

---

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSEPH ALTON HAFLICH,

Defendant and Appellant.

---

OPENING BRIEF OF APPELLANT

---

On Appeal from the Montana Nineteenth Judicial District Court,  
Lincoln County, the Honorable Matthew J. Cuffe, Presiding

---

APPEARANCES:

CHAD WRIGHT  
Appellate Defender  
MOSES OKEYO  
Assistant Appellate Defender  
Office of State Public Defender  
Appellate Defender Division  
P.O. Box 200147  
Helena, MT 59620-0147  
mookeyo@mt.gov  
(406) 444-9505

ATTORNEYS FOR DEFENDANT  
AND APPELLANT

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

MARCIA BORIS  
Lincoln County Attorney  
JEFFREY ZWANG  
Deputy Lincoln County Attorney  
512 California Avenue  
Libby, MT 59923

ATTORNEYS FOR PLAINTIFF  
AND APPELLEE

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES.....ii

STATEMENTS OF THE ISSUES ..... 1

STATEMENT OF THE CASE ..... 1

STATEMENT OF THE FACTS .....6

STANDARDS OF REVIEW ..... 14

SUMMARY OF THE ARGUMENT ..... 15

ARGUMENT ..... 19

I. The district court committed reversible error when it allowed the jury to watch and then later rewatch Rands’s testimonial police interview video in which she accused haflich of aggressively beating her on the night in question as well as nearly every day for seven years..... 19

    A. Applicable Law ..... 19

    B. Error ..... 20

    C. Not Harmless ..... 32

II. Police officers entered Haflich’s home without a warrant and without exigent circumstance and, guns drawn, roused him from his sleep to interrogate and arrest him in contravention of the Fourth Amendment..... 37

CONCLUSION..... 49

CERTIFICATE OF COMPLIANCE..... 50

APPENDIX..... 51

## TABLE OF AUTHORITIES

### Cases

<i>City of Whitefish v. Large</i> , 2003 MT 322, 318 Mont. 310, 80 P.3d 427 .....	39
<i>Fontenot v. State</i> , 881 P.2d 69 (Okla. Crim. App. 1994).....	20, 21
<i>Harris v. Wainwright</i> , 760 F.2d 1148(11th Cir.1985).....	21
<i>Michigan v. Tyler</i> , 436 U.S. 499, 98 S.Ct. 1942 (1978) .....	41
<i>Payton v. New York</i> , 445 U.S. 573 (1980).....	2, 38
<i>State v. Bales</i> , 1999 MT 334, , 297 Mont. 402, 994 P.2d 17 .....	30, 31, 33
<i>State v. Bassett</i> , 1999 MT 109, 294 Mont. 327, 982 P.2d 410 .....	41
<i>State v. Courville</i> , 2002 MT 330, 313 Mont. 218, 61 P.3d 749 .....	47
<i>State v. Dasen</i> , 2007 MT 87, 337 Mont. 74, 155 P.3d 1282 .....	47
<i>State v. Devlin</i> , 251 Mont. 278, 825 P.2d 185 (1991) .....	24
<i>State v. Dunn</i> , 2007 MT 296, 340 Mont. 31, 172 P.3d 110 .....	39
<i>State v. Elison</i> , 2000 MT 288, 302 Mont. 228, 14 P.3d 456 .....	39, 41, 43

<i>State v. Gomez</i> , 2007 MT 111, 337 Mont. 219, 158 P.3d 442 .....	41
<i>State v. Greene</i> , 2015 MT 1, 378 Mont. 1, 340 P.3d 551 .....	26, 27, 28, 29
<i>State v. Hammer</i> , 233 Mont. 101, 759 P.2d 979 (1988) .....	42
<i>State v. Hardaway</i> , 2001 MT 252, 307 Mont. 139, 36 P.3d 900 .....	38
<i>State v. Harris</i> , 247 Mont. 405, 808 P.2d 453 (1991) .....	passim
<i>State v. Herman</i> , 2009 MT 101, 350 Mont. 109, 204 P.3d 1254 .....	30
<i>State v. Howard</i> , 2011 MT 246, 362 Mont. 196, 265 P.3d 606 .....	24
<i>State v. Koontz</i> , 41 P.3d 475 (Wash. 2002) .....	26
<i>State v. Lacey</i> , 2009 MT 62, 349 Mont. 371, 204 P.3d 1192 .....	47
<i>State v. Lanegan</i> , 2004 MT 134, 321 Mont. 349, 91 P.3d 578 .....	43
<i>State v. Lawrence</i> , 285 Mont. 140, 948 P.2d 186 (1997) .....	19, 20, 21, 24
<i>State v. Logan</i> , 2002 MT 206, 311 Mont. 239, 53 P.3d 1285 .....	43
<i>State v. Mayes</i> , 251 Mont. 358, 825 P.2d 1196 (1992) .....	28, 29, 31
<i>State v. McCarthy</i> , 258 Mont. 51, 852 P.2d 111 (1993) .....	43

<i>State v. Pound</i> , 2014 MT 143, 375 Mont. 241, 326 P.3d 422 .....	23, 24
<i>State v. Reichmand</i> , 2010 MT 228, 358 Mont. 68, 243 P.3d 423 .....	32
<i>State v. Ruggirello</i> , 2008 MT 8, 341 Mont. 88, 176 P.3d 252 .....	passim
<i>State v. Stone</i> , 2004 MT 151, 321 Mont. 489, 92 P.3d 1178 .....	38, 40, 43
<i>State v. Van Kirk</i> , 2001 MT 184, 306 Mont. 215, 32 P.3d 735 .....	32
<i>State v. Vegas</i> , 2020 MT 121, 400 Mont. 75, 463 P.3d 455 .....	14, 37
<i>State v. Wakeford</i> , 1998 MT 16, 287 Mont. 220, 953 P.2d 1065 .....	38, 41, 48
<i>State v. Ward</i> , 2020 MT 36, 399 Mont. 16, 457 P.3d 955 .....	30
<i>United States v. Shephard</i> , 21 F.3d 933 (9th Cir. 1994) .....	48
<i>United States v. United States District Court</i> , 407 U.S. 297 (1972) .....	38

United States Constitution

Amend. IV .....	passim
-----------------	--------

Montana Constitution

Art. II, § 10 .....	passim
---------------------	--------

Montana Code Annotated

§ 46-6-311 ..... 43, 44, 45, 48  
§ 46-6-601 ..... 44  
§ 46-15-503 ..... 28, 38

Montana Rules of Evidence

Rule 404 ..... 22  
Rule 801 ..... 19, 23, 25  
Rule 802 ..... 19

## **STATEMENTS OF THE ISSUES**

1. Was it reversible error to allow the jury to watch the police interview of the alleged victim, Jennifer Rands—which showed her visibly upset as she said Haflich beat her on the night in question, as well as every night for the past seven years—before her live testimony and then again allowing a deadlocked jury to rewatch that same video without attempting to isolate the jury’s difficulty?

2. Three heavily armed police officers crawled through the window into Haflich’s bedroom without a warrant and without exigent circumstance, weapons drawn, roused him from his sleep, interrogated, and then arrested him. Did the warrantless entry without a valid exception violate the Fourth Amendment? Should the evidence be suppressed under the fruit of the poisonous tree doctrine?

