IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0338

CITY OF GREAT FALLS,

Plaintiff and Appellee,

v.

KENTON STEVEN MONROE,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John A. Kutzman, Presiding

APPEARANCES:

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STATEMENT OF THE ISSUE

Did the City fail to prove by evidence beyond a reasonable doubt that a syringe in Mr. Monroe's possession was drug paraphernalia that he intended to use to introduce a dangerous drug into his body?

STATEMENT OF THE CASE

Mr. Monroe was charged in the Municipal Court in Great Falls, Montana with the misdemeanor offense of criminal possession of drug paraphernalia, after police found a capped syringe in Monroe's coat pocket. He was tried *in absentia* without a jury before the Municipal Court. In closing arguments, defense counsel asserted that the City had failed to prove the elements of the offense. The court found Mr. Monroe guilty in findings pronounced at the conclusion of the bench trial, and imposed sentence. The sentence was later stayed pending appeal. The combined trial and sentencing are memorialized for appellate review in an approximately one-hour audio recording. (Trial at 00:00 to 1:00:04).

Mr. Monroe appealed to the Montana Eighth Judicial District Court, Cascade County. He challenged the sufficiency of the City's evidence to prove all elements of the offense, including the element of intent.

The District Court did not hold a hearing. The Court reviewed the sufficiency of the evidence and affirmed the Municipal Court's decision in a

written Order on Appeal. District Court document ("DC __") 28, attached in the Appendix to this Brief as Appendix A.

Mr. Monroe filed a timely notice of appeal. DC 30.[1]

STATEMENT OF THE FACTS

Trial Testimony.[2]

Sgt. Jeff Bragg of the Great Falls Police Department pulled a car over at about 9:55 p.m. on November 7, 2015. Brenda Valerio was the driver, Kenton Monroe was a passenger, and an unnamed man was in the rear passenger seat. Trial 08:55-09:45. Bragg testified that Mr. Monroe appeared to be jumpy, twitchy and irritable. He told Bragg that Brenda was taking him to the hospital because he was having a panic attack. Trial 09:45-10:00. Bragg determined that Monroe wanted an ambulance and summoned one to the scene. Bragg testified that the ambulance crew assessed Mr. Monroe and determined there was no reason for him to go the emergency room, as they felt he was not having a panic attack. Trial

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[1] The District Court record and the Municipal Court record were transmitted to this Court. The Municipal Court documents were attached to and filed with the Notice of Appeal in the District Court. DC 1.

[2] All trial quotations in this brief are undersigned counsel's own, best transcription of this audio recording.

10:01-10:20. Sgt. Bragg testified that as he continued to observe Mr. Monroe, Monroe was jittery and jumpy, with rapid speech. Bragg said he had dealt with people who got nervous around a police officer, and Mr. Monroe was well beyond that state. Trial 10:25-11:19. Sgt. Bragg also has dealt with people suffering from panic attacks, and observed symptoms of irritability, disorientation, rapid speech, and an inability to communicate due to heavy breathing. Trial 18:45-19:30.

Bragg learned at some point that a warrant was pending for Monroe. After the ambulance left, Bragg arrested Monroe on the warrant. Officer Larson, who was backing up Bragg, conducted a pat-down search as part of their standard procedure. Trial 11:20-12:10. Larson removed a capped syringe from Monroe's coat pocket. Trial 12:30-14:58; 26:55-27:35; 29:50-30:00.[3] Monroe was cited for possession of drug paraphernalia.

Bragg explained why he cited Mr. Monroe for possession of drug paraphernalia. "[W]hen we removed the syringe from him as per my normal I asked him, 'any reason you have this' because sometimes folks have that for medical reasons. He just shrugged his shoulders and said 'no.'" Trial 15:55-16:13. Sgt. Bragg said he thought the object was used for illegal drug use because there was no insulin around and Monroe's behavior indicated he might be under the

[3] The syringe was admitted as State's exhibit A.

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influence. Bragg reiterated that Monroe had not provided any medical reason for having the syringe. Trial 16:20-17:02. Sgt. Bragg later noted that Monroe had not made any statement to the effect that he had used or would use the syringe to inject drugs; "he simply just didn't offer an explanation as to why he had it when asked." Trial 21:00-21:05.

According to Sgt. Bragg, syringes are used in connection with illegal drug use. Narcotics are melted and mixed with water, or pills are crushed and strained, and then mixed with water. The solution is then injected into the body with a syringe. Trial 17:05-17:30. Bragg acknowledged that he did not see any liquid or anything on the syringe to indicate it had already been used. He saw an orange speck and could not tell if it was on the inside or the outside of the syringe. Trial 17:30-17:45. The City did not test the syringe for drugs. Trial 18:20-18:30. Bragg did not observe any elastic tubing, or any spoons or bottle caps that might be used to melt drugs, or any packaging, baggies, pill bottles or balloons. Trial 20:00-20:25. Bragg did not see any track marks or blood on Mr. Monroe. Trial 19:37-19:55.

The Municipal Court's Findings and Conclusions.

