

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

No. DA 22-0248

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

CODY RAN TUNNELL,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana First Judicial District Court,  
Lewis and Clark County, the Honorable Christopher D. Abbott , Presiding

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**APPEARANCES:**

**CHAD WRIGHT**  
Appellate Defender  
**KRISTINA L. NEAL**  
Assistant Appellate Defender  
Office of State Public Defender  
Appellate Defender Division  
P.O. Box 200147  
Helena, MT 59620-0147  
krneal@mt.gov  
(406) 444-9505

**ATTORNEYS FOR DEFENDANT  
AND APPELLANT**

**AUSTIN KNUDSEN**  
Montana Attorney General  
**TAMMY K PLUBELL**  
Bureau Chief  
Appellate Services Bureau  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

**KEVIN DOWNS**  
Lewis and Clark County Attorney  
**JOHN NESBITT**  
Deputy County Attorney  
Courthouse-228 E. Broadway  
Helena, MT 59601

**ATTORNEYS FOR PLAINTIFF  
AND APPELLEE**

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## **STATEMENT OF THE ISSUE**

A witness can be questioned about specific instances of conduct during cross examination if the evidence is probative of the witness' credibility. The district court limited Cody's cross-examination regarding Sandy's prior filing of a false police report to being "stuck" with whatever answer Sandy provided. The district court's limitation prevented the jury from fully evaluating Sandy's testimony.

## **STATEMENT OF THE CASE**

The State charged Cody Tunnell with criminal endangerment, felony DUI and Partner or Family Member Assault (PFMA). (District Court (DC) Document 4.) The allegations were that he was driving while intoxicated and injured his friend Sandra. (DC 2.) The jury convicted Cody of criminal endangerment and the DUI but found him not guilty of the PFMA. (DC 32.) The district court sentenced Cody to thirteen months to the Department of Corrections, followed by five years suspended for the DUI and sentenced him to five years to the Department of Corrections, all suspended, for the criminal endangerment. (DC 53.) (A copy of Second Amended Judgment is attached as Appendix A.)

## **STATEMENT OF THE FACTS**

Both Cody and Sandy were homeless and lived in their respective vehicles. (1/3/22 Transcript (Tr.) p. 112; 1/4/22 Tr. p. 51.) At the time of

the incident, Cody was living in his Nissan truck/camper in the Big Lots/Les Schwab parking lot. (1/4/22 Tr. pp. 51, 56.) His truck was inoperable, so he had a friend tow it from the Walmart parking lot to the Big Lots parking lot. (1/4/22 Tr. pp. 51, 64, 87.) Somewhere near dark, Sandy and a few other people showed up at his truck with a bottle of vodka. (1/4/22 Tr. pp. 51-52, 61.) Cody described his relationship with Sandy as intimate one time years ago and then just friends. (1/4/22 Tr. p. 74; State's Exhibit (Ex.) 11.) Cody had not seen Sandy for approximately four years before the night of the incident. (1/4/22 Tr. p. 55.)

Cody and Sandy sat in his truck, in the parking lot, and drank vodka. (1/4/22 Tr. p. 60.) As Sandy became intoxicated, she began to accuse him of being a Satanist. (1/4/22 Tr. p. 63.) They argued, and the disagreement became physical with Sandy trying to pull his hair. (1/4/22 Tr. pp. 53, 63.) When this happened, he got out of the truck and went to use the restroom at a nearby fast-food restaurant. (1/4/22 Tr. 53, 63.) When he walked back over to the truck his dog was missing, and he went to look for his dog. (1/4/22 Tr. p. 53.)

After he found his dog and returned to the truck, Sandy was screaming and lying next to his truck with an injured arm. (1/4/22 Tr. p. 54.) The police arrived almost immediately after he got back to his truck. (1/4/22 Tr. p. 65.) He testified he did not know how Sandy was injured. (1/4/22 Tr. p. 54; State's Ex. 11.) His theory was that Sandy and the other man she arrived with tried to push his vehicle and steal it, when he went to look for his dog, and that Sandy slipped and fell while doing so. (1/4/22 Tr. p. 66.) Cody openly admitted he was intoxicated but denied driving and maintained his truck was not operable. (1/4/22 Tr. pp. 64, 69.) He also denied physically kicking Sandy out of the truck, as it would have been physically impossible as there is a console between the driver and passenger seats. (1/4/22 Tr. pp. 56, 91; State's Ex. 11.)

