

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GARRETT MICHAEL O'HOWELL,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Broadwater County, the Honorable Michael Menahan, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
I. The traffic stop.	2
II. The trial.	9
A. Smock's testimony.	10
B. Laird's testimony.	12
C. O'Howell's testimony.	14
D. Closing argument and jury instructions.	15
STANDARD OF REVIEW	17
SUMMARY OF THE ARGUMENT	18
ARGUMENT	19
I. Cordova pursued an ill-defined hunch to extend a traffic stop and seize O'Howell because two men in the back of a car looked at him funny.	19
A. A cop cannot seize a car passenger because other passengers stared at him.	23
B. Cordova did not diligently effectuate the purpose of the stop, he unlawfully expanded it by investigating O'Howell and the others.	27
II. The State failed to corroborate the accomplices' testimony that O'Howell knew about Hamlin's intent to distribute meth.	33

A.	Smock and Laird were both accomplices.....	35
B.	The State provided no evidence to corroborate that O’Howell knew the drugs would be sold or shared.	37
CONCLUSION		38
CERTIFICATE OF COMPLIANCE.....		40
APPENDIX.....		41

TABLE OF AUTHORITIES

Cases

<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961).....	20
<i>State v. Bales</i> , 1999 MT 334, 297 Mont. 402, 994 P.2d 17	17
<i>State v. Ballinger</i> , 2016 MT 30, 382 Mont. 193, 366 P.3d 668	21
<i>State v. Blackcrow</i> , 1999 MT 44, 293 Mont. 374, 975 P.2d 1253	35
<i>State v. Bolton</i> , 65 Mont. 74, 212 P. 504 (1922)	35
<i>State v. Broken Rope</i> , 278 Mont. 427, 925 P.2d 1157 (1996)	22, 31, 32
<i>State v. Carrywater</i> , 2022 MT 131, 409 Mont. 194, 512 P.3d 1180	passim
<i>State v. Case</i> , 190 Mont. 450, 621 P.2d 1066 (1980)	34
<i>State v. Deshaw</i> , 2012 MT 284, 367 Mont. 218, 291 P.3d 561	20
<i>State v. Fey</i> , 2000 MT 211, 301 Mont. 28, 7 P.3d 358	17
<i>State v. Harning</i> , 2022 MT 61, 408 Mont. 140, 507 P.3d 145	17, 19
<i>State v. Kaufman</i> , 2002 MT 294, 313 Mont. 1, 59 P.3d 1166	21

<i>State v. Kemp</i> , 182 Mont. 383, 597 P.2d 96 (1979)	34, 35
<i>State v. Laster</i> , 2021 MT 269, 406 Mont. 60, 497 P.3d 224	20, 22
<i>State v. Marino</i> , 2016 MT 220, 384 Mont. 490, 380 P.3d 763	23
<i>State v. Noli</i> , 2023 MT 84, ___ Mont. ___, ___ P.3d ___	20, 23, 28
<i>State v. Reeves</i> , 2019 MT 151, 396 Mont. 230, 444 P.3d 394	21, 23, 27
<i>State v. Skinner</i> , 2007 MT 175, 338 Mont. 197, 163 P.3d 399	18
<i>State v. Strom</i> , 2014 MT 234, 376 Mont. 277, 333 P.3d 218	passim
<i>State v. Sutton</i> , 2018 MT 143, 391 Mont. 485, 419 P.3d 1201	18
<i>State v. Tollie</i> , 2022 MT 59, 408 Mont. 129, 506 P.3d 1021	passim
<i>State v. Torgerson</i> , 2008 MT 303, 345 Mont. 532, 192 P.3d 695	18
<i>State v. Wilson</i> , 2018 MT 268, 393 Mont. 238, 430 P.3d 77	passim
<i>State v. Woods</i> , 221 Mont. 17 (1986)	34
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	22, 30
<i>U.S. v. Evans</i> , 786 F.3d 779 (9th Cir. 2015)	22

