

IN THE SUPREME COURT OF THE STATE OF
MONTANA Case No. DA 25-0100

STATE OF MONTANA,

Plaintiff and Appellee,

vs.

JEFFREY W. BURRINGTON,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Fourth Judicial District Court
Missoula County, Honorable Shane A. Vannatta, Presiding

APPEARANCES:

LANCE P. JASPER
REEP, BELL & JASPER, P.C.
P.O. Box 16960
Missoula, MT 59808-6960
Phone: (406) 541-4100
jasper@westernmontanalaw.com

*Attorneys for Defendant
& Appellant*

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K. PLUBELL
Appellate Bureau Chief
Joseph P. Mazurek Building
215 N. Sanders
Helena, MT 59620-1401

JUSTIN EKWALL
Deputy County Attorney
Missoula County Attorney's Off.
200 West Broadway
Missoula, MT 59802

Attorneys for Plaintiff & Appellee

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STATEMENT OF THE ISSUES

- I. Whether the district court erred in denying Burrington’s motion for a directed verdict.
- II. Whether the district court’s comment about Sally Burrington’s prior road rage warrants a new trial.
- III. Whether the prosecutor’s comments about the Burringtons’ character warrant a new trial.
- IV. Whether the cumulative effect of errors warrants a new trial.

STATEMENT OF THE CASE

On July 27, 2023, the Missoula County Attorney’s Office charged Jeffrey W. Burrington (“Burrington”) with aggravated assault in violation of Mont. Code Ann. § 45-5-202. (Doc. 3). The Information alleged that during a roadside altercation on July 22, 2023, Burrington punched Ryan Williams (“Williams”) once in the jaw, causing serious bodily injury or a reasonable apprehension of such injury. (*Id.*)

Williams sustained a fractured lower jaw. (6/24/24 2nd Tr. 140:5-24). However, he experienced no deformities, mobility issues, or functional impairments. (*Id.*) His injury required no surgery or medical intervention. (*Id.* at 128:8-21). His pain was minimal, and he was able

to consume food throughout. (*Id.* at 55:4-7; 141:23-24). He returned to his physically demanding job as a smoke-jumper firefighter within two days. (*Id.* at 54:16-18).

Burrington's defense at trial was twofold: (1) justifiable use of force and (2) misdemeanor assault as a lesser included offense. He moved for a directed verdict, arguing that the State failed to prove the element of serious bodily injury. (6/25/24 Tr. 166:1-25 to 170:1-14). The district court denied his motion, in error. (*Id.* at 172:7-25 to 173:1-4).

Other act evidence was discussed throughout trial by both parties. During Burrington's cross-examination, the district court made a highly prejudicial comment before the jury about his wife's previous road rage. (6/26/24 Tr. 115:13-14). The jury was never given a limiting instruction to clarify the restricted purpose of the court's comment or to mitigate its impact.

The prejudice from the court's road rage comment was compounded by the prosecutor's improper arguments during closing, in which he emphasized character evidence to suggest the Burringtons acted in conformity with prior road rage incidents. (*Id.* at 202:5-14; 204:14-21; 205:16-25; 206:7-11).

The jury convicted Burrington of aggravated assault. (Doc. 49). The district court sentenced him to seven years in the Department of Corrections, with execution of the sentence fully suspended. (Docs. 61, 62). Burrington timely appealed.

STATEMENT OF THE FACTS

Lack of Serious Bodily Injury

Williams had no external facial injuries, and his primary complaint was soreness. (6/24/24 2nd Tr. 50:25; Ex. 7). Williams was examined by an oral surgeon named Dr. Richard Holtzen on July 28, 2023. (*Id.* at 140:5-24). Dr. Holtzen noted that while Williams was sore, his facial bones were symmetrical, with no step-offs, mobility issues, or deformities. (*Id.*) Williams had full range of motion in his jaw without pain, limitation, or deviation. (*Id.* at 141:13-16.) Dr. Holtzen found no functional impairment to Williams' jaw. (*Id.* at 140:19-21).

Williams was placed on a soft food diet for six weeks but never lost the ability to consume food. (6/24/24 2nd Tr. 56:1-2; 129:2-5). While he claimed his injury interfered with sleep, he provided no specifics regarding the amount or duration of sleep loss. (*Id.* at 56:3-18). When Dr. Holtzen was asked whether the injury caused Williams' sleep

difficulties, his response was that he expected Williams to be "quite sore." (*Id.* at 130:2-6.)