## **STATEMENT OF THE CASE**

Appellant Joseph Alton Haflich appeals from his judgment of conviction in the Nineteenth Judicial District Court, Lincoln County, following a guilty verdict for felony Partner Family Member Assault (PFMA). (*See Judgment (attached as App. A).*)

Haflich was charged by Information of one PFMA count. (D.C. Doc. 4.) On December 16, 2019, Haflich filed a motion to suppress all the evidence in this case and also to dismiss the single charge. (See D.C. 18; 12/16/19 Tr.) In that motion, firstly, Haflich argued that the police unlawfully entered his home and arrested him without a warrant and without exigent circumstances in violation of *Payton v. New York*, 445 U.S. 573,576 (1980), the Fourth Amendment, and Article II, Section II of the Montana Constitution. (D.C. Doc. 18 at 1.) Haflich urged the trial court to suppress: “all statements, observations, and physical evidence” made after the unlawful entry and arrest—which included the pictures documenting Rands’s alleged injuries in Haflich’s home after the illegal police entry. (See D.C. Doc. 18 at 1.) The State countered that police entry into Haflich’s home was lawful because his arrest stemmed from an allegation that he had committed PFMA—a circumstance justifying immediate arrest. (D.C. Doc. 21 at 4 (“Thus, the legislature has proscribed that the commission of partner or family member assault creates circumstances justifying immediate arrest, and that arrest is the preferred response in such cases.”).) Moreover, the State argued, Rands, one of the persons who lived in the shared

residence, gave officers permission to enter the residence—her consent constituted a valid exception to the warrant requirement. (D.C. Doc. 21 at 6.) In his reply, Haflich rebutted that Rands’s permission to enter did not supersede his Fourth Amendment rights to be secure in his own home—he still had a reasonable expectation of privacy in his own home independent of whether Rands could allow police to enter the shared residence. (See D.C. Doc. 22 at 2.) The trial court rejected Haflich’s argument under the Fourth Amendment on the grounds that consent is a “well-delineated exception” to the warrant requirement and Rands who had the requisite “common authority” over the shared residence permitted officers to enter the shared residence. (See D.C. Doc 33, attached as App. D, at 1–2.)

Second, Haflich argued the police unlawfully entered his home and subjected him to custodial interrogation without giving him *Miranda* warnings. Haflich urged the trial court to suppress any statements elicited in violation of *Miranda*. (D.C. Doc. 18 at 1.) The State conceded Haflich was subjected to a custodial interrogation without *Miranda* warnings. (D.C. Doc. 21 at 11.) However, it argued there was no derivative evidence to suppress and conceded only those

statements Haflich made while officers questioned him without *Miranda* warnings should be suppressed. (See D.C. Doc. 21 at 11.) The trial court agreed with the State and suppressed only those statements. (D.C. Doc. 33 at 4.)

Ultimately, the trial court denied Haflich’s motion to suppress and dismiss on the grounds that Rands consented to the entry of the shared residence and that there were exigent circumstances to effect the immediate arrest of the perpetrator of a PFMA. (D.C. Doc. 33 at 3.)

The trial court reasoned:

Law enforcement had probable cause to believe the offense of Partner Family Member Assault had occurred. Ms. Rand, the alleged victim, could not return to her home as long as the individual who allegedly spent the night beating her was still there. The court finds “existing circumstances require immediate arrest.” § 46-6-311(1), MCA. Moreover, the court finds that because law enforcement was at the residence at the request of Ms. Rand because her significant other had allegedly assaulted her, and she suffered injuries, there were “exigent circumstance for making an arrest.” § 46-6-311 (2)(a), MCA.

(D.C. Doc. 33 at 3.)

At the June 9, 2020 trial, the State sought to introduce the body camera recording of Rands’s interview with Deputy Hauke—The video, shows a visibly upset Rands recounting how Haflich beat her all over

her body, stomped on her head on the night in question, and has been threatening and/or assaulting her nearly every day for the past seven years, with the most frightening incident occurring seven years ago when Haflich beat her, broke her arm making a bone to stick out of the skin but he let her suffer for five hours and prevented her from going to hospital for treatment. (*See* 6/11/20 Tr. at 140–42; *see* Police Report, attached as App. C, at 3; *see* Oct. 5 Interview 7:00–8:30;12:00–17:30; 24:25–26:30.) Haflich objected, arguing that the body camera recording was hearsay. (*See* 6/11/20 Tr. at 142 (“So I object to it being played at this time without her testimony.”).) The State argued that the video was not hearsay because Rands was available to testify and be cross-examined. Over Haflich’s objection, the trial court admitted this video into evidence.

During Rands’s live testimony, the State bolstered her evidence with what she said in the video:

Q. You said in your testimony and in the video that we saw, that [Haflich] stomped on your head and your arms repeatedly, correct?

A. Yes.

(6/10/20 Tr. at 163.)

Following a three-day jury trial, held at Libby Elementary School gymnasium, the jury deliberated for three hours and could not issue its verdict until the trial court answered seven questions. (*See* 6/10/20 Tr. at 229,232–3.) Question 3 was a request to rewatch Rands’s police video interview. This was the only question the trial court answered—it granted the jury’s request and allowed the jury to re-watch it.

Haflich was convicted of the single count of PFMA. (6/11/20 Tr. at 249.) The trial court imposed a five-year Montana State Prison sentence with no time suspended and no eligibility for parole. (Sentencing Tr. at 22–23.) The trial court also awarded Haflich 289 days as credit for time served. (D.C. Doc. 62, attached as App. A, at 1.) Haflich filed a timely appeal. (D.C. Docs. 66, 69.)

### **STATEMENT OF THE FACTS**

On October 5, 2019, Haflich came home at about midnight after having drinks with his friends. (6/10/20 Tr. at 185.) He argued with his domestic partner Jennifer Rands because he was home late and because he caught a ride home with some other woman. (6/10/20 Tr. at 185–6, 191.) At about 1 a.m., Haflich left their apartment to deescalate the situation. (6/10/20 Tr. at 186.) When he returned at 5:30 a.m., Rands

was not home, and Haflich lay in bed and promptly went to sleep—with a blanket covering him head to toe. (See 6/10/20 Tr. at 148.)

Approximately five hours later, at 10:12 a.m., Haflich woke up confused—four police officers in uniform of authority roused him from his deep sleep pointing their service weapons at him. (See 6/10/20 Tr. at 148, 188 (In his own words: “Cops, police officers waking – standing above me, pointing guns at me, waking me up.”).) Police roused him from his slumber, guns trained on him, and started questioning him “What happened last night?” (See 6/10/20 Tr. at 148.) The police did not have a warrant and did not read Haflich the required *Miranda* warnings.

At approximately 6:45 a.m., Deputy Derryberry and Deputy Hauke received a call from Cabinet Peaks Emergency Room (ER) that Rands had been assaulted. The deputies arrived at the ER approximately 7:02 a.m. At the ER, the deputies met Rands, who was accompanied by her friend and neighbor Michelle McMullen. Deputy Hauke’s body camera was on and recorded his interview with Rands.

While the deputies interviewed Rands at the hospital, they asked her “Is there any weapons in your house? Any firearms?” Rands said

“no I don’t like guns.” Deputy Denyberry then asked her, “Joey doesn’t have any firearms? She shook her head from side to side—“No.” (See 6/10/20 Tr. at 176–77.)

At 9:00 a.m., instead of applying for and waiting for a judge to issue an arrest warrant, Deputy Denyberry, Deputy Hauke, Officer Guches, and Libby City Officer Buckner went to the residence Haflich shared with Rands to find him. Deputy Hauke knocked so loudly on Haflich’s door that it could be heard all throughout the trailer, hollering: “Joey! Sheriff s Office!” Nobody came to the door. So all the Officers left the residence.