The Municipal Court pronounced its findings and conclusions at the end of the bench trial. The court found that a syringe can be used to inject legal and illegal drugs and is drug paraphernalia pursuant to Mont. Code Ann. §§ 45-10-101 and -

102. Trial 46:30-47:32. The court found it probative that although an accused person has the right to remain silent, when Monroe was given an opportunity to explain why he had the syringe, he offered no explanation and simply shrugged. Trial 47:30-47:55.

Turning to the element of intent, the court initially found the only information regarding intent to use the object was the failure to provide any explanation of medical use. The court found that Sgt. Bragg had the requisite experience to offer an opinion that Monroe acted as if he was under the influence, and Monroe seemed nervous, jittery and had a hard time communicating. The court noted that Mr. Monroe said he was having a panic attack, and medical personnel were called. The court concluded circumstantially that if Monroe was having a panic attack that was warranted enough, the ambulance probably would have taken him away. So, on the element of intent, the court considered Bragg's observations, the fact Monroe was not transported by the ambulance, and the fact officers found the syringe. The syringe was drug paraphernalia by definition, through circumstantial evidence including Monroe's failure to provide any other explanation as to why he had it in his pocket. Trial 49:05-50:39; 51:54-52:12. The court concluded that Monroe possessed the syringe with the intent to use it to inject drugs and found him guilty as charged. Trial 52:40-53:30.

Defense counsel raised an exception at this point, asserting that the court should not draw a negative inference from the accused exercising his Fifth Amendment right to remain silent. The evidence identified by the court moved in that direction and implied that the court was holding it against Monroe for failing to explain something when he had the constitutional protection to remain silent. Trial 53:38-54:00. The court replied, "ok, well take that out then he's still . . . he's got a syringe on him and he's acting is if he's under the influence." Trial 54:00-54:12.

Mr. Monroe appealed to the District Court. He argued, in part, that there was no evidence the syringe had been or would be used, no evidence of drugs, paraphernalia, or physical signs of injection of drugs, and his demeanor could be attributed to a panic attack. See DC 22, at 7.

The District Court reviewed the sufficiency of the evidence on appeal and affirmed the decision by the Municipal Court. App. A, at pp. 16, 18-19.

This appeal follows.

SUMMARY OF ARGUMENT

The City failed to prove beyond a reasonable doubt that Mr. Monroe possessed a capped, unused syringe with the intent to use it as drug paraphernalia to inject a dangerous drug. The City's evidence established that a syringe was

found in Mr. Monroe's coat pocket. There was no evidence that dangerous drugs, residue or paraphernalia were found with the syringe. In a bench trial, the Municipal Court held the syringe was drug paraphernalia, and inferred that Mr. Monroe intended to use the syringe to inject drugs based on the presence of the syringe and an officer's opinion about Monroe's demeanor. The court's findings and conclusions, and the inferences the court drew regarding the element of intent, were not supported by the evidence. The court erred in finding Mr. Monroe guilty of criminal possession of drug paraphernalia. The conviction should be reversed.

STANDARDS OF REVIEW

On appeal from a municipal court of record, district courts function as intermediate courts of appeal with the scope of review "confined to review of the record and questions of law." Mont. Code Ann. sections 3-5-303 and 3-6-110.

When reviewing a district court's ruling on the decision of a municipal court, the Court examines the record independently of the district court's decision, applying the appropriate standards of review. The Court reviews questions on the sufficiency of the evidence in a criminal matter to determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *City of Helena v. Strobel*, 2017 MT 55, ¶ 8, 387 Mont. 17, 390

P.3d 921 (citing cases). This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Whether sufficient evidence exists to convict a defendant is ultimately an application of the law to the facts and, as such, is properly reviewed *de novo*. *City of Helena v. Strobel*, 2017 MT 55, ¶ 8 (citing cases).

ARGUMENT

The City Failed to Prove by Evidence Beyond a Reasonable Doubt that a Syringe in Mr. Monroe's Possession was Drug Paraphernalia that he Intended to Use to Introduce a Dangerous Drug into his Body.

"A fundamental principle of our criminal justice system is that the State prove every element of a charged offense beyond a reasonable doubt." *State v. Daniels*, 2011 MT 278, ¶ 33, 362 Mont. 426, 265 P.3d 623. The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 363–64 (1970); *State v. Favel*, 2015 MT 336, ¶ 25, 381 Mont. 472, 362 P.3d 1126. A mere modicum of evidence cannot

support a conviction beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S., at 320.

To establish the offense of possession criminal possession of drug paraphernalia in this case, the City had to prove that Mr. Monroe purposely or knowingly possessed with intent to use drug paraphernalia to inject a dangerous drug. Mont. Code Ann. §45-10-103.[4] The Municipal Court's conclusion that Mr. Monroe possessed the unused syringe with the requisite intent to use it to inject a dangerous drug rested on two considerations. First, the court concluded the syringe was drug paraphernalia "by definition." Second, the court found that Monroe was acting as if he was under the influence of narcotics, based on Sgt. Bragg's opinion and the court's speculation as to why Monroe did not receive medical treatment. The City's evidence was deficient on the elements, and the court erred in finding Mr. Monroe guilty.