Williams did not require surgery or any other medical intervention. (*Id.* at 128:10-15). He fully recovered with no lasting damage. (*Id.* at 135:1-17). Within one to two days of the injury, he returned to work as a smoke-jumper, engaging in physically demanding tasks such as hiking, carrying heavy equipment, and firefighting. (6/24/24 2nd Tr. at 54:12-25 to 56:1-2). Although he was temporarily restricted from jumping into fires or flying in helicopters, his overall job performance was unaffected. (*Id.*)

Directed Verdict

For the directed verdict, Burrington argued that Williams' injury did not meet the element of protracted loss or impairment of a bodily function under Mont. Code Ann. § 45-2-101(66)(a)(ii). (6/25/24 Tr. 166:20-25 to 170:1-14). The motion emphasized that the injury was short-lived, required no medical treatment, and did not significantly impede Williams' daily activities like eating, sleeping and working. (*Id.*)

The State responded that whether the impairment was protracted was a question of fact for the jury, citing cases in which a six-week

recovery period had been deemed sufficient to support a finding of serious bodily injury. (*Id.* at 170:15-25 to 172:1-6); see also State's Response to Motion to Dismiss and Brief in Support (App. A); Order & Rationals Regarding Defendant's Motion to Dismiss (App. B). The State's argument was as follows:

THE STATE: I think the element to look at is the protracted impairment. Probably, impairment is more appropriate to this case than loss. I guess, loss could be argued of a bodily function. And I think just *the fact that some of Mr. Williams's bodily functions were performing fully doesn't really tell us much here.*

The testimony from the physician was that it did impair eating. That was also supported and consistent with the testimony from the victim and his spouse, which the jury is within their rights to credit.

And, I think, as far as how long something has to be to be protracted, believe that's a question of fact for the jury. But, to some extent, I think, maybe, the level and necessity of what's being impaired probably matters there, or at least, the jury can consider that.

And as we cited in response to the written Motion to Dismiss, there are several cases in Montana, and in other jurisdictions, that have allowed a jury to find that a period of six weeks for recovery is protracted.

THE COURT: Although, I do believe that was with a jaw wired shut, wasn't it?

THE STATE: Many of them were. There -- there's actually several different fact patterns. Some of them involved wiring shut. Some of them involved a broken jaw in addition to other injuries. Yeah, it's just the reality that it's hard to ever find a case that has the exact fact pattern that we have before us. But I do think this is a case that can get to the jury. I also note that the State did include in its charging documents that reasonable apprehension of a serious bodily injury could be grounds to convict here, and I think, at the absolute least, Ryan Williams had apprehension of having to have his jaw wired shut, which was, under the circumstances, reasonable for him to have for, at least, a day or two.

THE COURT: Except for he didn't think there was anything wrong until the last moment when the pain didn't go away.

(6/25/24 Tr. 170:17-25 to 172:1-9). (Emphasis added).

The district court denied the directed verdict on the following rationale:

But, nevertheless, the Court is going to deny the motion that was made under Montana Code Annotated 46-16-403, 'When, at the close of the prosecution's evidence, or at the close of all of the evidence, the evidence is insufficient to support a finding or a verdict of guilty, the Court may, on its own motion, or on the motion of defendant, dismiss the action and discharge the defendant.'

The Court did hear evidence. Whether it's sufficient to actually result in a finding of guilty will be left up to the jury. The Court heard, as the State pointed out, that there were limitations on eating; limitations on, frankly, speaking; limitations on being able to open; limitations—issues of loss of sleep. And he testified to continuing tingling.

I think everything that you just argued, Mr. Jasper, can be argued to the jury, but I think it still goes to the jury. It's a question of fact, and the jury will decide.

(*Id.* at 172:10-25 to 173:1-4.)

Other Act Evidence

During opening statement, defense counsel referenced prior incidences where Burrington and his wife (Sally) had been victims of violent crimes, including a 2023 roadside incident where a man brandished a machete at Sally. (6/24/24 2nd Tr. 28:9-17).

On direct examination of Sally, defense counsel elicited testimony regarding Burrington's character as a husband and father. (6/25/24 Tr. 178:22-23). The State objected, and the district court warned that the defense risked opening the door to rebuttal character evidence. (*Id.* at 178:24-25 to 179:1-14.)

Later, defense counsel asked Sally whether she had ever seen her husband afraid. She responded by discussing a 1987 roadside incident involving an armed individual. (*Id.* at 180:4-22). The State objected, and

the district court again warned about opening the door to rebuttal evidence. (*Id.* at 180:23-25; 181:1-10). Defense counsel proceeded with questioning about the 1987 and 2023 machete incidents. (*Id.* at 181:11-25; 182-186:1-15). The State then questioned Sally about the machete incident during cross-examination. (6/25/24 Tr. 219:19-25 to 221:1-11.)

Day 2 Conference with District Court

At the close of trial on Day 2, the State announced its intent to request the pattern instruction on 404(b) evidence (MCJI 1-120) and sought to introduce a third prior roadside incident involving Burrington, which had resulted in an assault charge later reduced to disorderly conduct. (*Id.* at 247:6-17.) The defense objected, arguing the prior incidents were introduced solely to explain the Burringtons' state of mind – not their character. (*Id.* at 250:2-19). The district court reserved ruling and ordered further briefing. (*Id.* at 248:6-25 to 267:1-23).

Day 3 Ruling on Other Act Evidence

At the start of trial on Day 3, the district court ruled that it would not permit additional 404(b) evidence from the State due to (1) lack of prior notice and (2) undue prejudice under Rule 403, Mont. R. Evid.