<i>U.S. v. Sharpe</i> , 470 U.S. 675 (1985).....	22
---	----

<i>United States v. Cortez</i> , 449 U.S. 411 (1981).....	21, 22
--	--------

Statutes and Constitutional Provisions

Mont. Code Ann. § 45-2-301 (2019).....	1
Mont. Code Ann. § 45-2-302.....	35
Mont. Code Ann. § 45-9-103.....	1
Mont. Code Ann. § 45-10-103.....	1
Mont. Code Ann. § 46-5-401.....	21
Mont. Code Ann. § 46-5-403.....	22
Mont. Code Ann. § 46-13-302.....	20, 35
Mont. Code Ann. § 46-16-213.....	34
Mont. Const. art. II, § 10.....	20
Mont. Const. art. II, § 11.....	20
U.S. Const. amend. IV.....	20
U.S. Const. amend. XIV.....	20

STATEMENT OF THE ISSUES

Did the deputy unlawfully seize Garrett O’Howell and extend the minor traffic stop into a criminal investigation when he required identification from O’Howell and the other passengers?

Other than testimony from two accomplices trying to save their own skin, the State had no evidence Garret O'Howell intended to help distribute the meth found in Katelyn Smock's car. Was there insufficient evidence corroborating the accomplices’ testimony?

STATEMENT OF THE CASE

O’Howell appeals the denial of his motion to suppress and subsequent conviction for one felony drug charge and one misdemeanor paraphernalia charge after a jury trial.

After a May 4, 2020, traffic stop involving O’Howell and three others, the State charged O’Howell with Count I: Accountability for Criminal Possession of Dangerous Drugs (CPDD) with Intent to Distribute in violation of Montana Code Annotated §§ 45-9-103, 45-2-301 (2019); and Count II: Criminal Possession of Drug Paraphernalia in violation of Montana Code Annotated § 45-10-103. (D.C. Doc. 2, 30, 33.)

O’Howell moved to suppress evidence collected after the traffic stop on several grounds, arguing the investigating officer lacked particularized suspicion to extend the stop beyond its original purpose, and that O’Howell had been unlawfully seized. (D.C. Doc. 19.) After an evidentiary hearing and additional briefing, the district court denied O’Howell’s motion. (D.C. Doc. 25, 27, 38, 47.) (D.C. Doc. 47, Order on Motion to Suppress, attached as Appendix A.)

Trial occurred May 3 and 4, 2021. (D.C. Doc. 54, 55.) O’Howell moved for a new trial afterward; the court held a hearing and denied the request. (D.C. Doc. 59, 60, 70.) The court sentenced O’Howell to the Department of Corrections for ten years with five suspended, granting credit for 458 days served on the felony conviction, and six months jail with credit for six months served on the misdemeanor. (D.C. Doc. 72, Judgment and Commitment, attached as Appendix B.) O’Howell timely appealed. (D.C. Doc. 76.)

STATEMENT OF THE FACTS

I. The traffic stop.

Deputy Tony Cordova of the Broadwater County Sheriff’s Office saw two males seated in the back of a parked sedan “staring” at him

when he pulled into a Townsend gas station around 9:00 p.m. (12/10/20 Evidentiary Hearing Transcript at 6–8.) The men were repeatedly “looking at [Cordova] and then looking away.” (12/10/20 Tr. at 8.) Though people look at him all the time, Cordova considered it “suspicious.” (12/10/20 Tr. at 39.)

Smock and O’Howell exited the gas station and got into the sedan with two men in back. (12/10/20 Tr. at 9.) Smock entered the driver seat and O’Howell entered the front passenger seat. (12/10/20 Tr. at 9.) The sedan pulled out of the lot onto Highway 287 heading south. (12/10/20 Tr. at 10.)

Cordova decided to run Smock’s license plate number “[b]ecause of suspicious activity inside of the vehicle with them looking at [him].” (12/10/20 Tr. at 9–10.) The car was registered to a female with a revoked license. (12/10/20 Tr. at 11–12.) Cordova followed the sedan and saw one of the men look back and appear to “kind of fidget[] with something on the floorboard.” (12/10/20 Tr. at 12.) Cordova activated his radar and clocked the car at 52 miles per hour in a 45 mile-per-hour zone. (12/10/20 Tr. at 13.)

Cordova activated his emergency lights. (12/10/20 Tr. at 14.) Smock pulled over and Cordova approached wearing his uniform, tactical vest, and a firearm strapped to his leg. (Exhibit A, Patrol Car Video at 1:00–1:20.) Cordova’s emergency lights remained on; his headlights shone brightly against Smock’s car throughout the stop. (Ex. A at 1:00–18:00.) Cordova notified Smock she was speeding and that the registered owner of the vehicle had a revoked license. (Exhibit B, Body Camera 1 at 0:30–0:50.) He asked Smock for her license, she admitted she did not have one but said it was her car. (Ex. B at 0:30–0:55.) Cordova asked for her registration and insurance cards, which she said were at home. (Ex. B at 0:40–1:00.)