The Municipal Court's finding that the syringe was drug paraphernalia "by definition" is not supported by the facts or the applicable statutes. Mont. Code Ann. §46-10-101(1) defines "drug paraphernalia" to mean "all equipment, products, and materials of any kind that are used, intended for use, or designed for

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[4] "Dangerous drug" "means a drug, substance, or immediate precursor in Schedules I through V set forth in Title 50, chapter 32, part 2." Mont. Code Ann. §§45-10-101(2) 50-32-101(6).

use" in a multitude of activities. This statutory definition of drug paraphernalia includes a lengthy non-inclusive list of items.[5] The list does not include a syringe.

The City presented evidence through Sgt. Bragg that syringes may be associated with illicit drug use. However, many objects that have legitimate primary uses would also be capable of being used with a dangerous drug. An object is not drug paraphernalia simply because it conceivably could be used for an illegal purpose. "Hypodermic syringes have legitimate medical purposes so that in every instance they cannot be said to constitute drug paraphernalia as defined" in a state statute. *Baggett v. State*, 562 So. 2d 359, 362 (Fla. App. 1990).[6]

Mont. Code Ann. §45-10-102 lists fourteen factors a court or other authority should consider, in addition to all other logically relevant factors, in determining whether an object is drug paraphernalia. The court failed to adequately consider pertinent factors in light of the City's evidence.

The statute directs the court to consider "the proximity of the object in time and space to a direct violation" of the drug paraphernalia statutes; "the proximity

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[5] Mont. Code Ann. §45-10-101(1)(a)-(k)(i)-(xiii).

[6] The *Baggett* court reviewed a number of statutory factors that a court should consider in determining whether an object is drug paraphernalia. That statute, section 893.146, Florida Statutes (1987), was substantially similar to Mont. Code Ann. §45-10-102. See *Baggett*, 562 So.2d at 361-62.

of the object to dangerous drugs;" and "the existence of any residue of dangerous drugs on the object[.]" Mont. Code Ann. §§45-10-102(3), (4), (5). The City did not introduce any evidence that the syringe was in proximity in time and space to drug paraphernalia. Sgt. Bragg described how narcotics can be melted or crushed and mixed with water and injected with a syringe. There was no evidence that police observed elastic tubing, spoons, bottle caps, baggies or other objects indicative of drug use in the car or in Monroe's possession that night.

No dangerous drugs were observed or seized. There was no residue of any dangerous drug on the capped syringe. Sgt. Bragg did not see anything in the syringe to indicate it had already been used. He saw only an "orange speck" and he could not tell whether it was on the inside or outside of the syringe. The state did not test the syringe for the presence of any drugs. There was no evidence of needle marks or tracks on Monroe. The two people in the car with Monroe were not implicated; the officers permitted the passenger to leave the scene.

The court did not adequately weigh and consider the evidence in light of these factors. The court instead placed undue emphasis on Monroe's response to Bragg's question regarding why he had the syringe. Mont. Code Ann. §45-10-102(1) provides that in determining whether an object is drug paraphernalia, the court should consider "statements by an owner or anyone in control of the object concerning its use[.]" The Municipal Court relied on Sgt. Bragg's question to

Monroe, whether there was any reason why he had the syringe, and Monroe's response. Monroe, whom the court found was having trouble communicating and was on his way to the hospital when he was stopped, said "no" and shrugged his shoulders. Monroe did not make an affirmative admission that the syringe was intended to be used to inject drugs. When the statutory factors that help define drug paraphernalia are considered in light of the basic facts established by the City's proof – there was no proof the syringe had been used, no proof of drugs, residue or paraphernalia – it is clear the Municipal Court erred in concluding the syringe was drug paraphernalia.

The City also had to prove intent to use the syringe to inject or otherwise introduce a dangerous drug into one's body. Intent may be inferred from the acts of the accused and the facts and circumstances of the offense. *State v. Arthun*, 274 Mont. 82, 91, 906 P.2d 216, 222 (1995). The court initially inferred intent based on Monroe's response to Bragg. Following defense counsel's objection, the court recognized it should not hold the response against Monroe.

At trial Sgt. Bragg told the Court that Monroe had the opportunity to tell Bragg if there was a medical reason for having the syringe. That is, Bragg put the burden on Monroe. If Monroe did not respond and provide a legitimate reason for possessing the syringe, Bragg would presume the object was paraphernalia. The City was required to prove the elements set out in Mont. Code Ann. §45-10-103

beyond a reasonable doubt. Any attempt to shift the burden to Monroe to claim a medical use for the syringe is inappropriate. See, *Berkhardt v. State*, 82 N.E.3d 313 ¶ 14 (Ind.App. 2017) ("With respect to the absence of evidence of a medical use for the syringes, this argument is an inappropriate attempt to shift the burden to Berkhardt to explain his possession of the syringes.")