(6/26/24 Tr. 4:12-25 to 5:1-11). However, the court cautioned that the defense could still “open the door.” (*Id.*)

Road Rage Comment by the District Court

During cross-examination of Burrington, the State questioned him about the 1987 and machete incidents. (*Id.* at 115:3-10). Defense counsel objected, but the court overruled the objection. (*Id.* at 115:11-22). The district court then made a highly prejudicial comment before the jury about Sally:

“No, no, no. He's talking about Ms. Burrington's previous road rage.”

(*Id.* at 115:13-14.)

This mischaracterization unfairly suggested to the jury that Sally, and likely her husband, had a history of aggressive or violent driving behavior, which was entirely unsupported by the evidence. A curative instruction for this comment was never offered during trial.

Failure to Provide a Limiting Jury Instruction

Although evidence of other acts was discussed throughout trial by both sides, the Court never provided the jury with a limiting instruction (MCJI 1-120) to clarify that such evidence could not be used to infer propensity. (6/26/24 Tr. 131-141).

Improper Character Arguments by the Prosecution

Much of the State's rebuttal in closing consisted of argument about the character and credibility of Williams and the Burringtons, including who lied and who testified truthfully. For example:

Now, you haven't had a whole ton of evidence about character in this case, because that's not what a criminal case is about. You know, you haven't seen people's criminal histories, you haven't seen, you know, elaborate descriptions of other incidents they've been in. And I don't want you to assume that those have happened, and I don't want you to assume that they haven't happened. I just want you to look at the evidence that you have. But you—you have seen something of the nature of these people.

(Id. at 202:5-14.)

Consider that when you're thinking about any other purported contradictions in Ryan Williams's statements. And also consider who is making a sincere effort to answer questions on even cross-examination. And -- and who's contradicting themselves. Who suddenly is having great difficulty in understanding questions. Who is interrupting the other attorney. These are all things that have bearing on credibility.

(Id. at 204:14-21.)

Now, the defense suggested that Ryan Williams was caught in a lie. There hasn't been any evidence that he was. But what does it look like when someone's caught in a lie? Does it look like someone being asked if they told the police that their husband was going to pop somebody, again? "Did you say that?" "No." "Are you saying you don't remember saying that, or are you saying you definitely didn't say that?" "No, I did not say that." Then you watch a video of them saying that to law enforcement.

(*Id.* at 205:16-25.)

Does it look -- does getting caught in a lie look like someone being asked a question and looking at the Judge and asking, "Do I have to answer that?" Because what he said was so inconsistent with what the case he's presenting to you all today is.

(*Id.* at 206:7-11.)

STANDARDS OF REVIEW

Directed Verdict

A motion to dismiss for insufficiency of the evidence under Mont. Code Ann. § 46-16-403, is only appropriate if, viewing the evidence in a light most favorable to the prosecution, no evidence exists upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Bomar*, 2008 MT 91, ¶ 13, 342 Mont. 281, 182 P.3d 47 (referencing *State v. Swann*, 2007 MT 126, ¶ 16, 337 Mont. 326, 160 P.3d 511). The established standard of review for denial of a motion for a directed verdict of acquittal is to determine whether the district court abused its discretion. *Swann*, ¶ 16 (citations omitted). If the denial of a directed verdict is based on a conclusion of law, such as the interpretation of a statute, the denial is reviewed *de novo* for correctness. *Id.* (citations omitted).

Improper Comments

Plain error review is undertaken only in those cases that implicate a criminal defendant's fundamental constitutional rights, where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.

State v. DuBois, 2006 MT 89, ¶ 31, 332 Mont. 44, 134 P.3d 82

(citations omitted).

The Montana Supreme Court will review a claim under such circumstances even though it was not raised in the district court. *State v. Novak*, 2005 MT 294, ¶ 31, 329 Mont. 309, 124 P.3d 182 (citation omitted). The decision to invoke plain error review is a discretionary one, to be invoked sparingly, on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances. *State v. Haithcox*, 2019 MT 201, ¶ 23, 397 Mont. 103, 447 P.3d 452 (citations omitted).

Jury Instructions

Jury instructions in a criminal case are reviewed to determine whether, as a whole, they fully and fairly instruct the jury on the applicable law. *State v. Crawford*, 2002 MT 117, ¶ 15, 310 Mont. 18, 48 P.3d 706 (citation omitted). If a defendant failed to object to a jury

instruction at trial, the issue is ordinarily not reviewed unless it qualifies for plain error review. *State v. Birthmark*, 2013 MT 86, ¶ 11, 369 Mont. 413, 300 P.3d 1140.

SUMMARY OF ARGUMENTS

Lack of Serious Bodily Injury

A small fracture is not *per se* serious bodily injury. Fracture or not, the injury must result in a protracted loss or impairment of a bodily member's function or process. Mont. Code Ann. § 45-2-101(66)(a)(ii). There was no such loss or impairment in this case.

The district court erred in denying Burrington's motion for a directed verdict, as the evidence presented by the State was insufficient to establish that the victim sustained serious bodily injury as defined by statute. Specifically, Williams received no medical treatment, and he was able to eat, sleep, and work without significant impairment. Just two days after the incident, he returned to work as a federal firefighter, engaging in physically demanding activities such as hiking and fighting fires.

