

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.

---

**REPLY BRIEF OF APPELLANT**

---

On Appeal from the Montana Fourth Judicial District Court  
Missoula County, The 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](mailto:jasper@westernmontanalaw.com)

*Attorneys for Defendant  
& Appellant*

AUSTIN KNUDSEN  
Montana Attorney General  
THAD TUDOR  
Assistant Attorney General  
Joseph P. Mazurek Building  
215 N. Sanders  
Helena, MT 59620-1401

MATT JENNINGS  
Missoula County Attorney  
JUSTIN EKWALL  
Deputy County Attorney  
200 West Broadway  
Missoula, MT 59802

*Attorneys for Plaintiff & Appellee*

**TABLE OF CONTENTS**

TABLE OF CONTENTS . . . . . -i-

TABLE OF AUTHORITIES . . . . . -ii-

ARGUMENT . . . . . 1

I. The State failed to establish serious bodily injury  
sufficient to survive a directed verdict . . . . . 1

II. The failure to give a limiting instruction on other-act  
evidence was reversible error . . . . . 3

III. The prosecutor’s rebuttal remarks were improper  
and prejudicial . . . . . 4

IV. Cumulative error requires reversal . . . . . 6

CONCLUSION . . . . . 7

CERTIFICATE OF COMPLIANCE . . . . . 8

CERTIFICATE OF SERVICE . . . . . 9

**TABLE OF AUTHORITIES**

**Cases:**

*Billings Leasing Co. v. Payne*, 176 Mont. 217, 577 P.2d 386 (1978) . . . . 4

*Bollenbach v. United States*, 326 U.S. 607, 612 (1946) . . . . . 3

*Quercia v. United States*, 289 U.S. 466, 472, (1933) . . . . . 4

*State v. Ayers*, 2003 MT 114, 315 Mont. 395, 68 P.3d 768 . . . . . 4

*State v. Fleming*, 2019 MT 237, 397 Mont. 345, 449 P.3d 1234 . . . . . 4

*State v. Hardman*, 2012 MT 70, 364 Mont. 361, 276 P.3d 839 . . . . . 6

*State v. Stringer*, 271 Mont. 367, 897 P.2d 1063 (1995) . . . . . 5, 6

*United States v. Dellinger*, 472 F.2d 340(7th Cir. 1972) . . . . . 3, 4

**Statutes:**

Mont. Code Ann. § 45-2-101(66)(a) . . . . . 1, 2

Mont. Code Ann. § 45-2-101(66)(a)(ii) . . . . . 2

**Rules:**

Mont. R. Evid. 404(b) . . . . . 4

**Jury Instructions:**

MCJI 1-120 . . . . . 4

## ARGUMENT

The State’s response sidesteps the core legal deficiencies of the trial that Burrington raised in his opening brief. Rather than confront the statutory definition of “serious bodily injury,” it relies on generalities and speculative implications. It also misrepresents the trial court’s prejudicial road rage comment, downplays prosecutorial misconduct, and ignores the compounded harm of unaddressed instructional errors. Each of these errors independently undermined the fairness of Burrington’s trial. Taken together, they demand reversal.

### **I. THE STATE FAILED TO ESTABLISH SERIOUS BODILY INJURY SUFFICIENT TO SURVIVE A DIRECTED VERDICT.**

The State argues that a fractured jaw and a six-week soft-food diet meet the definition of “serious bodily injury” under Mont. Code Ann. § 45-2-101(66)(a). (Appellee’s Br. at 23). The argument disregards both the insufficient medial evidence at trial and the statute’s precise requirement of *protracted loss or impairment* of a bodily member or organ.

A fracture, standing alone, does not automatically constitute “serious bodily injury.” The statute requires evidence of protracted loss

or impairment – not just physical pain or temporary inconvenience.

Mont. Code Ann. § 45-2-101(66)(a)(ii).

As set forth in Burrington’s opening brief, the undisputed medical testimony showed that Williams’ injury caused no structural damage, functional impairment, or lasting effect. (6/24/24 2nd Tr. 140:5–141:16). Williams maintained full jaw mobility, experienced only temporary soreness, and resumed work as a federal firefighter just two days after the injury. (*Id.* at 54:12–56:2). He never lost the ability to eat, sleep or speak, and his soft-food diet was precautionary – not the result of serious dysfunction. (*Id.* at 56:1–2; 129:2–5, 130:2–6). The absence of surgical intervention, durable impairment, or any restriction in his demanding profession confirms this was not a “serious bodily injury.”

Critically, the record includes no medical testimony that the injury caused *protracted* impairment. At most, the State presented evidence of short-term discomfort, which is entirely insufficient under § 45-2-101(66)(a). Even viewed in the light most favorable to the prosecution, the evidence does not rise above the threshold for ordinary bodily injury.