The Municipal Court then inferred intent from two considerations: Monroe's possession of the syringe and his demeanor, as if he was under the influence. Possession of an object alone is insufficient to permit this inference of intent. "[P]roof of a defendant's possession of a single item associated with drug use or trafficking does not operate to create a presumption of intent to use for drug-related purposes, shifting the burden to the defendant to produce evidence that the item also has lawful uses." *Brooks v. United States*, 130 A.3d 952, 958 (D.C. App. 2016). A court reached a similar conclusion in *Sluder v. State*, 997 N.E.2d 1178, 1181 (Ind.App. 2013). There, the defendant was stopped on an outstanding warrant, and a search revealed a syringe in his back pocket. The appellate court held that the evidence apart from the fact of possession was insufficient to prove the element of intent. "In this case, the State presented no evidence that Sluder intended to use the syringe to inject a controlled substance into his body. There was no evidence of track marks on Sluder's arms, past drug use, previous drug

convictions, or the presence of drugs that would circumstantially establish his intent to use drugs." 997 N.E.2d at 1179, 1181.

The Municipal Court found that Monroe intended to use the syringe to inject a dangerous drug based on inferences based on Monroe's demeanor. Mr. Monroe said he was having a panic attack, and he was on his way to the hospital when the car was stopped. The court ruled out a panic attack as the cause of Monroe's demeanor, based on speculation that if Monroe was having a panic attack and it warranted attention, "circumstantially" the ambulance crew would have taken him in for treatment. Trial 49:05-50:39. He was not taken in, so the court concluded the cause of his demeanor had to be the influence of narcotics.

The fact that the medical personnel did not take Monroe to a hospital does not support an inference that Monroe was not suffering from any physical or emotional problems that caused the symptoms Bragg observed. It just indicates the problems Monroe was experiencing did not require immediate medical attention. The court failed to note that the symptoms Bragg observed – including rapid speech, an inability to communicate, irritability – were also consistent with a panic attack.

The court essentially declined to weigh and consider the evidence because it did not satisfy a high standard: A person may experience some physical, mental or emotional problem and appear to act or speak in an aberrant manner, but unless

that problem warrants prompt medical attention, it will be discounted. The court's conclusion that because Monroe did not need medical attention, his behavior could only have been caused by drugs, is conjecture. It is not proof beyond a reasonable doubt.

Further, the City failed to offer any medical evidenced that Mr. Monroe was under the influence of narcotics. Monroe was examined by medical personnel, and no witness offered a medical opinion. The court relied on the opinion of Sgt. Bragg, a veteran officer but admittedly not a medical expert.

This Court has held that the intent to introduce a dangerous drug into one's body may be inferred from factors such as the presence of drugs or residue on an object, drug convictions, and a person's affirmative admissions. In *Arthun*, the defendant was charged with possession of drug paraphernalia after police found marijuana, two marijuana pipes and two marijuana roaches in a kitchen the defendant shared with his wife. The defendant had recently been convicted of felony possession of a UPS package of marijuana. The Court held that the presence of the drugs and paraphernalia in the kitchen, combined with the defendant's connection to the package of marijuana, would have been sufficient to infer that the defendant possessed the paraphernalia with the intent to use it. *Arthun*, 274 Mont. at 91, 906 P.2d at 222. In *City of Missoula v. Shumway*, 2019 MT 38, ¶¶ 21-23, 394 Mont. 302, 434 P.3d 918, the Court held that the trier of fact could infer

the intent to use pipes to inhale marijuana, based on the defendant's admission to an officer that she had "marijuana pipes" in her purse and the officer observed marijuana residue in the pipes.

The basic facts that supported a reasonable inference of intent in *Arthun* and *Shumway* were not proven by the City's case against Monroe. There was no evidence that any dangerous drugs were found nor was there any evidence of drug residue on the syringe. There was no proof of any affirmative admission that the syringe had been or would be used to inject drugs. There was no proof of paraphernalia nor any physical indications that Monroe injected drugs, such as needle marks on his arms. Evidence of possession of a syringe and Sgt. Bragg's non-medical opinion that Monroe was under the influence of a narcotic were not sufficient to prove the element that Monroe intended to use the syringe at some other time to inject a dangerous drug.

CONCLUSION

A syringe is not always drug paraphernalia and possession of a syringe is not automatically illegal. The government must prove possession with intent to use drug paraphernalia. Based on the facts presented in this case, the syringe did not appear to have been used, and no drugs or drug paraphernalia were observed. The trial court erred in finding that the syringe was drug paraphernalia, and inferring

intent from speculation regarding opinions about Monroe's medical condition. This proof was not sufficient to satisfy the City's burden of proof.

Mr. Monroe respectfully asks this Court to reverse the judgment and conviction of the Municipal Court and order that the charge of possession of drug paraphernalia be dismissed.

Respectfully submitted this 25th day of April, 2019.

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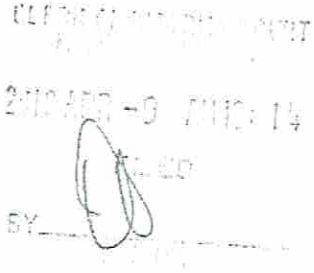
By: /s/
William F. Hooks

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a 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 Microsoft Word for Windows is 3,882 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

APPENDIX



MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

STATE OF MONTANA, CITY OF GREAT FALLS, Plaintiff and Respondent, vs KENTON STEVEN MONROE, Defendant and Appellant.	Cause No. CDC-16-327 **ORDER ON APPEAL**

Presently pending is Kenton Steven Monroe's appeal from Great Falls Municipal Court, Cause Number TK-2015-7013. Mr. Monroe did not appear at his May 27, 2016 bench trial and was tried in absentia. He now says the Municipal Court erred when it allowed law enforcement to give opinion testimony and found him guilty of criminal possession of drug paraphernalia. The Court AFFIRMS the Municipal Court for the reasons set forth below.