The lack of medical intervention and the victim's ability to resume normal, physically strenuous activities so soon after the incident

demonstrate that the injury did not result in the protracted loss or impairment of bodily function or process, as required by law. The evidence failed to meet the statutory definition of serious bodily injury, and the district court should have granted a directed verdict on the aggravated assault charge.

Prejudicial Comments

The district court's comment regarding Sally's "prior road rage" in front of the jury was highly prejudicial to Burrington and constitutes reversible error. The court should have *sua sponte* struck this comment from the record and provided a curative instruction regarding this statement, as well as similar instructions when witnesses testified about other act evidence. The prosecutor compounded these errors by making improper character-based arguments during closing, further tainting the trial.

Cumulative Error

The cumulative effect of these errors deprived Burrington of his constitutional right to a fair trial. His conviction must be reversed, and a new trial granted.

ARGUMENTS

I. THE DISTRICT COURT ERRED IN ALLOWING THE AGGRAVATED ASSAULT CHARGE TO GO TO THE JURY BECAUSE THE VICTIM DID NOT SUFFER A PROTRACTED LOSS OR IMPAIRMENT OF JAW FUNCTION.

A person commits aggravated assault if they purposely or knowingly cause serious bodily injury to another or purposely or knowingly, with the use of physical force or contact, cause reasonable apprehension of serious bodily injury or death in another. Mont. Code Ann. § 45-5-202(1).

“Serious bodily injury” is defined as “bodily injury that creates a substantial risk of death; causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ.” Mont. Code Ann. § 45-2-101(66)(a)(i-iii).

“Bodily injury,” as required for misdemeanor assault, means “physical pain, illness, or an impairment of physical condition and

includes mental illness or impairment.” Mont. Code Ann. § 45-2-101(5); Mont. Code Ann. § 45-5-201(1).

It was never alleged at trial that Williams suffered a substantial risk of death or permanent disfigurement. (6/25/24 Tr. 170:1-4; 169:13-16). The critical factor in determining whether the charge of aggravated assault was appropriately submitted to the jury was whether the injury to Williams’ jaw caused him a protracted loss or impairment of function. (*Id.* at 170:16-25 to 172:1-25).

A) The medical evidence at trial confirmed there was no functional impairment of Williams’ jaw.

The trial record is devoid of any evidence demonstrating that Williams suffered a prolonged or meaningful loss of jaw function as required under Mont. Code Ann. § 45-2-101(66)(a)(ii). Dr. Holtzen’s testimony unequivocally established that Williams’ facial structure remained intact, with no asymmetry, instability, or deformity. (6/24/24 2nd Tr. 140:5-24). Dr. Holtzen confirmed that Williams exhibited a full range of motion in his jaw, free from pain, restriction, or abnormal movement. (*Id.* at 141:13-16). He further stated that the injury resulted in no impairment whatsoever. (*Id.* at 140:22-24). Given this uncontroverted medical testimony, there was no basis to conclude that

Williams experienced any protracted dysfunction of his jaw. The medical evidence clearly undermines any assertion of lasting or substantial impairment.

B) The victim always retained the ability to eat and speak.

Although Williams adhered to a soft-food diet for six weeks or less, he never lost the ability to eat. (*Id.* at 129:2-5; 56:1-2). A temporary dietary modification does not equate to a loss of function. Williams' ability to consume food remained intact, and there was no evidence that his ability to nourish himself was significantly impacted.

Similarly, the record does not support any claim of impaired speech. Though the court noted "limitations on, frankly, speaking," (6/25/24 Tr. 172:10-173:1-4) no evidence or testimony presented during trial substantiates this claim.

The injury, therefore, did not significantly interfere with essential bodily functions, and the State's own concession during the directed verdict motion reinforces this point. The State acknowledged that "the fact that some of Williams's bodily functions were performing fully doesn't really tell us much here." (6/25/24 Tr. 170:120-23). On the contrary, it tells us everything.

C) There was no evidence of significant pain or disability.

Williams' primary complaint was soreness. (*Id.* at 50:25.) While he reported difficulty sleeping, he did not specify the extent or duration of his sleep loss. (*Id.* at 56:3-18). Dr. Holtzen testified that he would expect Williams to be "quite sore" but did not indicate any meaningful sleep impairment was experienced by Williams. (*Id.* at 130:2-6).

D) No medical intervention was required.

Williams' injury was minor and did not result in a protracted impairment of any bodily function. He required no surgery, no significant medical intervention, and only temporary dietary restrictions. (6/24/24 2nd Tr. 128:10-21). If his injury had been serious, more extensive treatment – such as wiring his jaw shut – would have been necessary. Instead, he made a full recovery with no lasting effects. (*Id.* at 134:10-25 to 135:1-17).

Most critically, Williams returned to work as a federal firefighter just two days later, performing strenuous tasks like hiking rugged terrain, carrying heavy equipment, and actively fighting fires. (*Id.* at 54:12-25 to 56:1-2). While he had brief restrictions on jumping into fires or flying in helicopters, these limitations were minimal and did not

prevent him from performing the essential functions of his job. (*Id.*) Had he suffered serious bodily injury, he would have been physically incapable of resuming such demanding work so quickly. The fact that he was fighting fires just days after the alleged protracted impairment demonstrates that his injury was neither serious nor lasting.