Sandy testified she was living in her car in the ShopKo parking lot in late January. (1/3/22 Tr. p. 112.) The temperature was freezing, and she did not have enough money for gas to run her car's heater. (1/3/22 Tr. p. 112.) Cody drove up and started talking with her. (1/3/22 Tr. p. 113.) She got in with Cody because she was so cold. (1/3/22 Tr. p. 113.) She gave him what money she had, and he bought a bottle of vodka.

(1/3/22 Tr. p. 115.) They started driving around, while drinking straight from the bottle. (1/3/22 Tr. p. 115.)

Sandy's testimony then became bizarre. She testified while driving on Highway 12 toward East Helena, Cody told her he worshiped the devil and that he was going to take her into the mountains and kill her and eat her. (1/3/22 Tr. pp. 115, 118.) Thus, Sandy decided to escape from the vehicle by opening the truck door and pushing Cody's dog, a pit bull, out of the truck. (1/3/22 Tr. p. 120; State's Ex. 11.) When she threw the dog out of the truck, Cody stopped the truck to retrieve the dog. (1/3/22 Tr. p. 120.) Sandy changed her mind about leaving the vehicle because she did not see any other cars on the road, so she remained in the truck. (1/3/22 Tr. p. 120.)

Sandy claimed Cody then drove to the Big Lots/Les Schwab Tire parking lot area, where Cody lived. (1/3/22 Tr. pp. 121-122.) Sandy demanded Cody drive her back to ShopKo. (1/3/22 Tr. p. 121.) Cody refused and the two got in a fight which included hair pulling, Cody hitting her and Sandy biting Cody. (1/3/22 Tr. p. 123.) Cody demanded she get out of the truck. (1/3/22 Tr. p. 121.) When Sandy refused, Cody physically kicked her so hard she pushed the truck door open and fell

out of the truck. (1/3/22 Tr. p. 124.) Cody then tried to drive away and drove over her arm. (1/3/22 Tr. p. 124.) Her arm was not broken but she claimed she spent “awhile” in the hospital since her arm was torn open to the bone, and the arm kept becoming infected. (1/3/22 Tr. pp. 129, 131.)

Another “resident” of the parking lot called 911 and police arrived while Sandy was still laying on the ground, next to the passenger side of Cody’s truck. (1/3/22 Tr. pp. 128, 153; 1/4/22 Tr. p. 16; State’s Ex. 11.) Cody and another man were standing in front of the truck. (1/3/22 Tr. p. 153; State’s Ex. 11.) Law enforcement interviewed Cody and Sandy and decided to arrest Cody. (1/3/22 Tr. p. 146.) One of the officers claimed that the engine to Cody’s truck was warm to the touch. (1/4/22 Tr. p. 16.) Cody refused all FSTs. (1/4/22 Tr. p. 18.) An officer obtained a search warrant for a blood draw, and Cody’s blood alcohol level was a .157. (1/4/22 Tr. pp. 20, 41.)

Sandy has a prior 2012 conviction for filing a false report. (1/3/22 Tr. p. 7.) The State moved to preclude this evidence as too remote and not relevant. (1/3/22 Tr. p. 7.) The court found the evidence not too remote. (1/3/22 Tr. p. 9.) The court further found the evidence relevant

and material. (1/3/22 Tr. p. 9.) However, pursuant to M. R. Evid. 608 and M. R. Evid. 609, the court ruled defense counsel could question Sandy about the facts underlying the conviction but would be “stuck with her answers” and could not introduce the prior conviction or extrinsic evidence about the prior conviction. (1/3/22 Tr. p. 8.)

During cross examination of Sandy, she said that although “maybe I lied to the police” about somebody being in her home, she did not remember being dishonest with the police in 2012. (1/3/22 Tr. p. 139.) Rather, she described herself as a “pretty honest person.” (1/3/22 Tr. p. 140.) She further offered, “[i]n fact, all the street people will tell you she [Sandy] didn’t lie. All the street people will say that about me.” (1/3/22 Tr. p. 140.) Based on the court’s pre-trial ruling, defense counsel was “stuck” with this answer and concluded her cross-examination. (1/3/22 Tr. p. 140.)