## II. THE FAILURE TO GIVE A LIMITING INSTRUCTION ON OTHER-ACT EVIDENCE WAS REVERSIBLE ERROR.

The State minimizes the district court's unsolicited remark that Sally Burrington had a "history" of road rage, suggesting it was either provoked by the defense or too vague to matter. (Appellee's Br. at 25–26). But the record is clear. The court made an unqualified statement that suggested a pattern of aggressive conduct: "No, no, no. He's talking about Ms. Burrington's previous road rage." (6/26/24 Tr. 115:13-14). It did not clarify, retract, or instruct the jury to disregard the comment.

Unlike arguments from counsel, jurors view a judge's words with deference and authority. Judicial comments in the presence of the jury are subject to special scrutiny because of the recognized fact that "the influence of the trial judge on the jury is necessarily and properly of great weight, and that his[/her] lightest word or intimation is received with deference, and may prove controlling." *United States v. Dellinger*, 472 F.2d 340, 386 (7th Cir. 1972), quoting *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). Even cautionary instructions cannot cure a comment "of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." *Dellinger*, 472 F.2d at 386,

quoting *Quercia v. United States*, 289 U.S. 466, 472, (1933). This principle must apply to the cumulative effect of a series of deprecating remarks. *Dellinger*, 472 F.2d at 386.

The court’s road rage remark was not just a ruling – it implicitly endorsed a propensity-based narrative in direct violation of Mont. R. Evid. 404(b). The State argues that defense counsel “opened the door” to the court’s remark. Even if that is remotely true, the court still had a duty to issue a limiting instruction. MCJI 1-120; *State v. Ayers*, 2003 MT 114, ¶ 77, 315 Mont. 395, 68 P.3d 768; *State v. Fleming*, 2019 MT 237, ¶¶ 18–19, 397 Mont. 345, 449 P.3d 1234; *Billings Leasing Co. v. Payne*, 176 Mont. 217, 224-25, 577 P.2d 386, 390-91 (1978).

Without a limiting instruction, the jury was free to infer a shared pattern of aggression within the Burrington household – a form of improper character inference that Rule 404(b) squarely forbids. The resulting prejudice was substantial and warrants reversal under plain error review.

### **III. THE PROSECUTOR’S REBUTTAL REMARKS WERE IMPROPER AND PREJUDICIAL.**

The State contends the prosecutor’s remarks – referring to “the nature of these people” and accusing Burrington of being “caught in a

lie” – were simply responses to inconsistencies. (Appellee’s Br. at 28). That characterization ignores the cumulative prejudice and the rules governing argument at trial.

A prosecutor may argue reasonable inferences from the evidence, but may not express a personal belief or opinion as to the truth or falsity of any testimony or evidence. *State v. Stringer*, 271 Mont. 367, 897 P.2d 1063, 1072 (1995). The prosecutor did not just highlight contradictions. He appealed directly to the jury’s judgment of the Burringtons’ character, urging them to convict based on who they were rather than what occurred. This was not commentary on the evidence. It was an impermissible appeal to prejudice.

The accusation that Burrington “got caught in a lie” constituted a personal opinion on credibility – something this Court has consistently condemned:

[W]e 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.

*Stringer*, 897 P.2d at 1072 (citation omitted).

These remarks weren’t fleeting. They emphasized character over conduct and prejudiced the jury against the defendant. Combined with

the court's own comments and the lack of limiting instructions, the misconduct rendered the trial fundamentally unfair.

#### **IV. CUMULATIVE ERROR REQUIRES REVERSAL.**

Under the doctrine of cumulative error, a conviction must be reversed when multiple errors, even if individually harmless, collectively deprive the defendant of a fair trial. *State v. Hardman*, 2012 MT 70, ¶ 35, 364 Mont. 361, 276 P.3d 839. The State's claim that no single error justifies reversal ignores the compounded effect of the judicial comments, unmitigated other-act evidence, and prosecutorial misconduct.

This case arose from a single punch during a roadside confrontation. Burrington advanced a plausible claim of self-defense. But instead of evaluating that defense under the law, the jury was encouraged – by the judge and prosecutor – to convict based on who he was, the company he kept, and vague insinuations of bad character.

That is not justice. It is cumulative error. And it demands reversal.

///

///

## CONCLUSION

This Court should reverse Burrington's conviction for aggravated assault and remand for dismissal or a new trial. The evidence was legally insufficient to establish serious bodily injury. Even if it was, the cumulative effect of prejudicial judicial comments, character-based insinuations, and prosecutorial misconduct deprived Burrington of a fair trial.

Respectfully submitted this 4<sup>th</sup> day of June, 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 Reply Brief of Appellant 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 1144.

Dated this 4<sup>th</sup> day of June, 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 Reply Brief of Appellant to the following on June 4, 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 Reply to the following on 06-04-2025:

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

Thad Nathan Tudor (Govt Attorney)  
215 N SANDERS ST  
HELENA MT 59601-4522  
Representing: State of Montana  
Service Method: eService

Electronically signed by Tami Espinoza on behalf of Lance Patrick Jasper  
Dated: 06-04-2025