On or about 9:45 a.m. or 10 a.m., Deputy Hauke called the hospital to see when Rands would be released and to warn her not to go home, because they had not yet located Haflich. (D.C. Doc. 21 at 3.) The hospital informed Deputy Hauke they had just discharged Rands. (D.C. Doc. 21 at 3.) The police officers located Rands walking up the hill to the Park Street walking bridge near the residence she shared with Haflich. (See D.C. Doc. 21 at 3.) The officers asked Rands for permission to enter the residence, and she allowed them entry. (See

D.C. Doc. 21 at 3.) Rands’s plan was to stay at McMullen’s house. (App. C at 3–4.)

The undisputed facts before the trial court on Haflich’s motion to suppress and dismiss were as follows: at approximately 10:12 a.m. Deputy Denyberry, Deputy Hauke, Officer Guches, Officer Buckner, and Rands came to Halfich’s residence. (Docs 18, 21 at 2–3.) Deputy Hauke climbed into the residence through a door window, Deputy Derryberry climbed in second, and Officer Guches climbed in last. (Docs 18, 21 at 2–3.) They found Haflich in bed—blanket covered head to toe. (Docs 18, 21 at 2–3.) Their service weapons were drawn and pointed at Haflich. (See Docs 18, 21 at 2–3.) Deputy Hauke said, “Joey? Officer Hauke of the Sheriff s Department.” Haflich stuck his head out of the *blanket* and responded, “Yeah. What’s going on?” (Docs 18, 21 at 2–3.)

Deputy Hauke told Haflich he was being detained because they needed to speak with him about what happened last night. (Docs 18, 21 at 2–3.) Haflich kept asking what was going on. (Docs 18, 21 at 2–3.) Deputy Hauke asked Haflich if he could tell them what happened last night. Haflich said “What happened? What are you talking about?” Deputy Hauke kept asking Haflich if something happened last night.

Haflich said “Nope, the fuck if I know. What are you talking about?”

(Docs 18, 21 at 2–3.)

Deputy Hauke asked Haflich to tell his side of the story. Haflich said “You’re looking at it. This is it. I’m not doing shit. Sleeping.” (Docs 18, 21 at 2–3.) Deputy Hauke then arrested Haflich for PFMA. (*See* Docs 18, 21 at 2–3.)

### **Rands’s Video Interview**

At trial, just before Rands testified, the State moved to admit the video of Deputy Hauke’s body camera as he interviewed Rands at the ER and she offered testimonial evidence against Haflich. (6/10/20 Tr. at 140–41.) The defense counsel objected to the video on the grounds that it contained Rands’s hearsay statements not made under oath. (*See* 6/11/20 Tr. at 142 (“So I object to it being played at this time without her testimony.”).) And the trial court said it would reserve ruling on the issue. (*See* 6/11/20 Tr. at 142.) But then, without the State making any argument, the district court overruled the defense’s objection on the ground that Rands would later testify for the State. (*See* 6/11/20 Tr. at 142.) The district court allowed the State to play the video for the jury even before Haflich testified: “You may publish it now for the sole

purpose of it being a true and accurate depiction of his encounter. So the objection is overruled.” (See 6/11/20 Tr. at 142.) The State played Rands’s testimonial video interview. (6/11/20 Tr. at 142–3.)

In the video, Rands narrates how Haflich came how drunk, beat her, stomped on her head, and he literally threatens, intimidates, or assaults her nearly every day for the past seven years—with the worst, most frightening incident occurring seven years ago when Haflich broke her hand and for five hours, let her suffer and would not allow her to go to hospital for treatment:

**Deputy Hauke:** Do you think he (Joseph) will seriously injure or kill you?

**Rands:** Injure me, good for that.

**Deputy Hauke:** What makes you think he will injure you?

**Rands:** Because he already has .... over the last seven years he has.

**Deputy Hauke:** How frequently or seriously does he intimidate, threaten-or assault you?

**Rands:** alot. . . . every other day, every day sometimes.

**Deputy Hauke:** Can you describe the most frightening event/worst incident of violence involving Joseph?

**Rands:** It was about seven years ago when he broke .... , he said he didn’t break my arm .... , but he made me suffer for five hours and wouldn’t let me go to the hospital . . . .the bone was sticking out ( of her skin), and I came here. We were going together for about seven months, eight months.

(App. C at 3; Oct. 5 Interview 24:25–26:30.)

Additionally, during Rands's live testimony, the State bolstered her evidence with what she said in the video:

Q. You said in your testimony and in the video that we saw, that [Haflich] stomped on your head and your arms repeatedly, correct?

A. Yes.

(6/10/20 Tr. at 163.)

Haflich testified that he came home after meeting up with some friends to talk and have drinks. (6/10/20 Tr. at 186–87.) He played some music, which unfortunately woke Rands from her sleep. (6/10/20 Tr. at 186–87.) Haflich and Rands verbally argued. (6/10/20 Tr. at 186.) And to deescalate the argument, Haflich left to go see some friends on 5<sup>th</sup> Street. (6/10/20 Tr. at 186.) Haflich only returned home at 5:30 a.m. and promptly went to bed. (6/10/20 Tr. at 186–87.) Haflich fell fast asleep. The next thing he remembered was waking up confused: “Cops, police officers waking—standing above me, pointing guns at me, waking me up.” (6/10/20 Tr. at 188.)

In closing, the State emphasized the video: “Now, you were able to see her testify today. You were able to see her on the video there. You can make up your own minds as to how she appeared to you.” (6/10/20 Tr. at 223.)

## Jury Questions

After the closing arguments, the jury retired to deliberate. After three hours of deliberations, it was deadlocked and decided to break the deadlock by posing the following questions to the trial judge:

One, do the defendant and victim still reside together?

Two, what is the address and/or proximity to the hospital?

Three, can we review the video from start to finish?

Four, who called the police to the hospital?

Five, when the arrest was made, who let the police into the residence?

Six, when were the photographs taken and why weren't they taken at the hospital?

Seven, was Jennifer subpoenaed?

(6/10/20 Tr. at 229.)

The trial court declined to answer any of the jury's questions: "All questions appear to me to be questions of asking for additional facts, facts that weren't brought up, weren't questioned or talked about in the trial." (6/10/20 Tr. at 229.) Regarding the video, the trial court noted that the jurors wanted to view the entire video, rather than just Rands's interview that it already watched at trial, to provide additional context or information it did not already have. (*See* 6/10/20 Tr. at 230.) The trial court indicated it was going to instruct the jury to rely on the evidence already presented to decide this case: "I'm open to hear

arguments, but my initial reaction when hearing that is to respond with, you have been presented the evidence for which you must rely on to decide this case, and leave it at that.” (6/10/20 Tr. at 230.)

The district court then asked whether the parties objected to allowing the jury to rewatch Exhibit 1 one time through. (6/10/20 Tr. at 230.) Because of the prior adverse ruling admitting the video into evidence, this time the defense counsel did not object to the jury rewatching the testimonial video. (6/10/20 Tr. at 232.)

The district court responded only to the third question: “Question 3, you may watch the admitted portions of the video, Exhibit 1, but no other evidence.” (6/10/20 Tr. at 232–3.) Only the bailiff—not the defense counsel nor the prosecution—entered the deliberation room and re-played Rands’s testimonial video for the jury. (6/10/20 Tr. at 232–3.)

### **STANDARDS OF REVIEW**

This Court reviews a district court’s denial of a motion to suppress evidence for whether the court’s findings of fact are clearly erroneous and whether those findings were correctly applied as a matter of law. *State v. Vegas*, 2020 MT 121, ¶ 8, 400 Mont. 75, 78, 463 P.3d 455, 457 *citing State v. Ruggirello*, 2008 MT 8, ¶ 15, 341 Mont. 88, 176 P.3d 252.