### **STANDARD OF REVIEW**

This Court reviews evidentiary rulings for an abuse of discretion. *State v. Frey*, 2018 MT 238, ¶12, 393 Mont. 59, 427 P. 3d 86 (citation omitted). A district court abuses its discretion “if it acts arbitrarily without the employment of conscientious judgment or exceeds the

bounds of reason, resulting in substantial injustice.” *Frey*, ¶12 (citation omitted). To the extent an evidentiary ruling is based on a district court's interpretation of the Montana Rules of Evidence, this Court’s review is de novo. *Frey*, ¶12 (citation omitted). An erroneous evidentiary ruling constitutes reversible error when a substantial right of the party is affected. *State v. Buckles*, 2018 MT 150, ¶9, 391 Mont. 511, 420 P. 3d 511. (citation omitted).

### **SUMMARY OF ARGUMENT**

By restricting the cross-examination of Sandy’s prior false reporting conviction, the trial court violated M.R. Evid. 608(b). M.R. Evid. 608(b) provides that specific instances of misconduct, if probative of truthfulness or untruthfulness, may be inquired into on cross-examination of the witness. Thus, Cody had a right to confront Sandy concerning the conduct that she engaged which resulted in her conviction for filing a false report. The district court abused its discretion when it held Cody could ask her about the circumstances but then would be “stuck” with her answers.

Cody was prejudiced by the court’s erroneous ruling. Cody testified his truck was inoperable and repeatedly denied driving on the

night of the incident. Given that Sandy was the only witness to testify that Cody had been driving, the court's ruling prevented the jury from fully analyzing Sandy's credibility.

### **ARGUMENT**

**A witness can be questioned about specific instances of conduct during cross examination if the evidence is probative of the witness's credibility. The district court limited Cody's cross-examination regarding Sandy's prior filing of a false police report to being "stuck" with whatever answer Sandy provided. Did the district court's limitation prevent the jury from fully evaluating Sandy's testimony?**

The only witnesses to the incident were Cody and Sandy, and the two had very different accounts. Sandy's account included bizarre testimony about throwing Cody's pit bull out of the truck while he was driving and Cody physically kicking her out of the truck. (1/3/22 Tr. pp. 120, 124; State's Ex. 11.) This was not the first time Sandy was untruthful with law enforcement. Sandy had a prior conviction from 2012 for filing a false report. (1/3/22 Tr. p. 7.) Despite the State's arguments, the district court found the prior conviction relevant and not too remote in time. (1/3/22 Tr. p. 9.) Yet, in a restricted reading of Mont. R. Evid. 608 and Mont. R. Evid. 609, the district court only allowed vague cross-examination of this prior conviction and ordered

defense counsel that the defense would be “stuck” with whatever answer provided by Sandy. (1/3/22 Tr. p. 8.)

Although Sandy admitted she might have not been truthful with the police at one point, because of an incident with her roommate, she clarified she did not really remember the situation and did not remember if she had ever been convicted based on her untruthfulness. (1/3/22 Tr. pp. 139-140.) However, she affirmatively testified she had a reputation amongst the homeless population of being truthful, and she thought of herself as a “pretty honest person.” (1/3/22 Tr. p. 140.) Based on the court’s restrictive ruling, Cody was “stuck” with Sandy’s self-serving answer. (*See*, 1/3/22 Tr. p. 8.)

This Court has held that specific instances of conduct may be introduced through cross-examination if the evidence is probative of the witness’ credibility. *State v. Gommenginger*, 242 Mont. 265, 272, 790 P. 2d 455, 460(1990). In *Frey*, the district court allowed the State to cross-examine the defendant on a prior conviction for false reporting to law enforcement, as the conviction had bearing upon Frey’s truthfulness, pursuant to M. R. Evid. 608(b). *Frey*, ¶4. The district court reasoned the State could use the conviction because “a specific instance of conduct

may be inquired into on cross-examination of the witness but only if it is probative of truthfulness or untruthfulness.” *Frey*, ¶16. This Court agreed and explained, although M.R. Evid. 608(b) generally prohibits use of extrinsic evidence to prove specific instances of conduct, specific instances of conduct can be admitted during cross-examination to show a witness’ credibility, “i.e. their character for truthfulness.” *Frey*, ¶17. This Court specifically found that the false reporting conviction involved dishonesty to law enforcement and thus relevant to the defendant’s credibility for truthfulness. *Frey*, ¶20.