Appendix A

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I. Factual and Procedural History

On November 7, 2015, at 9:55 p.m. Sergeant Jeff Bragg saw a car on Smelter Avenue NE with its lights sporadically turning on and off. The reverse lights were lit but it was moving forward. Sergeant Bragg stopped the car at the 9th Street Bridge and N. River Rd. The driver identified herself as Brenda Valerio. The passenger identified himself as Kenton Monroe. Sergeant Bragg confirmed Mr. Monroe's identity with dispatch and learned Monroe had an active warrant.

Mr. Monroe said he was having a panic attack and Ms. Valerio was taking him to the hospital. Sergeant Bragg called for medical. An ambulance arrived. The crew checked out Mr. Monroe but did not take him to the hospital. Thereafter, Sergeant Bragg arrested Mr. Monroe for the active warrant. Officer Larson, who had arrived to assist Sergeant Bragg, patted down Mr. Monroe. He found and removed a capped unused syringe from Mr. Monroe's pocket. Sergeant Bragg asked why Monroe had the syringe. Mr. Monroe shrugged and said, "No." Sergeant Bragg cited Mr. Monroe for criminal possession of drug paraphernalia.

Mr. Monroe's bench trial was on May 27, 2016. He did not attend but was represented by counsel. His attorney moved to exclude law enforcement opinion testimony about whether Mr. Monroe had showed signs of intoxication. Hr'g R. at 6:15:51-6:16:54. Counsel argued that Sergeant Bragg and Officer Larson were not Drug Recognition Experts (DREs) and that no one but a DRE can ever testify about intoxication. *Id.*

Judge Bolstad denied counsel's motion to exclude. He reasoned that with proper foundation, law enforcement could give their opinions. Hr'g R. at 6.18:07-14. Judge Bolstad further explained that this was not an intoxication case but rather about possession of drug paraphernalia. Hr'g R. at 6:18:24-50. Therefore, whether Mr. Monroe appeared intoxicated was relevant to his intended use of the syringe. *Id.*

At trial, Sergeant Bragg testified he had 14 years of experience as a law enforcement officer. Hr'g R. at 6:20:11. He had attended the law enforcement academy and received training on drugs, drug paraphernalia, and characteristics of drug users. Hr'g R. at 6:20:27-6:21:06. He had completed standard and advanced K9 handler training which included

drug interdiction and recognition. Hr'g R. at 6:21:31-42. He had been the 2004 DUI task force officer of the year based on his work with intoxicated persons. Hr'g R. at 6:21:43-50. He also had attended additional POST certified training on drug interdiction and advance narcotic interdiction. Hr'g R. at 6:21:53-6:22:10. He said he commonly used his drug training as a law enforcement officer. Hr'g R. at 6:23:10.

Bragg explained that persons using drugs may show irritability, jumpiness, twitchiness, incoherent speech, and disorientation. Hr'g R. at 6:21:10-22. When asked what he looks for when he suspects someone is under the influence of a narcotic, he said

> Very basically, someone who is completely out of the ordinary from you or me on a normal day or a normal person. Jumpy, as I said, irritable, panicky, high blood pressure, high heart rate, that sort of thing. I'm not trained to take and check for those things. That's why I'd have medical come along and do those sorts of things. I'm not a DRE but again, like I was saying, disorientation, rapid speech, all these sorts of things.

Hr'g R. at 6:22:33-6:23:02.

Bragg testified that on November 7, 2015, he was near Walmart on Smelter Avenue and saw a car with its headlights sporadically going on and off and its reverse lights lit as it moved forward. Hr'g R. at 6:23:23-40. He stopped it. Hr'g R. at 6:23:50. Brenda Valerio was driving. Hr'g R. at 6:23:56. Mr. Monroe was a passenger. Hr'g R. at 6:24:00. Mr. Monroe appeared jumpy, twitchy and irritable. Hr'g R. at 6:24:11-16. He said Valerio was taking him to the hospital because he was having a panic attack. Hr'g R. at 6:24:18.

Sergeant Bragg had medical respond. Hr'g R. at 6:24:25. He said medical assessed Mr. Monroe and did not take him to the hospital. Hr'g R. at 6:24:31-37. Bragg said Mr. Monroe was jittery, jumpy, and had rapid speech. Hr'g R. at 6:24:51-55. He testified that based on his training and experience, Mr. Monroe was not simply nervous and was "well beyond" just being nervous. Hr'g R. at 6:25:15-39. Mr. Monroe had an active warrant. Hr'g R. at 6:25:46. Bragg arrested Mr. Monroe under the warrant. Hr'g R. at 6:26:01.