E) The case law relied upon by the State in defending the directed verdict involved far more serious injuries.

The State defended the motion for a directed verdict by citing cases involving broken bones. (*Id.* at 170:15-25 to 172:1-9; App. A). The injuries in these cases, however, were significantly more severe, often requiring surgery, wiring, or extended recovery periods. For example:

- *State v. Swensen*, 2009 MT 42, ¶ 4, 349 Mont. 268, 203 P.3d 786 (victim suffered over 50 blows, a severe concussion, facial lacerations requiring 33 stitches, a broken cheekbone, and numerous other lacerations).
- *State v. Pol*, 2008 MT 352, ¶ 30, 346 Mont. 322, 195 P.3d 807 (victim suffered a broken clavicle and concussion, required medication and a sling, and missed five weeks of work).
- *State v. Houle*, 1998 MT 235, ¶ 9, 291 Mont. 95, 966 P.2d 147 (victim required surgery for a broken jaw).
- *State v. Arlington*, 265 Mont. 127, 137-38, 875 P.2d 307, 313 (1994) (victim suffered multiple broken bones, a brain injury, and some of the worst injuries the doctor had seen in 20 years from an altercation).

- *In re J.R.T.*, 258 Mont. 520, 523-24, 853 P.2d 710, 712 (1993) (victim hit or kicked “very hard” five to six times, suffered a broken jaw that required unspecified medical treatment from an oral surgeon).
- *Wigfall v. Scott*, 1994 U.S. App. LEXIS 41597, 5-6 (5th Cir. 1994) (victim’s jaw was wired shut for four weeks, during which time she could not eat solid food or speak well).
- *State v. Williams*, 243 Neb. 959, 961, 503 N.W.2d 561, 563 (Neb. 1993) (victim hospitalized for four days, required surgery and metal plates, and suffered permanent scarring).
- *State v. Ware*, 2020 SD 20, ¶ 7, 942 N.W.2d 269 (S.D. 2020) (victim's broken jaw required wiring shut).
- *Winfrey v. State*, 547 N.E.2d 272, 273-74 (Ind. 1989) (victim’s broken jaw and other serious injuries required the victim to ambulate by wheelchair or cane).
- *Brown v. State*, 2014 WY 104, ¶ 13, 332 P.3d 1168, 1173 (WY 2014) (broken jaw led to scarring, an uneven bite, and potential airway blockages).
- *Walker v. State*, 742 P.2d 790, 791 (Alaska Ct. App. 1987) (victim’s severe facial fractures required jaw wiring for six weeks).
- *U.S. v. Carabello*, 88 F.4th 239, 242 (3rd Cir. 2023) (victim was struck with a five-inch metal shank, suffered multiple puncture wounds, a fractured mandible, and abrasions).
- *Commonwealth v. Jean-Pierre*, 65 Mass. App. Ct. 162, 162-63, 837 N.E. 2d 707 (2005) (victim's broken jaw required feeding through a tube for six weeks).

In *State v. Andrews*, 274 Mont. 292, 907 P.2d 967, 969 (1995), a father was convicted of aggravated assault for shaking and neglecting

his infant child. The child suffered nonaccidental trauma and shaken baby syndrome. 907 P.2d at 969. Her symptoms included impaired breathing, esophageal reflux, fever, lethargy, weight loss, and dehydration. *Id.* This Court reversed, holding:

[N]o one testified or even implied that [the child's] injuries and these conditions resulting from the March 2 shaking were life-threatening or, in the words of § 45-2-101(59), MCA (1991), that they created a 'substantial risk of death.' Moreover, the State did not present evidence that [the child] has protracted loss or impairment of the function or process of any bodily member or organ as a result of the March 2 shaking.

Id.

This Court concluded that the evidence presented by the State clearly did not meet the applicable statutory definition of "serious bodily injury." *Id.* Even reviewing the evidence in a light most favorable to the prosecution, the Court concluded that a rational trier of fact could not have found beyond a reasonable doubt that Andrews caused his child serious bodily injury. *Id.*

Williams had no secondary injuries, disfigurement, or functional impairment. He did not require surgery or invasive treatment such as jaw wiring. His only restrictions were temporary dietary modifications and mild discomfort, which are not comparable to the severe and

prolonged impairments in the cases cited by the State. His injuries were similar to the victim's injuries in *Andrews*.

The district court itself recognized this distinction, noting that the injuries in the cases relied upon by the State were significantly more severe and often required a victim's jaw to be wired shut. (6/25/24 Tr. 170:15-172:1-9). Given the court's acknowledgment that Williams' injuries did not rise to that level of severity, it was error to deny the motion for a directed verdict.

II. THE DISTRICT COURT'S PREJUDICIAL COMMENT ABOUT ROAD RAGE, THE PROSECUTOR'S IMPROPER CHARACTER ARGUMENTS, AND THE LACK OF LIMITING INSTRUCTIONS DEPRIVED BURRINGTON OF HIS RIGHT TO A FAIR TRIAL.