Likewise in *State v. Martin*, 279 Mont. 185, 198, 926 P. 2d 1380, 1388-1389 (1996), the State sought to cross-examine the defendant’s wife about providing false information in an unrelated criminal proceedings, in which she was convicted of unsworn falsification to authorities. This Court found the evidence the wife had provided false alibi information to authorities, “clearly was admissible pursuant to Rule 608(b), M.R. Evid., as probative of Jan’s veracity as a witness.” *Martin*, 279 Mont. at 199, 926 P. 2d at 1389. On appeal, the defendant in *Martin* relied upon *State v. Gollehon*, 262 Mont. 1, 864 P. 2d 249 (1993) to argue the false alibi information to authorities should have

been held inadmissible. *Martin*, 279 Mont. at 199, 926 P. 2d at 1389.

This Court distinguished the theft and burglary convictions the defendant sought to introduce in *Gollehon*, but agreed that certain criminal acts, such as suppression of evidence, filing under false pretenses, and embezzlement, indicate dishonesty. *Martin*, 279 Mont. at 200, 926 P. 2d at 138 citing *Gollehon*, 262 Mont. at 16, 864 P. 2d at 259. Thus, this Court in *Martin* held the facts surrounding the unsworn falsification to authorities conviction went directly to the wife's truthfulness as a witness. *Martin*, 279 Mont. at 200, 926 P. 2d at 1390.

Sandy told an unbelievable tale as to what happened on the night of January 30, 2021. Sandy's account of throwing out Cody's pit bull truck on Highway 12, and then choosing to remain in the truck, was implausible. (1/3/22 Tr. p. 120; State's Ex. 11.) Likewise, her story about Cody physically kicking her so hard that she fell out of the truck was not only unbelievable, but likely physically impossible. (1/3/22 Tr. p. 124; 1/4/22 Tr. pp. 56, 91.) Given the glaring deficits in Sandy's testimony, her credibility of how she was injured was critical for the State. As in *Martin* and *Frey*, Sandy's prior conviction of false reporting

to law enforcement went directly to her credibility and was probative of Sandy's veracity as a witness.

The final cross-examination of Sandy was her description of herself as an honest person and a reputation among her peers as being truthful. (1/3/22 Tr. p. 140.) The district court abused its discretion when it limited Cody's cross-examination of Sandy to being "stuck" with whatever answers Sandy provided, rather than allowing Cody to present evidence of Sandy's prior false reports to law enforcement. Cody was prejudiced by the district court's limitation on his ability to cross-examine Sandy regarding her lack of truthfulness.

### **CONCLUSION**

Sandy and Cody were the only eyewitnesses to testify as to what occurred to Sandy, and they told divergent accounts. Reasonable doubt existed as to Sandy's testimony as her description of the night included allegedly pushing Cody's pit bull out of the moving truck and Cody physically kicking her out of a truck with a shut door. The district court abused its discretion when it limited Cody's cross examination of Sandy regarding her untruthfulness and her prior filing a false report

conviction to being “stuck” with Sandy’s answers. Cody is entitled to a new trial in which the jury can fully evaluate Sandy’s credibility.

Respectfully submitted this 30th day of August, 2023.

OFFICE OF STATE PUBLIC DEFENDER  
APPELLATE DEFENDER DIVISION  
P.O. Box 200147  
Helena, MT 59620-0147

By: /s/ Kristina L. Neal  
KRISTINA L. NEAL  
Assistant Appellate Defender

## **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 2,579, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristina L. Neal  
KRISTINA L. NEAL

**APPENDIX**

Second Amended Judgment and Commitment .....App. A

## **CERTIFICATE OF SERVICE**

I, Kristina L. Neal, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-30-2023:

Austin Miles Knudsen (Govt Attorney)  
215 N. Sanders  
Helena MT 59620  
Representing: State of Montana  
Service Method: eService

Kevin Downs (Govt Attorney)  
228 E. Broadway  
Helena, MT MT 59601  
Representing: State of Montana  
Service Method: eService

Electronically signed by Kim Harrison on behalf of Kristina L. Neal  
Dated: 08-30-2023