Sergeant Bragg said he saw Officer Larson pat down Mr. Monroe. Hr'g R. at 6:26:27-29. Larson found a folded pocket knife and a capped syringe. After Larson found the syringe, Bragg asked Mr. Monroe the reason for the syringe. Hr'g R. at 6:30:26-32. He said Mr. Monroe shrugged and said, "No." *Id.*

Bragg testified that

> Typically, anyone that I've dealt with that has a syringe has insulin somewhere nearby and there was no insulin. There was no anything to use for it. His behavior, the way he was acting, indicated to me that he may be under the influence of narcotics based on my prior experience . . . So, everything pointed to me that there was no medical reason. I even gave him an opportunity to tell me if there was a medical reason and he did not provide any medical reason for having the syringe on his person.

Hr'g R. at 6:30:45-6:31:22. Bragg noted that people use syringes to inject narcotics into the body. Hr'g R. at 6:31:30-47. He further testified that based on his training and experience, this particular syringe "was used, or being used, or planned to be used, for the injection of narcotics." Hr'g R. at 6:32:11-14. On cross, Sergeant Bragg admitted he had not sent the syringe to the crime lab for testing. Hr'g R. at 6:32:43.

Officer Larson also testified that prior to the pat down, he saw that Mr. Monroe had a pocket knife. Hr'g R. at 6:40:52. He asked Mr. Monroe if he had a knife. Hr'g R. at 6:40:57. Mr. Monroe said, "No." Hr'g R. at 6:40:58-9. Officer Larson said it concerned him that Mr. Monroe was lying and that he may have had additional weapons. Hr'g R. at 6:41:06. Larson searched Monroe and found a capped syringe in the right front pocket of his jacket. Hr'g R. at 6:41:18-22

On cross, Officer Larson admitted he was not a DRE. Hr'g R. at 6:43:39. He said that prior to the search, he had asked Mr. Monroe if he had anything sharp and Mr. Monroe said "No." Hr'g R. at 6:43:53-55. He said Mr. Monroe's pocket knife was closed and the syringe was capped and not "sharp." Hr'g R. at 6:44:03-16. Defense counsel asked,

> So when he [Mr. Monroe] told you he had nothing sharp, nothing on him could have actually harmed you the way that you were discovering it through the pat down is that correct [sic]?

Hr'g R. at 6:44:17-25. Officer Larson said, "As long as the knife didn't pop open or something like that." Hr'g R. at 6:44:25-27.

At the close of the City's case, defense counsel moved to continue the trial so he could obtain a rebuttal witness to testify about other uses for syringes. Hr'g R. at 6:49:10-20. Judge Bolstad declined. The City presented closing argument. Hr'g R. at 6:50:20 - 6:53:40. In closing, defense counsel argued that there was insufficient evidence to find Mr. Monroe guilty. The City presented rebuttal argument. Hr'g R. at 6:57:38-6:59:59. Judge Bolstad then permitted defense counsel to present additional closing argument. Hr'g R. at 7:00:17-45. Mr. Monroe did not move for a directed verdict or to dismiss for insufficient evidence.

Judge Bolstad issued the following findings of fact and conclusions of law from the bench:

1. Jurisdiction was proper. The charged offense was a misdemeanor and happened within the city limits of Great Falls per the testimony of Sergeant Bragg.

2. The syringe was paraphernalia under §§ 45-10-102 and 45-10-101, MCA.

3. A syringe is commonly used to inject drugs – both legal and non-legal.

4. Most probative, though the defendant does have the right to remain silent, when given the opportunity to explain that [the syringe] was for medical purposes or for building models or for a number of other things, he provided no explanation and shrugged his shoulders.

5. As far as Mr. Monroe's knowledge, the syringe was found in his right front coat pocket. There was no testimony as to his surprise or denial of having the syringe other than stating he did not have anything sharp in his pocket.

6. That is not probative. Mr. Monroe may have thought that the capped syringe was not a sharp item in his pocket.

7. Officer Bragg has the requisite skill, training, and experience to give his opinion that Mr. Monroe was acting as somebody on a narcotic. A DRE was not needed because there was no requirement to make a legal conclusion that he was intoxicated but that he was acting as somebody on a narcotic.

8. Mr. Monroe was nervous, jittery, had a hard time communicating. If Mr. Monroe was having a panic attack and it was serious, circumstantially, medical would have taken him away. Medical did not take him away.

9. For intent, I'm looking at Sergeant Bragg's observations of Mr. Monroe, the fact that medical did not take him away, that he was left there and he was arrested for a warrant, and search incident to that warrant, there was a syringe and a knife found in his pocket.

10. Sergeant Bragg opined that Mr. Monroe appeared that he was under the influence of a narcotic.

11. In the search incident to arrest, Mr. Monroe had a syringe in his pocket.

12. Based on Sergeant Bragg's observations in his 14 years of experience and his training as a K9 handler in interdiction and his further training, it appeared that Mr. Monroe was under the influence of a narcotic. That was his opinion. Officer Larson found the syringe in Mr. Monroe's right front pocket. The syringe was not tested.

