U.S. at 475-476.

Evidence of other crimes, wrongs, or acts is not admissible to prove a person's character to show action taken in conformity with that character. M. R. Evid. 404(b). The purpose of M. R. Evid. 404(b) is to prevent convictions for one crime based on evidence of another. *State v. Aakre*, 2002 MT 101, ¶ 12, 309 Mont. 403, 46 P.3d 648.

Rule 404(b) is strictly enforced because of the prejudicial effect and injustice of such evidence. *State v. Rogers*, 2013 MT 221, ¶ 32, 371 Mont. 239, 306 P.3d 348; *see also*, *State v. Crist*, 253 Mont. 442, 444, 833 P.2d 1052, 1054 (1992). “A defendant must not be convicted merely because he is an unsavory person, or on the rationale that because he has committed a crime in the past, he has a defect of character that makes him more likely than other people generally to have committed the charged offense.” *State v. Derbyshire*, 2009 MT 27, ¶ 22, 349 Mont. 114, 201 P.3d 811 (internal citations omitted). “Rule 404(b) applies to any conduct, criminal or noncriminal, that effectively impugns or

reflects negatively on the defendant's character." *State v. Stewart*, 2012 MT 317, ¶ 62, 367 Mont. 503, 291 P.3d 1187.

Intimidation occurs when a person makes a threatening communication to compel another to perform or not perform a certain act. Mont. Code Ann. § 45-5-203(1). A defendant's demeanor or behavior while communicating is particularly important to a factfinder to determine if the communication was intended to be conveyed in a threatening manner. *See State v. McCarthy*, 2004 MT 312, ¶¶ 47-50, 324 Mont. 1, 101 P.3d 288 ("Under this statute, it does not matter whether or not the defendant actually intended to carry out the threat, only that the threat was made under circumstances which reasonably tended to produce fear and resulted in the victim reasonably fearing that the threat will be carried out.").

The parties agreed that neither side would introduce evidence of prior crimes, wrongs, or acts. (Tr. 97.) After calling Rosipal to the stand for the brief testimony of identifying Ball and processing an arrest at his home, the State used the redirect examination to ask Rosipal about Ball's demeanor when he arrived. (Tr. 145.) Rosipal answered that Ball was very agitated, and then kept going, saying, "It

was like he was under the influence of something, whether it was alcohol and/or drugs.” (Tr. 145.) This was the first time the jury had heard Ball being accused of acting under the influence. Given the timing of the arrest, Rosipal’s statement also suggested to the jury that Ball was high or drunk during his encounter with Ellis and drove his truck home while under the influence.

Rosipal then continued, saying, “With my past experiences with Mr. Ball, every time I’m there, it’s the same.” (Tr. 145.) The “same” means Ball is always very agitated. (Tr. 145.) Rosipal told the jury he had been to Ball’s house multiple times as a police officer and had “experiences” with Ball each time. (Tr. 145.)

Rosipal relied on his 27 years in law enforcement to impugn Ball’s character as someone who had multiple experiences with police at his home, was always very agitated, and, in addition, appeared drunk or high this time. After such an inflammatory comment, a jury would obviously conclude that Ball is more likely, consistent with his character, to have committed the charged conduct. Rosipal’s testimony violated M. R. Evid. 404(b).

Rosipal's remark came out of nowhere and caught defense counsel off guard, resulting in an immediate objection. (*See* Tr. 145.) The State had withdrawn jury instructions relating to 404(b) evidence and intoxication, misleading the district court and defense counsel into believing prior bad acts would not be coming up in the trial. (*See* Tr. 97, 101.) Testimony about prior involvement with law enforcement coupled with off-hand remarks of "alcohol and/or drugs" nonetheless showed up during trial, in front of jurors. This resulted in serious prejudice to Ball's defense.

With M. R. Evid. 404(b) violated and Ball prejudiced by evidence that he has had multiple prior involvements with law enforcement at his home, the remaining question is whether the district court's single word of "sustained," cured the prejudice heaped upon Ball by Rosipal. It did not.

B. The district court sustained the objection but nonetheless deprived Ball of a fair trial because the court did not cure the prejudice that resulted from Rosipal's inflammatory comment.

The district court sustained Ball's objection to Rosipal's unlawful remarks, but the district court's failure to strike the testimony or to

instruct the jurors to disregard Rosipal's words kept the damaging testimony within the juror's minds as they deliberated over Ball's guilt or innocence.