A court’s findings of fact are clearly erroneous if they are not supported by substantial credible evidence, the court has misapprehended the effect of the evidence, or this Court’s review of the record convinces it that a mistake has been committed.” *Ruggirello*, ¶ 15 (citation omitted).

### **SUMMARY OF THE ARGUMENT**

The district court erred by admitting the videotaped police interview of Rands taken at the hospital before she testified for the State. In the video, Rands is visibly distraught as she recounts how Haflich beat her, stomped on her head on the night in question, just as he threatened and assaulted her every night or every other night for the past seven years, with the most frightening incident happening seven years ago when Haflich beat her, broke her arm—until a bone stuck out of the skin—and he let her suffer for five hours all the while preventing her from going to hospital for treatment. (*See* 6/11/20 Tr. at 140–42; App. C, at 3, *see* Oct. 5 Interview 24:25–26:30.) Hearsay is inadmissible unless an exception applies. The district court incorrectly determined the jury could watch the video “for the sole purpose” to show a “true and accurate depiction” of Deputy Hauke’s encounter with Rands. (*See* 6/11/20 Tr. at 142.) This is not a valid exception under Montana’s

Hearsay Rules. Rands's statements were answers to Deputy Hauke's interview questions about an event that allegedly occurred the previous night at Rands and Haflich's shared home. The video contained inadmissible hearsay. (*See* 6/10/20 Tr. at 140–43.)

The district court's error prejudiced Haflich. The jury watched the video twice, first before Rands testified and a second time when the jury requested to rewatch it during deliberations. Playing the video twice gave undue emphasis to Rands's testimony and bolstered her credibility. The State clearly recognized the importance of the video for its case and highlighted it during its closing remarks. In the middle of deliberations, the district court *again* allowed a deadlocked jury to rewatch the fully admitted testimonial evidence of Rands's police interview in contravention of this Court's long-standing precedent. Testimonial evidence is not to be given wholesale to the jury upon request. The trial court must inquire and isolate the jury's specific difficulty regarding the requested evidence, weigh the probative value of the requested material against the danger of undue emphasis, and adopt a strictly controlled procedure for any permitted review. Even after it watched the video before Rands testified, the jury desired to

rewatch the video and were allowed to rewatch it at a crucial moment during deliberations. Undoubtedly, Rands's police interview video consisted of one of the State's main pieces of evidence against Haflich. The jury saw it twice and it bolstered the credibility of Rands's accusation. The State cannot prove there was no reasonable possibility the admission of the video might have contributed to Haflich's conviction on the PFMA charge. The error was not harmless, and the Court must remand for a new trial on the PFMA charge.

In addition, the district court incorrectly denied Haflich's motion to suppress and dismiss. No exigent circumstances supported the officers' warrantless entry into his house through the window. Officers wanted to talk with Haflich at his home. Instead of applying for a warrant, the officers simply waited for Rands to come home and convinced her to allow them into the home. The officers could have just as easily applied for an arrest warrant at this point. Which is what the law requires police officers to do. Three officers tactically crawled through the window into Haflich's home. Haflich was awakened from his deep slumber and saw three officers pointing guns at his recently

uncovered head. Officers declared Haflich was being detained for an alleged assault on his domestic partner.

When Rands left the hospital, she was on her way to McCullen's house and was not even going to the home she shared with Haflich. Officers convinced Rands to let them into the home she shared with Haflich so they could look for him. Only this short cut did not create an exigent circumstance. Now, admittedly, Rands's allegation that Haflich beat her up the previous night established probable cause to request an arrest warrant. This is precisely what the arresting officers should have done before deciding on their own to manufacture exigency and enter Haflich's home through the window. When the officers met up with Rands, the evidence on the record showed that she was not in any danger as she was going to stay at Michelle's house. Even if *arguendo*, she was walking home, she was outside the "scene of [the] reported domestic assault incident." Thus, there was no evidence to suggest that anyone inside Haflich's house was in any danger. The Court should reverse the denial of the motion to suppress, vacate Haflich's conviction, and remand for additional proceedings without the tainted evidence.

## ARGUMENT

**I. The district court committed reversible error when it allowed the jury to watch and then later rewatch Rands’s testimonial police interview video in which she accused Haflich of aggressively beating her on the night in question as well as nearly every day for seven years.**

**A. Applicable Law**

“Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.” Mont. R. Evid. 802. “Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Mont. R. Evid. 801(c).

However, this Court has held that an officer may testify to actions taken in response to information received when being used to explain the course of the investigation. Investigatory explanations are not hearsay if they are not offered to prove the truth of the matter asserted. *State v. Lawrence*, 285 Mont. 140, 167, 948 P.2d 186, 202 (1997).

However, this Court created an important caveat that protects the limited rule in *Lawrence* from abuse. An officer’s testimony is not admissible when it “effectively points the finger of accusation at [the] defendant.” *Lawrence*, 285 Mont. at 167, 948 P.2d at 202 (*quoting*

*Fontenot v. State*, 881 P.2d 69, 82 (Okla. Crim. App. 1994)). “In other words, the State may not indirectly accomplish what the hearsay rule directly forbids.” *Fontenot*, 881 P.2d at 82, (internal citation omitted), *see also, Lawrence*, 285 Mont. at 167, 948 P.2d at 202. Under *Lawrence*, an officer may not testify that, after he spoke to a witness, he directed his investigation at the defendant.

## **B. Error**

The district court committed reversible error when, over Haflich’s objection, it admitted Rands’s police interview into evidence on the basis that it was not admitted for the truth of matters Rands asserted but “for the sole purpose” of giving the jury a “true and accurate depiction” of Deputy Hauke’s encounter with Rands. (*See* 6/11/20 Tr. at 142.) Providing a jury with a “true and accurate depiction” of Deputy Hauke’s encounter with Rands is not an exception to the hearsay rule. Clearly, the State sought to use this video for another purpose: To suggest to the jury that Haflich was a chronic abuser who aggressively beat Rands on the night in question, just as he has either threatened or assaulted her nearly every day in the course of the past seven years, including a specific instance seven years ago when Haflich broke her

hand and would not allow her to seek medical attention. (See Oct. 5 Interview 24:25–26:30.) The State offered Rands’s statements for the truth of the matter they asserted and, throughout the trial, developed the idea that Rands’s accusation that Haflich stomped on her head was true because nearly every day for seven years Haflich was committing uncharged aggravated assault on Rands.

Courts have held that while an officer may testify about actions taken in response to information received, such testimony is inadmissible if it “effectively points the finger of accusation at defendant.” *Lawrence*, 285 Mont. at 167, 948 P.2d at 202 (*citing Fontenot*, 881 P.2d at 82) (“In other words, the State may not indirectly accomplish what the hearsay rule directly forbids.”). *Accord, Harris v. Wainwright*, 760 F.2d 1148, 1151–53 (11th Cir.1985) (error to allow officer’s implied reference to an anonymous informant’s help in identifying the defendant).

Undoubtedly, the State used Rands’s statements for the truth of the matter asserted—that Haflich beat Rands on the night in question just as he had done nearly every day in the course of seven years, and just as he had done during the frightening instance from seven year ago

when he fractured her hand and let her suffer for five hours as he stopped her from even going to hospital for treatment.