A criminal defendant's right to a fair trial is protected by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 190 P.3d 1091. A fundamental aspect of this right is ensuring that the jury is not exposed to improper and highly prejudicial remarks about the defendant's character. *State v. Howell*, 226 Mont. 148, 152, 734 P.2d 214, 216-17 (1986); *State v. Stringer*, 271 Mont. 367, 897 P.2d 1063, 1071 (1995). When such comments are made, they are

presumed cured *only* if the trial judge withdraws or strikes the remark from the record and issues a cautionary instruction. *State v. Brush*, 228 Mont. 247, 251, 741 P.2d 1333, 1335 (1987) (emphasis added).

The district court made a highly prejudicial comment before the jury regarding Sally's road rage, which no doubt impacted her credibility and that of Burrington. The Court did not withdraw or strike the remark, nor did it issue a curative instruction to mitigate its impact. This error alone violated Burrington's right to a fair trial and warrants reversal. The prosecutor then deepened this error by making improper character argument during rebuttal closing. The cumulative effect of these errors further undermined the fairness of the trial and necessitates a new trial.

A) The district court's road rage comment was highly prejudicial.

During Burrington's cross-examination, as the State questioned him about the 1987 and machete incidents, the district court denied defense counsel's objection by stating in front of the jury:

No, no, no. He's talking about Ms. Burrington's previous road rage.
(6/26/24 Tr. 115:13-14).

With this remark, the district court improperly suggested that Sally had a history of road rage, directly reinforcing the very type of conduct alleged in the charged offense. This Court has long recognized that when a judge expresses opinions about the parties or the case in front of the jury, and it becomes apparent that a fair trial has not been had, relief must be granted to the prejudiced party. *State v. Brooks*, 57 Mont. 480, 490, 188 P. 942, 945 (1920).

A court's statement constitutes an improper comment on the evidence if it conveys the court's attitude toward the merits of the case or signals its evaluation of a disputed issue. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929, 935 (Wash. 1995) (citing *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706, 711 (Wash. 1986)). The key consideration is whether the trial court's remark communicates its view on the credibility or truthfulness of a witness's testimony. *Id.* (citing *State v. Trickel*, 16 Wn. App. 18, 553 P.2d 139 (Wash. 1976), review denied, 88 Wn.2d 1004 (1977)).

Once it is shown that a judge's remark constitutes a comment on the evidence, the reviewing court presumes prejudice. *Lane*, 125 Wn.2d at 838, 889 P.2d at 935 (citing *State v. Bogner*, 62 Wn.2d 247, 249, 253-

54, 382 P.2d 254 (Wash. 1963)). The burden then shifts to the State to demonstrate that no prejudice resulted unless the record affirmatively shows that the comment could not have influenced the jury. *Id.* (citing *State v. Stephens*, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wn.2d 485, 519 P.2d 249 (Wash. 1974)).

The district court's comment unfairly bolstered the State's case by introducing an uncharged and inflammatory allegation that mirrored the assault claim against Williams. Evidence of prior bad acts is highly prejudicial because it diverts jurors' focus from the charged offense and encourages convictions based on improper considerations. *State v. Derbyshire*, 2009 MT 27, ¶ 51, 349 Mont. 114, 201 P.3d 811. By suggesting that Sally had a history of road rage, the judge not only referenced an alleged prior bad act but also implied a pattern of behavior by the Burringtons, making it more likely that the jury would convict based on perceived character rather than evidence of the conduct charged.

This is precisely the type of improper influence Rule 404(b), Mont. R. Evid., seeks to prevent. The rule exists to guard against unfair prejudice by ensuring that jurors decide cases on the specific facts

before them, not on assumptions about a defendant's character. *State v. Dist. Court of the Eighteenth Judicial Dist. (Salvagni)*, 2010 MT 263, ¶ 56, 358 Mont. 325, 246 P.3d 415. Here, the judge's comment encouraged the jury to see the Burringtons as people prone to violent outbursts, unfairly influencing their perception of the Burringtons and undermining the integrity of the trial.

This Court has recognized that improper judicial remarks about prior bad acts can so unfairly influence a trial that reversal is required. *State v. Howell*, 226 Mont. at 152, 734 P.2d at 216-17. As explained in *McMahon*, prejudicial judicial comments have a "natural tendency to infect the proceedings with an unfairness that can be corrected only by declaring a mistrial and starting anew the legal contest." 271 Mont. 75, 894 P.2d 313, 317 (1995) (internal quotations omitted). Unlike statements made by attorneys – whom jurors recognize as advocates – a judge's words carry the weight of authority and credibility, making them particularly prejudicial. The district court's statement that Sally had prior road rage tainted the entire trial, warranting reversal.

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B) The lack of curative and limiting instructions for other act evidence increased the prejudice caused by the court's road rage comment.

Despite prior act evidence being discussed throughout the trial, the district court never required a limiting instruction to guide the jury's consideration of such evidence. Worse, after improperly introducing an uncharged road rage allegation against Burrington's wife, the court failed to strike the remark from the record or issue a curative instruction to mitigate its prejudicial impact.