While a failure to object prevents this Court from reviewing an issue, a preserved objection is reviewable by this Court on appeal. *State v. Hinshaw*, 2018 MT 49, ¶ 16, 390 Mont. 372, 414 P.3d 271; Mont. Code Ann. §§ 46-20-104(2), 46-20-701(1). The Supreme Court on appeal “shall consider the orders, rulings, or proceedings and the objection thereto and shall reverse or affirm the cause on the appeal according to the substantial rights of the respective parties, as shown upon the record.” Mont. Code Ann. § 46-20-701(1). On appeal, this Court may review “the verdict or decision and any alleged error objected to” that involves the merits or necessarily affects the appealed judgment. Mont. Code Ann. § 46-20-104(2). The statutes do not require a trial court's ruling to be made against the appealing party before this Court can adjudicate the legal issue on the merits, only that a “definitive ruling” occur. *See State v. Favel*, 2015 MT 336, ¶ 19, 381 Mont. 472, 362 P.3d 1126, Mont. Code Ann. §§ 46-20-104(2), 46-20-701(1).

A conviction must be reversed if the record shows the error prejudiced the defendant's right to a fair trial. *See State v. Byrne*, 2021 MT 238, ¶¶ 18, 23, 405 Mont. 352, 495 P.3d 440; *State v. Hixon*, 2008 MT 365, ¶¶ 26-29, 346 Mont. 427, 197 P.3d 918; Mont. Code Ann. § 46-20-701(1). Unfair prejudice results when the evidence "arouses the jury's hostility or sympathy for one side without regard to its probative value." *State v. Schauf*, 2009 MT 281, ¶ 41, 352 Mont. 186, 216 P.3d 740. Prior bad acts are highly prejudicial due to the great risk the evidence "will emotionally provoke the jury to desire to punish the defendant for prior bad conduct or, at least, give the prior bad acts evidence undue weight over the actual case-specific evidence of guilt or innocence centrally at issue." *State v. Pelletier*, 2020 MT 249, ¶ 26, 401 Mont. 454, 473 P.3d 991.

Once counsel opposes the admission of evidence, prejudicial error can be presumptively cured during trial if the district court carries out three necessary steps: Sustaining the objection, ordering the evidence stricken from the record, and instructing the jury to disregard the evidence. *West*, 252 Mont. at 91, 826 P.2d at 945.

In *West*, defense counsel objected to evidence brought out by the prosecution concerning alcohol breath tests. *West*, 252 Mont. at 90-91, 826 P.2d at 945. The district court sustained the objection, struck the testimony, cautioned the jury to take the law from the instructions, and instructed the jury on how to apply alcohol test evidence. *West*, 252 Mont. at 90-92, 826 P.2d at 945-946. *West* did not move for a new trial but argued for reversal on direct appeal. *West*, 252 Mont. at 86, 826 P.2d at 942. Upon review, the district court held that any error made by the State was cured by the district court's repeated admonishments and the reading of the applicable jury instruction. *West*, 252 Mont. at 92, 826 P.2d at 946.

The additional requirements of striking the evidence and instructing the jurors to disregard the evidence are important because our court system operates on the presumption that jurors will only be influenced by legal evidence and will disregard what they are told to disregard. *See State v. Freeman*, 183 Mont. 334, 345-346, 599 P.2d 368, 374-375 (1979), quoting *Pennsylvania Co. v. Roy*, 102 U.S. 451, 459 (1880). This Court has repeatedly found that district courts must not only sustain objections, but to strike evidence and instruct jurors to

disregard inadmissible evidence to properly cure prejudice resulting from the error. *See State v. Brush*, 228 Mont. 247, 251, 741 P.2d 1333, 1335 (1987); *State v. Staat*, 251 Mont. 1, 10, 822 P.2d 643, 648 (1991); *State v. Arlington*, 265 Mont. 127, 153-154, 875 P.2d 307, 323 (1994); *State v. Seaman*, 236 Mont. 466, 475, 771 P.2d 950, 955-956 (1989).

In *Brush*, counsel objected after a witness improperly brought up a prior bad act and the district court sustained the objection. *Brush*, 228 Mont. at 250, 741 P.2d at 1335. The parties agreed the testimony was not purposely drawn out by the county attorney and that the witness had made an inadvertent slip. *Brush*, 228 Mont. at 251, 741 P.2d at 1335. The district court issued three cautionary instructions to disregard the remark, including one immediately after defense counsel's objection as well as a written jury instruction to "erase this testimony from your minds." *Brush*, 228 Mont. at 251, 741 P.2d at 1335-1336.