A discussion of Rule 404(b) illustrates the point. A specific instance of conduct proving character requires a permissible, non-character purpose. Mont. R. Evid. 404(b). Montana Rule of Evidence 404's ban on character evidence applied to Haflich's prior uncharged assaults allegedly happening nearly every day for seven years, including the specific instance from seven years ago. Montana Rule of Evidence 404(a) generally provides, "[e]vidence of a person's character or a trait of character is not admissible for purpose of proving action in conformity therewith on a particular occasion." Mont. R. Evid. 404(a). Further, Rule 404(b) provides "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Mont. R. Evid. 404(b). The jury twice viewed Rands's police interview video and it delivered an impermissible rule 404(b) inference to the jury—Haflich threatened or assaulted Rands nearly every day for seven years, and therefore he most likely assaulted Rands in this instance just as he had done nearly every day for seven years, and just like he did that instance seven years ago.

Montana Rule of Evidence 801(d) excludes certain out-of-court statements from the general definition of hearsay. Under Rule 801(d)(1)(B), an out-of-court statement is not hearsay if “[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement and the statement is . . . consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive[.]”

Under certain circumstances, however, prior out-of-court statements of a witness may be admitted into evidence. Pertinent to the present case, Mont. R. Evid. 801(d)(1)(A) allows admission of prior statements by a witness that are inconsistent with the witness’s testimony at trial. *State v. Pound*, 2014 MT 143, ¶ 33, 375 Mont. 241, 326 P.3d 422. This Court has ruled that a “claimed lapse of memory,” as well as testimony marked by “evasion, denial, and inability to remember,” are inconsistencies within the meaning of Rule 801(d)(1)(A), when the prior statements have been “sufficiently inconsistent” with testimony at trial. *Baker*, ¶ 30; *Pound*, ¶¶ 33, 37 (citations and internal quotation marks omitted).

In *Pound*, the Court upheld a district court ruling allowing a forensic interviewer to testify at trial concerning the statements of a 4-year-old victim of sexual assault that were inconsistent with the child's testimony at trial in which she denied or could not remember prior statements to the interviewer. *Pound*, ¶ 39. Likewise, in *Baker*, the Court upheld the admission of taped forensic interview of a 6- or 7-year-old victim of sexual assault whose testimony was "sufficiently inconsistent" with her interview statements, in which some areas were consistent and others were not. *Baker*, ¶ 30. The Court also has held that it is not an abuse of discretion for a district court to admit "some consistent statements with the inconsistent ones for reasons of judicial efficiency and assisting the jury." *Lawrence*, 285 Mont. at 160, 948 P.2d at 198; *Accord State v. Howard*, 2011 MT 246, ¶¶ 31– 32, 362 Mont. 196, 265 P.3d 606 (finding no abuse of discretion where the district court admitted prior consistent statements along with inconsistent ones "where the nature of the witness's testimony made it difficult for the court to separate the consistent from the inconsistent portions of the prior statement"); *State v. Devlin*, 251 Mont. 278, 282, 825 P.2d 185, 187

(1991) (determining that prior inconsistent statements may include both positive contradictions and claimed lapses of memory).

In this case, the State played the video to the jury before Rands's live testimony and cross-examination. Before the video was played there were no inconsistencies between Rands's interview and her testimony—Rands had not even testified. More importantly, the State did not argue that there were any inconsistencies between Rands's police interview and her live testimony. The State did not claim it was offering the video to rebut an express or implied charge that Rands was subsequently fabricating her allegations. Rands was competent to testify. Other than the additional allegations of Haflich's prior bad acts, Rands's testimony was consistent with what she said in the video. The State played for the jury her hearsay statements before she testified at trial and was subject to cross-examination.

The district court incorrectly interpreted Rule 801(d)(1)(B) and abused its discretion in admitting the testimonial video. (*See* 6/11/20 Tr. at 142 (“You may publish it now for the sole purpose of it being a true and accurate depiction of [Deputy Hauke's] encounter [with Rand]. So

the objection is overruled.”.) The Court must reverse Haflich’s conviction and remand for a new trial.

At trial, Haflich objected to allowing the jury to watch Rands’s testimonial interview video. Over Haflich’s hearsay objections the trial court allowed the jury to view the video twice—once before she testified and another time when the jury was deadlocked in deliberations. Moreover, the district court allowed the jury to reenter the courtroom without the court or counsel present and rewatch the testimonial exhibit of Rands’s police interview during deliberations. (6/11/20 Tr. at 243–246.)

Generally, a trial court is not permitted to submit testimonial evidence to the jury during deliberation. *Hayes*, ¶ 15; *Nordholm*, ¶ 10; *State v. Greene*, 2015 MT 1, ¶ 22, 378 Mont. 1, 340 P.3d 551. This common law rule recognizes that a fair trial is governed not only by limitations on what information a jury may hear, but also by limitations on the manner in which that information is delivered to the jury. *See State v. Koontz*, 41 P.3d 475, 477 (Wash. 2002); *see Nordholm*, ¶ 10.

The rule against submitting testimonial material to the jury applies both to materials given to the jury at the start of deliberations

and juror requests to rehear testimonial material during deliberations. *Nordholm*, ¶ 10. The rule “prevents the jury from giving undue weight to one witness’s statements to the exclusion of the evidence presented by other witnesses.” *Nordholm*, ¶ 10 (citation omitted).

Montana Code Annotated § 46-16-503(2) creates a narrow exception for juror requests to review testimonial materials. *Hayes*, ¶ 15. That statute grants trial courts discretion to answer specific questions from the jury with limited testimonial materials under strictly controlled procedures. *Hayes*, ¶¶ 15–16. “The touchstone for a district court in exercising its discretion under § 46-16-503(2), MCA, is whether complying with the jury’s request would unduly emphasize the testimony of certain witnesses, relative to the probative value of that testimony.” *Hayes*, ¶ 16.

This Court has emphasized the exception at Mont. Code Ann. § 46-15-503(2) is directed to permitting testimonial information “on a specific and limited matter,” such as “the width of a street, the height of an object, distance, [or] time,” or whether a person went into a room or not. *Greene*, ¶ 26 (quoting *State v. Harris*, 247 Mont. 405, 417, 808 P.2d 453, 460 (1991)). Jurors’ questions must be specific, and trial courts

abuse their discretion if they allow jurors to review entire statements or unspecified portions. *Hayes*, ¶¶ 18–20; *State v. Mayes*, 251 Mont. 358, 374, 825 P.2d 1196, 1206 (1992); *Harris*, 247 Mont. at 418, 808 P.2d at 460; cf. *Greene*, ¶ 25 (affirming the trial court providing jurors “particular testimony, which was limited to the portion of [the] testimony that addressed the jury’s question”). If the jury makes a broad request for materials, the trial court must inquire further and isolate the jury’s specific difficulty and then weigh the probative value of the requested testimonial material against the danger of undue emphasis. *Hayes*, ¶ 18.

If a trial court determines the requested testimonial material’s probative value outweighs the danger of undue emphasis, then the court is “required to adopt a ‘strictly controlled procedure’ . . . and arrange to isolate the specific area giving the jury difficulty for review.” *Hayes*, ¶ 18; *Greene*, ¶ 25. These procedures include supplying jurors only the limited portion of the testimonial material that addresses the jury’s specific question, *Greene*, ¶ 25, cautioning jurors not to give undue emphasis to the testimony of any one witness to the exclusion of others, *Harris*, 247 Mont. at 418, 808 P.2d at 460, and supervising the

jury's review of the testimonial materials in open court, *Nordholm*, ¶ 14; *Greene*, ¶ 23.