This Court recognizes the importance of limiting instructions under Rule 105, Mont. R. Evid., as critical safeguards against unfair prejudice. When evidence of other acts is admitted, the trial court must instruct the jury on the limited purpose of such evidence both at the time of its introduction and again in the final jury charge. MCJI 1-120; *State v. Ayers*, 2003 MT 114, ¶ 77, 315 Mont. 395, 68 P.3d 768; *State v. Fleming*, 2019 MT 237, 397 Mont. 345, 449 P.3d 1234.

In *McMahon*, this Court explained that improper comments do not necessarily require a mistrial if the judge promptly instructs the jury to disregard the remark and ensures that the verdict will be based solely on the evidence properly admitted at trial. 271 Mont. 75, 894 P.2d 313,

316 (1995) (citation omitted). However, any improper comment is presumed cured only if the trial judge explicitly withdraws or strikes the remark from the record and issues a cautionary instruction. *Brush*, 228 Mont. at 251, 741 P.2d at 1335.

Limiting and curative instructions are essential to ensure that jurors consider prior act evidence only for a legally permissible purpose, rather than using it to improperly infer the defendant's character or predisposition to commit the charged offense. The district court's failure to provide such instructions only exacerbated the prejudice caused by its improper road rage comment, further undermining the fairness of Burrington's trial.

C) The court had a duty to issue instructions regardless of counsels' request.

A trial judge has an independent duty to ensure that the jury receives proper instructions on controlling legal issues, regardless of whether counsel requests them. *Billings Leasing Co. v. Payne*, 176 Mont. 217, 224-25, 577 P.2d 386, 390-91 (1978). Jury instructions are essential to the jury's ability to correctly apply the law, and this responsibility cannot be delegated to the attorneys. *Id.* As this Court previously stated:

It is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth. *The court must instruct the jury properly on the controlling issues in the case even though there has been no request for an instruction or the instruction requested is defective.*

Id. at 225, 391 (citing Wright & Miller, Federal Practice and Procedure, Civil § 2556) (emphasis in original).

The district court's failure to issue a limiting instruction left the jury to interpret the prior bad act evidence without guidance, creating an unacceptable risk that they used it to infer the Burringtons' bad character rather than for a legally permissible purpose, such as evaluating Burrington's state of mind during the incident with Williams, like defending his wife. Further, this omission severely undermined his affirmative defense of justifiable use of force.

By failing to properly limit the jury's consideration of this evidence, the court allowed the jury to infer a propensity for violence, which is precisely the type of unfair inference that Rule 404(b) is designed to prevent. Compounding this error, the court also failed to issue a curative instruction after its improper road rage comment, leaving its prejudicial effect unchecked.

Regardless of whether counsel requested an instruction or not, the court had an affirmative duty to ensure the jury was properly guided in its deliberations. Its failure to do so left the jury free to convict Burrington based on improper assumptions about his and Sally's character rather than the evidence related to the charged offense. This was not a minor oversight – it was a fundamental failure to ensure a fair trial and a violation of Burrington's constitutional right to due process.

D) The prosecutor's improper comments on character deprived Burrington of a fair trial.

If a prosecutor's improper comments prejudice a defendant's right to a fair trial, reversal is the proper remedy. *State v. Byrne*, 2021 MT 238, ¶ 18, 405 Mont. 352, 495 P.3d 440 (citing *State v. Sanchez*, 2008 MT 27, ¶ 51, 341 Mont. 240, 177 P.3d 444; *Hayden*, ¶ 27). This Court applies a two-step analysis to determine whether improper comments resulted in prejudice: (1) whether the prosecutor made improper comments, and if so, (2) whether those comments prejudiced the defendant's right to a fair trial. *Byrne*, ¶ 18 (citing *Sanchez*, ¶ 51). Prejudice is not presumed; the defendant must demonstrate from the record that the prosecutor's improper comments affected his right to a

fair and impartial trial. *Id.* (citing *State v. Gladue*, 1999 MT 1, ¶ 27, 293 Mont. 1, 972 P.2d 287). The Court evaluates prejudice by reviewing the improper comments in the context of the entire trial. *Id.* (citing *State v. Wing*, 2008 MT 218, ¶ 33, 344 Mont. 243, 188 P.3d 999). A final factor for consideration is whether any curative instructions were given by the trial court. *Wing*, ¶ 34.

Prosecutors may not offer personal opinions on witness credibility or invite the jury to consider a defendant's character, as such arguments risk shifting the jury's focus from the evidence to improper biases. *Byrne*, ¶ 23 (citing *State v. Aker*, 2013 MT 253, ¶ 26, 371 Mont. 491, 310 P.3d 506); *Hayden*, ¶ 28; *Stringer*, 897 P.2d at 1071 (citations omitted); *State v. Thorp*, 2010 MT 92, ¶ 24, 356 Mont. 150, 231 P.3d 1096 (citation omitted). Assessing the truthfulness of testimony is solely within the jury's function. *State v. St. Germain*, 2007 MT 28, ¶ 27, 336 Mont. 17, 153 P.3d 591. When a prosecutor expresses personal opinions on credibility, it risks improperly influencing the jury's independent judgment and, in some cases, constitutes reversible error. *Stringer*, 897 P.2d at 1071-72.

