

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0095

STATE OF MONTANA,

Plaintiff and Appellee,

vs.

LISA MARIE LEWIS

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Twenty-First Judicial District Court, Ravalli County,
the Honorable Jennifer B. Lint, Presiding

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ARGUMENT

The State conceded that the District Court erred when it did not take additional procedural safe guards when it allowed the jury to review the video during deliberations. (State's Res. 31.) The State argues that the err was harmless, since the "testimonial" portion of the Driving Under the Influence (hereinafter DUI) investigative video, was cumulative testimony from Trooper Jester and Lewis.

I. Lewis was prejudiced by the District Court's err, as the jury was allowed to emphasis the testimonial material of the dash cam video over the other evidence and testimony.

Testimony material or testimonial evidence is defined as a "person's testimony offered to prove the truth of the matter asserted; esp., evidence elicited from a witness. Also termed communicative evidence; oral evidence." *State v. Stout*, 2010 MT 137, ¶ 30, 356 Mont. 468, 237 P.3d 37. (citing *Black's Law Dictionary* 640 (Bryan A. Garner ed., 9th ed., West 2009.)

The State compares Lewis' case to *State v. Bales*, 1999 MT 334, 297 Mont. 402, 994 P.2d 17. (State's Res. Brief 32-34.) In *Bales*, the district court erred when it allowed the jury to listen to a taped interview of the defendant during deliberations, but this Court ruled that err was harmless since the recording was cumulative of other testimony. At ¶¶ 24, and 29. This Court has ruled that a video that was erroneously played for the jury during deliberation was harmless because they were not essential to

the State's case and any testimony was cumulative of other testimony. *State v. Hart*, 2009 MT 268, ¶ 36, 352 Mont. 92, 214 P.3d 1273.

This Court had ruled that a silent video that depicted actions, not meant to communicate information from one person to another through verbal, written, or any other communicative form is not testimonial evidence. *State v. Green*, 2022 MT 218, ¶¶ 15, 20, 410 Mont. 415, 519 P.3d 811. Communication is defined as “[t]he expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception.” *Black’s Law Dictionary* 316 (Bryan A. Garner ed., 9th ed., West 2009.)

Lewis was prejudiced by the jury being allowed to review the DUI investigative video during deliberations. *Bales* is distinguished from the Lewis’s case as the recording in that matter was only an audio recording, and the current case is an audio/video recording. At ¶ 13. The State’s argument that only the words spoken on the video is testimonial is misplaced. Testimonial material is also considered communicative evidence. The non-verbal communication found on the video is also testimonial in nature. *Black’s Law Dictionary* 316. As the non-verbal actions taken by Lewis and Trooper Jester were all meant to convey information, and the jury was able to emphasize that communication by watching the video during deliberations.

In Lewis’ case the DUI investigative video’s verbal communications and the non-verbal communication are both testimonial in nature. While the words spoken on the

video are clearly testimonial, so are the actions and reactions that both Lewis and Trooper Jester took during the video. Lewis' physical reactions and actions were used to communicate her frustration, lack of ability, and fear. Lewis' reactions and actions were taken as communications by Trooper Jester. Further, Trooper Jesters reactions and actions in the video communicated his disbelief, frustration, and annoyance at Lewis. Trooper Jesters actions and reactions were taken as communication by Lewis.

The jury clearly was allowed to emphasize the DUI investigative video when the District erred by allowing the jury to watch video during deliberations. The communication included all verbal and non-verbal communication found in the video. The District Court's err in allowing the jury to review video during deliberations clearly prejudiced Lewis. There is more than a reasonable probability that the jury's review of the DUI investigative video allow them to emphasize the video, and lead to the jury finding Lewis guilty. Further, it is clear that the video was of paramount importance to the State's case.

CONCLUSION

Lewis requests that this Court overturn the felony DUI conviction, and order that she receive a new trial due to the District Court's err that allowed the jury to emphasize the testimonial nature of the DUI investigative video over that of other witnesses and evidence.

Respectfully Submitted on 10th day of November, 2025.

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By: /s/ Ryan P. Archibald
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count calculated by LibreOffice for Windows is 736, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance and Appendices.

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CERTIFICATE OF SERVICE

I, Ryan Phillip Rebhahn Archibald, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 11-10-2025:

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