This Court's precedent makes clear that a judge abuses its discretion by allowing the jury to rewatch testimonial evidence even once. *See, e.g., Hayes*, ¶¶ 10, 20 (court reporter played forensic interview once upon request); *Mayes*, 251 Mont. at 374, 825 P.2d at 1206 (“[T]he District Court abused its discretion in allowing the jury to listen to the tape recordings of the entire testimony of Panzer and Berens.”); *see also, Harris*, 247 Mont. at 416–18, 808 P.2d at 459–60 (holding district court abused its discretion in having entire trial testimony of child victim witness re-read to the jury in the courtroom upon jury request). While the jury's ability to repeatedly rewatch testimonial evidence heightens the fear of undue emphasis, *see, e.g., Nordholm*, ¶ 14, allowing the jury to review testimonial materials one time in deliberations can itself place undue emphasis on that reviewed evidence; at a minimum, such rewatching without any imposed safeguards erroneously permits the jury to do so. *See Hayes*, ¶ 19 (concluding the rewatching placed undue emphasis on the victim's testimony to the exclusion of other evidence); *Nordholm*, ¶ 10.

This Court has often held evidence like this interview is testimonial. *See State v. Bales*, 1999 MT 334, ¶¶ 13, 24, 297 Mont. 402, 994 P.2d 17 (tape recording of defendant’s interview with police); *see also, Hayes*, ¶¶ 8, 18 (victim forensic interview); *Nordholm*, ¶¶ 6, 11, 14–15 (witness interviews with police); *State v. Herman*, 2009 MT 101, ¶¶ 34, 39, 350 Mont. 109, 204 P.3d 1254 (written statement of a witness). The record is clear that Rands’s fully admitted police interview video was played for the jury upon request. *Cf. State v. Ward*, 2020 MT 36, ¶¶ 28–29, 399 Mont. 16, 457 P.3d 955. The jury made a broad request to rewatch this video, but the trial court did not inquire further to isolate the jury’s specific difficulty. *See Hayes*, ¶ 18. Nor did it weigh the probative value of the requested testimonial material against the danger of undue emphasis. *See Hayes*, ¶ 18.

The district court abused its discretion by allowing jurors, before Rands testified, to watch Rands’s testimonial police interview video. Additionally, when the jury was hung, the trial court allowed it to rewatch that testimonial police interview video during deliberations while wholly failing to abide by any of the safeguards laid down by this Court for addressing juror requests for testimonial materials. The

district court did not isolate the specific questions the jury had about the interview. (*See* 6/10/20 Tr. at 229, 6/11/20 Tr. at 246.) There is no indication in the record that the district court weighed the probative value of the testimonial exhibit against the danger of undue emphasis. The district court allowed the jury to review the Rands's police interview video. The district court permitted the bailiff to escort the jury into the courtroom and play Rands's 20-minute video interview, unsupervised by the court or the parties. No cautionary instruction accompanied the jury's rewatching of the interview to warn jurors to avoid undue emphasis. Additionally, allowing the jury to rewatch Rands's police interview video without attempting to isolate the jury's specific difficulty regarding the video was an abuse of discretion. *See Hayes*, ¶¶ 18–20; *Mayes*, 251 Mont. at 374, 825 P.2d at 1206. More importantly, allowing the jury to rewatch the video prejudiced Haflich because it allowed the State and the jury to place undue emphasis to inadmissible testimonial evidence. The district court's error was precipitated by its misinterpretation of this Court's precedent as allowing the jury to watch the video once but only prohibits the jury from rewatching testimonial evidence multiple times.

The jury was allowed to watch Rands’s 20-minute testimonial video twice. First, just before Rands took the stand. And, over Haflich’s hearsay objection, the district court incorrectly allowed the jury to view the testimonial video. Secondly, following the jury’s third question requesting to be allowed to see the entire video so as to give context or additional information to Rands’ police interview, (*see* 6/10/20 Tr. at 229,232–3), the district court abused its discretion by permitting the jury rewatch Rands’s testimonial video without attempting to abide by any safeguards to prevent the jury from giving undue emphasis to the rewatched interview.

### **C. Not Harmless**

Allowing jurors access to testimonial materials is trial error, subject to harmless error analysis. *Nordholm*, ¶ 12. To prove the error harmless, “the State must demonstrate that there is ‘no reasonable possibility’” that the erroneous review of testimonial evidence might have contributed to the defendant’s conviction. *Nordholm*, ¶ 12 (*quoting State v. Van Kirk*, 2001 MT 184, ¶ 47, 306 Mont. 215, 32 P.3d 735). The State’s burden is a “very high bar.” *State v. Reichmand*, 2010 MT 228, ¶ 23, 358 Mont. 68, 243 P.3d 423. The State must convince

this Court there is no reasonable possibility the jury's improper review allowed jurors to give undue emphasis to Rands's police interview video in finding Haflich guilty. *See Nordholm*, ¶ 14. Allowing the jury to rehear testimonial evidence critical to the State's case during deliberations carries a danger of undue emphasis the State cannot overcome. *See Hayes*, ¶¶ 18–19; *Bales*, ¶ 20; *Harris*, 247 Mont. at 418, 808 P.2d at 460. The State cannot carry its burden here.

Rands's police interview was damning evidence—In addition to her live testimony that Haflich beat her, and stomped on her head, the jury saw a visibly upset and emotional Rands as she recounted that Haflich beat her on the night in question as he had done nearly every day for the past seven years Haflich, with the worst, most frightening incident occurring seven years ago when he broke her hand—to the point a bone stuck out of the skin—and for five hours, he let her suffer and would not allow her to go to hospital for treatment. The jury was still struggling to unanimously conclude the State had satisfied its burden to show beyond a reasonable doubt that Haflich assaulted Rands in the manner she described. Before Rands testified, the jury watched her police video. And then again after the jury was

deadlocked, it was allowed to rewatch the police interview video at a key point in deliberations. The jury had been unable to reach a verdict despite deliberating for three hours. (6/10/20 Tr. at 229.)

The prosecutor's emphasis of the video during closing argument demonstrates that she recognized its compelling nature. (6/10/20 Tr. at 223 ("Now, you were able to see her testify today. You were able to see her on the video there. You can make up your own minds as to how she appeared to you.")) The record shows the jury rewatched Rands's interview on the third day for 20 minutes, sometime between when it began deliberations at 8:55 a.m. to 9:15 a.m. (6/10/20 Tr. at 229, 6/11/20 Tr. at 246.) The jury had watched the video once during trial. The jury's request to rewatch the video a second time reflected that the jury was seeking to further scrutinize that evidence. (6/11/20 Tr. at 246.) The fact that the jury was undecided after three hours demonstrates this was a close case. The jury deliberated for more than three hours and sent seven questions to the judge. (*See* 6/10/20 Tr. at 229, 232–3.) This suggests the jury was questioning the veracity of Rands's accusation against Haflich. The twice-viewed interview video no doubt tipped the scale—corroborating Rands's testimony, bolstering her

credibility, and informing the jury of additional uncharged damning accusations against Haflich.

Haflich was prejudiced even before Rands testified as the jury was allowed to watch and then rewatch Rands's interview in its fully admitted form, without limitation and without the court or counsel present. Haflich's counsel was unable to supervise the replaying of the video. It was only shortly after the jury rewatched the interview that it reached a guilty verdict. (6/11/20 Tr. at 229, 232–3, 246, 249.)

In *Nordholm*, ¶¶ 13-14, the Court reversed after the district court allowed the jury to take into the jury room video exhibits of the witnesses' statements to police the night of the incident. The record did not show whether the jury actually rewatched the video exhibits; it was simply allowed to do so. *Nordholm*, ¶ 11. The Court did not focus upon whether the substance of the testimonial evidence was such that it could have swayed the jury to convict over the in-court evidence. *See Nordholm*, ¶ 13. The Court focused on the common law rule's purpose to prohibit a jury "giving undue weight" to testimonial evidence it is allowed to review over the in-court testimony the jury must only remember. *Nordholm*, ¶ 13. Since the jury was given the opportunity

to emphasize Rands's unsworn and un-cross-examined evidence in its deliberations without restriction, the State was unable to satisfy its harmless error burden. *See Nordholm*, ¶ 13.