The reasons why prosecutorial comments about the guilt of an accused are improper are threefold: (1) a prosecutor's expression of guilt invades the province of the jury and usurps its function to declare guilt or innocence; (2) the jury may simply adopt the prosecutor's views instead of exercising independent judgment based on the evidence; and (3) the prosecutor's personal views inject irrelevant and inadmissible matters into the case, adding the weight of the prosecutor's official influence to the probative force of the testimony. *Id.* (citing *State v. Campbell*, 241 Mont. 323, 328-29, 787 P.2d 329, 332-33 (1990)).

This Court has consistently condemned such prejudicial prosecutorial tactics. In *Stringer*, the Court reversed a conviction after inflammatory comments in closing arguments deprived the defendant of a fair trial, reiterating:

This Court has been unequivocal in its admonitions to prosecutors to stop improper comment and we have made it clear that we will reverse a case where counsel invades the province of the jury by characterizing a party or witness as a liar, or his testimony as lies.

Id. at 1072 (citing *State v. Arlington*, 875 P.2d at 325).

Here, the prosecutor explicitly invited the jury to judge the Burringtons' character rather than focusing on the charged offense, stating, "you have seen something of the nature of these people."

(6/26/24 Tr. 202:5-14). The prosecutor also intruded on the jury’s exclusive role in determining credibility by suggesting that Burrington “lied,” was “caught in a lie,” or exhibited behaviors inconsistent with truthfulness. (*Id.* at 204:14-21; 205:16-25; 206:7-11). These statements improperly conveyed the prosecutor’s personal assessment of credibility and reinforced a prejudicial narrative about the Burringtons’ character.

Improper comments are not automatically prejudicial, but this Court evaluates their impact in the broader trial context. *Byrne*, ¶ 18 (citing *Gladue*, ¶ 27; *Wing*, ¶ 33). The prejudice in this case is particularly acute when considered alongside the district court’s improper road rage comment, which further invited the jury to convict based on character rather than the elements of the charged offense. Without a curative instruction to mitigate these improper remarks, the prosecutor’s statements improperly influenced the jury’s verdict. Because the State’s argument relied on character evidence rather than the actual facts of the case, this violation warrants reversal of the conviction and a new trial.

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III. THE CUMULATIVE EFFECT OF THESE ERRORS WARRANTS A NEW TRIAL.

The cumulative error doctrine mandates reversal of a conviction when multiple errors, taken together, prejudice the defendant's right to a fair trial. *State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178 (citations omitted). The defendant must prove prejudice, as merely alleging errors without demonstrating their harmful effect is insufficient. *Id.* (citation omitted). The cumulative effect of multiple harmless errors can amount to prejudice equivalent to a single reversible error. *Id.* (secondary citation and footnotes omitted). While defendants are not entitled to a trial free from errors, where individual errors alone would be insufficient, their collective impact can justify a reversal under the cumulative error doctrine. *Id.* (citation omitted).

Here, the prejudicial road rage comment by the district court, the failure to provide a limiting instruction on other act evidence (which could have mitigated the impact of that comment and the discussion of prior acts throughout trial), and the prosecutor's improper closing remarks, when considered together, deprived Burrington of a fair trial. These errors, in combination, directly impacted the trial's fairness, violating his right to due process. The cumulative nature of these errors

necessitates the reversal of his conviction and the granting of a new trial.

CONCLUSION

Multiple errors collectively deprived Burrington of a fair trial. The court improperly allowed the aggravated assault charge to go to the jury despite insufficient evidence of a protracted injury. In addition, the court's prejudicial comment on road rage and the failure to provide a limiting instruction on prior act evidence unfairly influenced the jury. The prosecutor's improper remarks on the Burringtons' character further undermined the trial's fairness. When considered together, these errors violated Burrington's constitutional right to a fair trial, warranting the reversal of his conviction and a new trial.

Respectfully submitted this day of April, 2025.

/s/Lance P. Jasper
Reep, Bell & Jasper
Attorney for J. Burrington

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately spaced Times New Roman typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my Microsoft Word software and excluding tables and certificates is 6,898.

Dated this 15th day of April, 2025.

/s/Lance P. Jasper
Reep, Bell & Jasper
Attorney for J. Burrington

CERTIFICATE OF SERVICE

I, Lance P. Jasper, hereby certify that I have served true and accurate copies of the foregoing Appellant's Opening Brief to the following on April 15, 2025:

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

Justin Ekwall (Govt Attorney)
Missoula County Attorney's Office
200 West Broadway
Missoula, MT 59802
Service Method: eService

/s/Lance P. Jasper
Reep, Bell & Jasper
Attorney for J. Burrington

CERTIFICATE OF SERVICE

I, Lance Patrick Jasper, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-15-2025:

Justin Raymond Ekwall (Govt Attorney)
200 West Broadway
Missoula MT MT
Representing: State of Montana
Service Method: eService

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

Electronically signed by Tami Espinoza on behalf of Lance Patrick Jasper
Dated: 04-15-2025