13. For these reasons, Mr. Monroe is guilty of possession of drug paraphernalia and that the syringe is drug paraphernalia by definition.

14. Through circumstantial evidence including Mr. Monroe's failure to provide any other explanation, not even a boo, as to why he had it in his pocket and Sergeant Bragg's observations of his actions, and that the ambulance did not take him away, Mr. Monroe possessed it [the syringe] with the intent to use, to inject [drugs] into his body.

15. Even taking out that he didn't say anything when given the opportunity, he had the syringe and was acting as if he was under the influence.

Hr'g R. at 7:00:50-7:08:37. Judge Bolstad found Mr. Monroe guilty of criminal possession of drug paraphernalia. He now appeals.

II. Standards of Review

An appeal from a municipal court to a district court is limited to review of the record and questions of law. Mont. Code Ann. § 3-6-110. The district court reviews the municipal court's factual findings for clear error and reviews legal conclusions *de novo*. *Stanley v. Lemire*, 2006 MT 304, ¶ 25, 334 Mont. 489, 148 P.3d 643.

The district court reviews a municipal court's rulings on the admissibility of evidence for abuse of discretion. *State v. Frasure*, 2004 MT 305, ¶ 15, 323 Mont. 469, 74, P.3d 1021. "For a court to abuse its discretion, it must act arbitrarily, without employment of conscientious judgment, or exceed the bounds of reason resulting in substantial injustice." *Christofferson v. City of Great Falls*, 2003 MT 189, ¶ 14, 316 Mont. 469, 74 P.3d 1021. The court will not overturn a trial court's decision absent a showing of such abuse. *Christofferson*, ¶ 8.

"The standard of review for a denial of a motion to dismiss for insufficient evidence is *de novo*." *State v. McAlister*, 2016 MT 14, ¶ 6, 382 Mont. 129, 365 P.3d 1062.

> A motion to dismiss for insufficient evidence is appropriate only if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.

State v. Rosling, 2008 MT 62, ¶ 35, 341 Mont. 1, 180 P.3d 1102.

III. Analysis

Mr. Monroe says admitting the officers' opinion testimony was an abuse of Judge Bolstad's discretion because neither officer met the expert foundational qualifications under Mont. R. Evid. 702. The State says these opinions were admissible under Mont. R. Evid. 701 and/or 702.

Judge Bolstad did not actually rely on Officer Larson's opinion testimony. *See* Hr'g R. at 7:00:50 -7:08:37. Accordingly, any alleged error in admitting it could not have resulted in substantial injustice to Mr. Monroe. *See Christofferson v. City of Great Falls*, 2003 MT 189, ¶ 19, 316 Mont. 469, 74 P.3d 1021. Therefore Judge Bolstad did not abuse his discretion in admitting it.

This Court therefore turns to Sergeant Bragg's opinion testimony. While it is unclear whether Judge Bolstad admitted it under Rule 701 or Rule 702, *see* Hr'g R. at 6:18:07-50, this Court concludes it was admissible under Mont. R. Evid. 701.

A. Motion *in Limine*

Mont. R. Evid. 701 provides

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Mont. R. Evid. 701. This rule permits police officers to "testify to 'matters as to which they have extensive experience and are properly qualified through training and experience.'" *State v. Frasure*, 2004 MT 305, ¶ 17, 323 Mont. 479, 100 P.3d 1013. In *Frasure*, the arresting officers testified that "based on their experience the amount of methamphetamine [defendant] was carrying illustrated she had an intent to sell." *Id.* The defendant objected, arguing "the officers' testimony was expert opinion for which the prosecution did not lay an adequate foundation" as required by Mont. R. Evid. 702. *Id.*, ¶¶ 9, 16.

The Supreme Court held that the officers' opinion testimony was admissible under Mont. R. Evid. 701. They had the requisite training and experience. Further, "their testimony was rationally based on their perceptions and helped give a clear understanding of whether [the defendant] had the intent." *Id.*, ¶ 18.

Here, the record establishes that Sergeant Bragg had extensive training and experience in drug interdiction, K9 drug handling, identifying drug paraphernalia, *and* identifying characteristics of drug users. Hr'g R. at 6:20:11-6:23:10. He had been a law enforcement officer for 14 years and had used this training on a daily basis. *Id.* This was sufficient foundation for Sergeant Bragg to opine that Mr. Monroe exhibited behaviors consistent with a person under the influence of a narcotic. Further, his testimony was rationally based on his perceptions of Mr. Monroe and helped give a clear understanding of whether Mr. Monroe intended to use the syringe to inject drugs. This complied with Rule 701. Judge Bolstad did not abuse his discretion in admitting this evidence.

B. Sufficiency of Evidence

Mr. Monroe also says Judge Bolstad should have granted his motion to dismiss for insufficient evidence. He says he made this motion at the close of the prosecution's case. A defendant may, "at the close of the prosecution's evidence or at the close of all the evidence," move to dismiss when "the evidence is insufficient to support a finding or verdict of guilty." Mont. Code Ann. § 46-16-403.

> A motion to dismiss for insufficient evidence is appropriate only if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.

Rosling, 2008 MT ¶ 35.