In *Hayes*, the jury asked to rewatch the State's evidence of the victim's forensic interview while deliberating. *Hayes*, ¶ 10. Without any inquiry or attempt to isolate the jury's difficulty, the district court allowed the court reporter to go into the jury room and replay unspecified portions of the exhibit. *Hayes*, ¶¶ 10, 18–20.

The Court again held that the defendant “was unfairly prejudiced ‘by placing undue emphasis on the statements of the alleged victim’ to the exclusion of the other evidence presented at trial.” *Hayes*, ¶ 19 (*quoting Harris*, 247 Mont. at 418, 808 P.2d at 460).

Here, the record reflects the jury watched a testimonial video during trial and again was allowed to rewatch Rands's police interview and did so during a critical moment of its deliberations. (6/11/20 Tr. at 229, 246.) Moments before the jury decided that Haflich was guilty, it watched a video where the alleged victim repeatedly accused him of assaulting her nearly every day for seven years, one time so badly her bone was protruding from her skin. More so than *Nordholm*, and akin

to *Hayes*, the record shows the jury did place undue emphasis on the testimonial evidence. It requested to rewatch Rands’s interview and did so on the cusp of reaching its guilty verdict. (See 6/11/20 Tr. at 246.) The appropriate procedures set forth in *Hayes* and Mont. Code Ann. § 46-15-503(2) were not followed or even attempted. As a result, Haflich was “unfairly prejudiced ‘by placing undue emphasis’” on Rands’s interview statements— and the especially prejudicial portion of the video where Rands alleges that Haflich has been threatening and assaulting her nearly every day for seven years, and seven years ago he allegedly broke her hand, let her suffer for five hours by preventing her from seeking medical attention—to the exclusion of the other evidence presented at trial, like Haflich’s in-court testimony. *Hayes*, ¶ 19.

**II. Police Officers entered Haflich’s home without a warrant and without exigent circumstance and, guns drawn, roused him from his sleep to interrogate and arrest him in contravention of the Fourth Amendment.**

The Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution both protect individuals against unreasonable governmental searches and seizures. *Vegas*, ¶ 10 citing *Ruggirello*, ¶ 17. Law enforcement’s entry into a private home without a warrant issued on probable cause constitutes a

search for Fourth Amendment purposes, *see State v. Stone*, 2004 MT 151, ¶ 40, 321 Mont. 489, 92 P.3d 1178, and is considered per se unreasonable unless an exception applies. *State v. Wakeford*, 1998 MT 16, ¶ 21, 287 Mont. 220, 953 P.2d 1065. The “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

Moreover, due to privacy rights protected by Section 10, Article II of the Montana Constitution, the range of warrantless searches that may be lawfully conducted under Montana law is narrower than the corresponding range of searches that may be lawfully conducted under the Fourth Amendment. *State v. Hardaway*, 2001 MT 252, ¶ 35, 307 Mont. 139, 36 P.3d 900 (citation omitted).

In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. *Payton*, 445 U.S. at 589-590.

In determining if a search violated the Montana Constitution, this Court looks to two factors: “(1) whether the person has an actual expectation of privacy that society is willing to recognize as objectively reasonable, and (2) the nature of the state’s intrusion.” *State v. Dunn*, 2007 MT 296, ¶ 12, 340 Mont. 31, 34, 172 P.3d 110, 113 *citing City of Whitefish v. Large*, 2003 MT 322, ¶ 14, 318 Mont. 310, 80 P.3d 427. Only where an objectively reasonable expectation of privacy has been intruded on by the State, or the State’s entry was overly intrusive, does this Court consider if an unlawful entry is permitted according to an enumerated exception to the warrant requirement. *Dunn*, ¶ 12.

Warrant exceptions typically fall under the categories such as exigent circumstances, search incident to arrest, inevitability, and consent. *See generally*, e.g., *State v. Elison*, 2000 MT 288, ¶ 56, 302 Mont. 228, 14 P.3d 456 (discussing the legal status of automobile searches and exceptions).

At the onset, there was no dispute in the lower court that Haflich had a reasonable expectation of privacy in his own home. This is why the trial court considered whether the officers’ unlawful entry was permitted according to an enumerated exception to the warrant

requirement. However, the trial court erred in concluding Rands had the requisite “common authority” over the shared residence to give officers consent to enter and this was a “well-delineated exception” to the warrant requirement. (*See* D.C. Doc 33 at 1–2.) Like Haflich argued below, Rands’s “common authority” to the shared residence did not supersede Haflich’s reasonable expectation of privacy in his own private home. Independent of Rands’s “common authority” in a shared residence, Haflich still had an inalienable constitutional right to be secure in his own home.

Another exception to the warrant requirement is the existence of exigent circumstances coupled with probable cause. *Ruggirello*, ¶ 17 (*citing Stone*, ¶ 18). Exigent circumstances exist when “the situation at hand would cause a reasonable person to believe that prompt action is necessary to prevent physical harm to an officer or other person, the destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating law enforcement efforts.”

*Ruggirello*, ¶ 17 (*quoting Stone*, ¶ 18).

As an initial matter, there were no exigent circumstances.

The exigent circumstances exception is a recognized exception to the warrant requirement and provides that a “warrantless entry by law enforcement officials may be legal when there is a compelling need for official action and no time to secure a warrant.” *Wakeford*, ¶ 23 (citing *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949 (1978)).

This Court stated that “exigent circumstances for conducting a warrantless search exist, ‘where it is not practicable to secure a warrant.’” *State v. Gomez*, 2007 MT 111, ¶ 27, 337 Mont. 219, 158 P.3d 442 (citing *State v. Bassett*, 1999 MT 109, ¶ 47, 294 Mont. 327, 982 P.2d 410. This Court has previously explained that exigent circumstances are those circumstances that would cause a reasonable person to believe that prompt action was necessary to prevent physical harm to police officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. *Elison*, ¶ 56 citing *Wakeford*, ¶ 24. The State bears the heavy burden of showing the existence of exigent circumstances and can meet that burden only by demonstrating specific and articulable facts. *Wakeford*, ¶ 24.

This Court’s interpretation of “exigent circumstance” contemplates “ongoing exigencies” as opposed to circumstances like the present where the alleged victim was not at home and was out of danger. *See C.f. State v. Hammer*, 233 Mont. 101, 108, 759 P.2d 979, 984 (1988). The statute contemplates police officers being called to the scene of the alleged domestic altercation and they obtain evidence of an “ongoing” domestic disturbance such that they must react immediately by arresting the “predominant aggressor” to prevent imminent injury to his or her partner or family member. The statute contemplates circumstances where officers are faced with the ongoing exigency—an “ongoing” or recent domestic altercation such that a partner or family member is in “imminent danger” of a continuing attack from the “predominant aggressor,” or where there is possible destruction of evidence. *See Hammer*, 233 Mont. at 108. The existing circumstances—imminent danger— leads a reasonable police officer to believe that prompt action is necessary to prevent physical harm to police officers or other persons (partner or a family member), the destruction of relevant evidence, the escape of the suspect, or some

other consequence improperly frustrating legitimate law enforcement efforts. *See Elison*, ¶ 56.