The Court held the inadmissible testimony "was cured by proper admonishment of the jury." *Brush*, 228 Mont. at 252, 741 P.2d at 1336.

In *Seaman*, counsel objected when an officer improperly testified about opium possession. *State v. Seaman*, 236 Mont. 466, 475, 771 P.2d 950, 955 (1989). The district court sustained the objection and asked if

counsel wanted to strike the answer. *Seaman*, 236 Mont. at 475, 771 P.2d at 955. After counsel so moved, the district court ordered the answer stricken and instructed the jury to disregard the officer's answer. *Seaman*, 236 Mont. at 475, 771 P.2d at 955. The Court held the error was cured because the district court took all three steps. *Seaman*, 236 Mont. at 476, 771 P.2d at 956.

In *Arlington*, the prosecutor made an incorrect statement about the burden of proof during voir dire. *Arlington*, 265 Mont. at 153, 875 P.2d at 322-323. After defense counsel objected, the district court: sustained the objection, restated the proper burden of proof, agreed with defense counsel's further framing of the burden of proof standard, and instructed the jury on the burden of proof. *Arlington*, 265 Mont. at 153, 875 P.2d at 323. This Court concluded that by correctly informing and instructing the jurors on the burden of proof, the error was cured. *Arlington*, 265 Mont. at 153-154, 875 P.2d at 323.

The jury cannot be presumed to ignore their duties with respect to instructions from the court, but they first must be so instructed. *See Brush*, 228 Mont. at 251, 741 P.2d at 1335. Jurors are presumed to follow instructions provided by the court. *State v. Sinz*, 2021 MT 163,

¶ 31, 404 Mont. 498, 490 P.3d 97. When clear instructions are not provided, we cannot ask lay jurors to apply the law by themselves. See *State v. Cain*, 220 Mont. 509, 516, 717 P.2d 15, 20 (1986) (“We cannot reasonably require a jury of lay persons to make a distinction which is so fine it proves difficult even for attorneys and legal scholars to make.”).

Here, the district court did not cure the prejudice brought about by Rosipal’s testimony when it did not order the evidence stricken and did not instruct the jurors to disregard Rosipal’s remarks. Rosipal told the jury that he has past experiences with Ball at his home, and that every time he is there, Ball is always the same, that is, very agitated. (Tr. 145.) This was highly damaging prior acts evidence. While the word “sustained” stopped the questioning, the jury was not told to disregard what it had just been told, and therefore still considered what Rosipal had testified to as legal evidence. Instruction #5 instructed the jury not to draw inferences from what a witness might have said following a sustained objection, but it did not address how the jury should interpret and use inadmissible evidence already spoken in court. Rather, Instruction #8 instructed the jury to “carefully consider all testimony

given, the circumstances under which each witness has testified, and every matter in evidence that tends to indicate whether a witness is worthy of belief.” (Doc. 40.)

The district court actively restricted Ball’s counsel from acting, putting more onus on the district court to cure prejudicial errors arising from objections. The district court said, “No speaking objections – both of you have tried cases with me . . . no speaking objections. I’ll ask if there is a question, just state the legal objection.” (10/19/20 Tr. 5.) In announcing a desire to have a trial free of detailed, well-crafted objections from counsel, the district court assumed the burden of curing prejudice arising from sustained objections. The district court put itself in a similar position to the trial court in *Seaman*, where the judge followed up with counsel to resolve a sustained objection. *See Seaman*, 236 Mont. at 475, 771 P.2d at 955. Had Ball’s counsel elaborated further on the objection without prompting from the judge, he may have drawn an admonishment from the court.

Prior acts evidence is highly prejudicial, and its prohibition must be strictly enforced. *Pelletier*, ¶ 26; *Rogers*, ¶ 32. When the district court only sustained the objection but otherwise declined to strike the

evidence or instruct the jury to disregard, the prejudice from Rosipal's remarks was not cured. Ball remained prejudiced by the inadmissible testimony and a new trial is required.