The Court has reviewed the record several times. Mr. Monroe never moved to dismiss for insufficient evidence – he moved for a continuance to retain a rebuttal expert at the close of the prosecution's case in chief. Hr'g R. at 6:49:10-20. Judge Bolstad denied this motion. Nowhere can the Court find where Mr. Monroe moved to dismiss for insufficient evidence.

This Court "must refrain from deciding issues not properly raised or objected to in the court below." *City of Missoula v. Robertson*, 2000 MT 52, ¶ 26, 298 Mont. 419, 998 P.2d 144. Judge Bolstad did not err in "denying" a motion no one actually raised. Mr. Monroe did, however, argue in closing that there was insufficient evidence to find beyond a reasonable doubt that he (1) knowingly possessed the syringe and (2) intended to use it to inject illegal drugs. He now makes these same arguments on appeal. Out of an abundance of caution, the Court reviews his sufficiency of the evidence challenge but finds it also fails.

1. "Knowing" Possession

The State must prove the defendant "possessed the drug paraphernalia" and "intended to use it." *State v. Arthun*, 274 Mont. 82, 90, 906 P.2d 216, 222 (1995). The controlling statute says

> [I]t is unlawful for a person to use or to possess with intent to use drug paraphernalia to . . . inject . . . or otherwise introduce into the human body a dangerous drug.

Mont. Code Ann. § 45-10-103.

Possession is "the knowing control of anything for a sufficient time to be able to terminate control." Mont. Code Ann. § 45-2-101(59). "Knowledge may be proved by the acts, declarations or conduct of the accused from which *an inference of knowledge may be drawn*" but "not by mere possession alone." *State v. Krum*, 238 Mont. 359, 362, 777 P.2d 889, 891 (1989)(emphasis added).

Here, Mr. Monroe had the syringe in the right front pocket of his jacket when he was arrested. Hr'g R. at 6:41:18-22. He was wearing the jacket that contained the syringe. Prior to the search, police asked if he had anything sharp in his pocket. Hr'g R. at 6:43:53-55. He said "No." *Id.* He did not seem surprised when Officer Larson found the capped syringe. Mr. Monroe's argument that he answered "No" to Officer Larson's question because the folded pocket knife and capped syringe were not "sharp" is nonsensical because he could not have known these items were not "sharp" without knowing he had them in the first place. Based on the above, there was sufficient evidence for Judge Bolstad to find beyond reasonable doubt that Mr. Monroe had "knowing" possession of the syringe.

2. "Intent to Use"

"The element of 'intent to use' is more difficult to prove." *Arthun*, 274 Mont. at 90, 906 P.2d at 222. "[T]here is rarely direct proof." *Id.* "[I]ntent [therefore] must be inferred from the acts of the accused and the facts and circumstances of the offense." *Id.*

Sergeant Bragg testified that Mr. Monroe was jittery, had rapid speech, and was twitchy. Hr'g R. at 6:24:11-16. He properly testified that these behaviors were consistent with being under the influence of a narcotic. Hr'g R. at 6:30:45-6:31:22. Mr. Monroe's actions were not consistent with a person who was simply nervous, but were "above and beyond." Hr'g R. at 6:25:15-39. Sergeant Bragg further testified that people use syringes to inject illegal drugs. Hr'g R. at 6:31:30-47. He conceded that people also use them for legitimate medical purposes. Hr'g R. at 6:30:45-6:31:22. But in his experience, people who have syringes for legitimate purposes typically also have insulin nearby. *Id.* Mr. Monroe did not. Mr. Monroe offered no legitimate medical explanation for the syringe when given the chance to explain why he had it. *Id.*

"When circumstantial evidence is susceptible to two interpretations, one which supports guilt and the other which supports innocence, the trier of fact determines which is most reasonable." *Arthun*, 274 at 91. Judge Bolstad was the trier of fact. He found Sergeant Bragg's testimony credible. This credibility determination was his to make. It is not this Court's role to substitute its own assessment of witness credibility for Judge Bolstad's. *Anderson v. Deafenbaugh*, 2014 MT 215, ¶ 12, 376 Mont. 212, 331 P.3d 835. Judge Bolstad saw and heard the testimony. He was in a better position than this Court to believe or disbelieve it. Therefore there was sufficient evidence for Judge Bolstad to find beyond reasonable doubt that Mr. Monroe intended to use the syringe to inject illegal drugs.

IV. Conclusion

ACCORDINGLY, the Court, having considered the appeal in this case, HEREBY ORDERS that the Great Falls Municipal Court's decision is **AFFIRMED**.

DATED this 6th day of April, 2018.

John A Kutzman

John A. Kutzman
District Court Judge

CC: Great Falls City Attorney's Office/Neil Anthon
OPD/Michael Kuntz
Defendant/c/o counsel
Judge Bolstad

CERTIFICATE OF MAILING
This is to certify that the foregoing
was served by mail upon counsel
of record at their address this 18
day of April, 2018
LYE McWILLIAMS, CLERK OF COU
BY: _____ DEPUT

CERTIFICATE OF SERVICE

I, William F. Hooks, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-25-2019:

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