This Court looks to the totality of the circumstances when evaluating whether exigent circumstances exist. *State v. Lanegan*, 2004 MT 134, ¶ 16, 321 Mont. 349, 91 P.3d 578 (citing *State v. McCarthy*, 258 Mont. 51, 57, 852 P.2d 111, 115 (1993)). Probable cause exists when “the facts and circumstances within the officer’s personal knowledge, or imparted to the officer by a reliable source, are sufficient to warrant a reasonable person to believe that the suspect has committed an offense.” *Ruggirello*, ¶ 17 (quoting *Stone*, ¶ 18). “The State bears the heavy burden of showing the existence of exigent circumstances and can meet that burden only by demonstrating specific and articulable facts.” *Ruggirello*, ¶ 18 (quoting *State v. Logan*, 2002 MT 206, ¶ 17, 311 Mont. 239, 53 P.3d 1285).

Under Mont. Code Ann. § 46-6-311(1), “A peace officer may arrest a person when a warrant has not been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.” The next section provides “Arrest is the preferred

response in partner or family member assault cases involving injury to the victim, use or threatened use of a weapon, violation of a restraining order, or other imminent danger to the victim.” Mont. Code Ann. § 46-6-311(2)(a) (2019).

The Montana Legislature has enacted numerous statutes that specifically address the relationship between police officers and domestic abuse victims. For example, Mont. Code Ann. § 46-6-311 provides that arrest represents the “preferred response” in domestic assault cases involving “imminent danger to the victim.” In fact, Mont. Code Ann. § 46-6-601 affirmatively requires a police officer to file a written report with the officer in command when the officer fails to make an arrest when called to the scene of a reported domestic assault incident.

This statute does not override or supersede Haflich’s rights under the Fourth Amendment and this entry was exigent-less.

Under Mont. Code Ann. § 46-6-311(1) police admittedly had probable cause to believe that Haflich committed the PFMA offense at his residence the previous evening. More than six hours elapsed before dispatch received a call to send police officers to Cabinet Peaks ER.

Thus, these existing circumstances did not require Haflich's immediate arrest. Rands, the alleged PFMA victim, was not in the residence with Haflich. Which means police officers had many opportunities to apply for and receive a warrant while Rands was at the ER, and while she trekked home from the ER.

Again, police officers were not called to the couple's shared home—the alleged scene of the PFMA. They were called by a nurse to the Cabinet Peaks ER. Montana Code Annotated § 46-6-311(1) clearly contemplates police officers being summoned to a place of residence by a partner or family member. The “place of residence” of the partner or family member is the “scene of a reported domestic assault incident.” The statute authorizes the immediate arrest of the “predominant aggressor” to avert “imminent danger” to the partner or family member.

The alleged assault occurred earlier than 4:30 a.m. and Rands allegedly left the residence where she was assaulted and went to McMullen's home. At approximately 7:02 a.m. Deputy Derryberry and Deputy Hauke interviewed Rands at the hospital. At approximately 9:00 a.m., four Officers went to Haflich's residence and knocked and announced themselves numerous times. They knew Rands was not

home, they hoped Haflich would answer the door if he was home. When they received no response, the officers rightly, left—did not go into the home.

Soon after, the Officers learned Rands had been discharged from the hospital and so they tracked her down while she was walking back to her friend McMullen's residence. Instead of spending their time applying for an arrest warrant, officers convinced Rands to allow them to enter the residence to locate Haflich. At approximately 10:12 a.m., at least six hours after the alleged incident, the Officers and Rands arrived at Haflich's home together and three officers climbed through a window. They roused Haflich by pointing their service weapons at him. And without incident they arrested him for PFMA.

The Officers had ample time to secure an arrest warrant for felony PFMA. Yet they chose to enter Haflich's residence to effect a warrantless arrest. Haflich was not an immediate threat to Rands. Rands had left the residence at 4:30 a.m. and there is no indication he was threatening future assaultive behavior or threatening to hunt her down. When officers entered his home, Haflich was peacefully sleeping. There were definitely no exigent circumstances. As Rands indicated,

she was going to her friend Ms. McMullen's home and did not want to be around Haflich. The alleged incident happened well over six hours prior, Rands indicated there were no weapons or other individuals in the residence, and there were no other imminent concerns leading police to believe Haflich's immediate arrest was necessary to prevent imminent injury to Rands.

Even if, *arguendo*, Rands was insisting on going back home while Haflich was still there, police officers had many opportunities to apply for an arrest warrant and waited outside Haflich's residence with Rands to prevent any escalation of the domestic altercation. The arrest of Haflich for PFMA in his home without a warrant or without exigent circumstances violated the Fourth Amendment.

"The 'fruit of the poisonous tree' doctrine forbids the use of evidence which is discovered as a result of the exploitation of an initial illegal act by the police." *State v. Lacey*, 2009 MT 62, ¶ 32, 349 Mont. 371, 204 P.3d 1192 (*citing State v. Dasen*, 2007 MT 87, ¶ 19, 337 Mont. 74, 155 P.3d 1282). Illegally obtained evidence is inadmissible in proceedings against the accused to deter the state from violating its citizens' constitutional rights. *See State v. Courville*, 2002 MT 330,

¶ 20, 313 Mont. 218, 61 P.3d 749.

After police officers conducted a warrantless arrest of Haflich, Deputy Hauke returned to his home and took photos of Ms. Rands's injuries without requesting an arrest warrant. This evidence and any other statements must be suppressed.<sup>1</sup>

There are no applicable warrant exceptions in Haflich's case.

Here there was no compelling need for official action by effecting Haflich's prompt warrantless arrest because there was plenty of time to secure an arrest warrant. *See Wakeford*, ¶ 23.

Under Montana law, for warrantless arrest, "exigency" is emergency so pressing that a warrant cannot be obtained; only where police must react immediately may they disregard warrant requirement. Mont. Code Ann. § 46-6-311.

The State has made no showing of any sort of urgency nor any ongoing exigency. It has therefore failed to show that the circumstances were such that the warrant requirement could be disregarded. *See United States v. Shephard*, 21 F.3d 933, 938 (9th Cir. 1994). In fact,

---

<sup>1</sup> The trial court suppressed all the statements Haflich made while being interrogated by officers without the benefit of the *Miranda* warnings. (D.C. Doc. 33 at 4.)

there simply were no exigent circumstances of any kind. Here, police were called to the emergency room and not Haflich's home. Police went to Haflich's home without a warrant, knocked and announced themselves but received no response. Then they were apprised that Rands had left hospital walking towards home. The best way to ensure her safety was to keep her out of Haflich's home while police applied for an arrest warrant. Under these circumstances, it was not reasonable for officers to believe that prompt action was necessary to prevent imminent injury to Rands.

### **CONCLUSION**

Haflich respectfully requests the Court to reverse and remand for a new trial without the testimonial video. Alternatively, Haflich respectfully requests the Court to reverse with instructions to suppress all the evidence against him for the Fourth Amendment violation.

Respectfully submitted this 22<sup>nd</sup> day of September 2021.

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

By: /s/ Moses Okeyo  
MOSES OKEYO  
Assistant Appellate Defender

## **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 Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,944, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Moses Okeyo

MOSES OKEYO

**APPENDIX**

Judgment and Sentence ..... App. A

Sentencing Tr ..... App. B

Police Report..... App. C

Opinion and Order Re: Motion to Suppress and Dismiss ..... App. D

## CERTIFICATE OF SERVICE

I, Moses Ouma Okeyo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-22-2021:

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

Marcia Jean Boris (Attorney)  
Lincoln County Attorney  
512 California Avenue  
Libby MT 59923  
Representing: State of Montana  
Service Method: E-mail Delivery

Electronically signed by Pamela S. Rossi on behalf of Moses Ouma Okeyo  
Dated: 09-22-2021