The words "overruled" and "sustained" may carry meaning to lawyers appearing in court every day, but they do not carry the same resonance or impact to a juror in the courtroom, which might be the only place they hear such words. The law presumes that jurors take their job seriously and carefully listen to all the evidence presented before them. The jurors were not instructed to disregard evidence deemed inadmissible but nonetheless conveyed to them in the courtroom. Rosipal's remarks prejudiced Ball, and the prejudice was not cured by the single use of the word "sustained." The jury, being instructed to carefully consider all the evidence, presumptively used Rosipal's unstricken remarks to resolve the case and arrive at a verdict.

C. Alternatively, Ball's counsel was ineffective for not filing a motion for a new trial.

Ball's counsel properly objected to Rosipal's remark. (Tr. 145.) Counsel's conduct in the heat of trial thus fell within the range of reasonable professional assistance, particularly given the judge's

admonishment of “no speaking objections.” Counsel also filed a timely notice of appeal and challenged Rosipal’s inflammatory remarks for uncured prejudice, as permitted under *West*. If, however, this Court believes that Ball should have taken the additional act of filing a motion for a new trial or moving for a mistrial outside the jury’s presence, then Ball alternatively argues counsel was ineffective for failing to undertake that additional act.

To establish an ineffective assistance of counsel claim, “a defendant must prove (1) that counsel’s performance was deficient, and (2) that counsel’s deficient performance prejudiced the defense.” *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. Ignorance or neglect is not a defense to deficient performance; rather, the question to be answered is whether counsel’s conduct fell below an objective standard of reasonableness. *Whitlow*, ¶¶ 17, 20. The standard of care reasonably demanded of trial counsel is to evaluate the law and act accordingly. *State v. Becker*, 2005 MT 75, ¶ 19, 326 Mont. 364, 110 P.3d 1. “Although counsel need not be a fortune teller, he must be a reasonably competent legal historian. Though he need not see into the

future, he must reasonably recall (or at least research) the past.”

Becker, ¶ 19.

While *West* provides that sustained objections can be raised and resolved on direct appeal, much of the case law addressing sustained objections have arisen in the context of motion for a new trial or a motion for mistrial made outside the jury’s presence. *See Staat*, 251 Mont. at 9-10, 822 P.2d at 648-649 (counsel filed motion for new trial after a sustained objection to prosecutor remarks in closing argument); *Brush*, 228 Mont. at 250, 741 P.2d at 1335 (counsel moved for a mistrial at close of State’s case, and filed a motion for a new trial after the verdict); *Seaman*, 236 Mont. at 475-476, 771 P.2d at 955-956 (counsel moved for a mistrial following a sustained objection).

Given (1) that counsel had objected to Rosipal’s testimony, (2) the inflammatory nature of the evidence, and (3) the district court’s failure to cure the prejudice with additional instruction, counsel should have either moved for a mistrial outside the jury’s presence or filed a motion for a new trial following the verdict. *See Arlington*, 265 Mont. at 155-156, 875 P.2d at 324. The failure to undertake this additional act constituted ineffective assistance.

The second step in an ineffective assistance inquiry is to establish prejudice by demonstrating a reasonable possibility the result of the proceeding would have been different but for counsel's error. *Kougl*, ¶ 25. "A reasonable possibility is a probability sufficient to undermine confidence in the outcome, but it does not require that a defendant demonstrate that he would have been acquitted." *Kougl*, ¶ 25. A defense attorney's failure to seek a proper jury instruction undermines confidence in the verdict. *State v. Resh*, 2019 MT 220, ¶ 20, 397 Mont. 254, 448 P.3d 1100.

The criminal allegation in this case involved only two witnesses with strongly contrasting stories and two police officers who were not present at the time. No other third-party who saw the event was called to testify, and no videos or photographs of the event were provided. The trial hinged on the credibility of the stories presented by Ellis and Ball. Rosipal did not provide any prior bad acts information about Ellis, but he told the jury that Ball had multiple law enforcement contacts, he was always very agitated, and this time he was also drunk or high. (Tr. 145.) Rosipal's remarks were not stricken and the jury was never instructed to disregard that evidence. (Tr. 145.) The prejudice was not

cured. Counsel's failure to move for a new trial in light of this highly damaging testimony prejudiced Ball and deprived him of a fair trial.

CONCLUSION

Ball respectfully requests this Court reverse and remand for a new trial.

Respectfully submitted this 27th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,436, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ James Reavis
JAMES REAVIS

APPENDIX

Redirect Testimony of Officer RosipalApp. A

Judgment.....App. B

Oral Pronouncement of Sentence.....App. C

CERTIFICATE OF SERVICE

I, James Richard Reavis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-27-2022:

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