Cordova quickly turned to the male passengers and asked for identification or valid drivers’ licenses. (Ex. B at 1:00–1:18.) None had valid licenses. (Ex. B at 1:00–2:30.) O’Howell’s had been stolen. (Ex. B at 1:00–2:30.) One of the rear passengers, Kody Laird, did not have his with him; and the other passenger, Donald Hamlin, had only a learner’s permit, though he was over fifty years old. (Ex. B at 1:00–2:30.) None could drive Smock’s car to avoid a tow.

Cordova asked the three men if any were on probation or parole. (Ex. B at 1:20–1:26.) Hamlin said he was on probation out of Helena where his son just had surgery and he was headed back home. (Ex. B at 1:15–1:45.) Cordova wanted to figure out who could drive the car. (Ex. B at 1:40–1:50.) He asked the men, not Smock, for names and birthdates. (Ex. B at 1:55–2:18.) Hamlin gave Cordova two copies of identification; Cordova returned one and kept the other. (Ex. B at 3:00–3:20.) Cordova doublechecked each name and date the men gave. (Ex. B at 3:45–4:05.) Cordova requested Smock sit in his vehicle; she asked why. (Ex. B at 4:05–4:45.) He wanted to figure out why her license was revoked though Smock never asked. (Ex. B at 4:05–4:45.)

Inside his patrol car, Cordova asked Smock if the men were her friends. (Ex. A at 5:55–6:05.) He asked where she came from and what she did that day. (Ex. A at 6:20–6:40.) Smock explained she was at home in Helena and her friends needed a ride. (Ex. A at 6:20–6:40.) Cordova asked if any of the men had warrants and why none had identification. (Ex. A at 7:00–7:15.) Cordova then asked her name for the first time; Smock provided it, and Cordova asked dispatch for the “RO,” or registered owner of the vehicle, which dispatch had already

provided before the stop. (Ex. A at 7:15–7:30; 5/3/20 Jury Trial Day 1 Transcript at 90–91.) Cordova advised dispatch that no one had identification and Smock interjected that she did; Cordova also had Hamlin’s ID in his hand. (Ex. A at 7:30–7:40.) Cordova gave the passengers’ names to dispatch along with information he learned about their licenses and probation status. (Ex. A at 7:40–8:45.) He did not ask dispatch for information about Smock.

Cordova asked Smock how long she had been revoked, how many tickets she had for suspended driving, and whether she was on probation. (Ex. A at 8:45–9:10.) Smock explained her need to get SR-22 insurance. (Ex. A at 9:10–9:30.)

“Is there something illegal in that vehicle?” (Ex. A at 9:15–9:30.) “All three of your guys are, sketching out, and looking back at us. They are doing something in there.” (Ex. A at 9:30–9:45.) Cordova asked Smock if there was marijuana, cocaine, heroin, or methamphetamine in the car, which she denied. (Ex. A at 9:40–9:55.) He asked Smock if it was her vehicle even though he had already received confirmation of the registered owner from dispatch, and Smock claimed ownership earlier. (Ex. A at 9:50–9:59.) He then asked Smock for her date of birth, which

she provided, and if she was under the influence of anything, which she denied. (Ex. A at 9:55–10:20.)

Cordova commented how the guys in Smock's car keep looking back. (Ex. A at 10:20–10:40.) Smock offered to ask them what was going on. (Ex. A at 10:20–10:40.) Cordova directed her to stay in the patrol car. (Ex. A at 10:30–10:50.)

Still in the patrol car, Smock asked if there was "anything else, is there any problems, or anything." (Ex. A at 10:45–11:00.) "Well yea, look how fidgety this guy is. . . Right now, I believe there is something illegal in that car." (Ex. A at 10:50–11:05.) Smock suggested Hamlin, who had a permit, drive the car; Cordova did not believe that would be okay. (Ex. A at 11:05–11:30.) "I just wanna make sure there is nothing illegal in your car, okay? . . . Everyone is moving around." (Ex. A at 11:25–11:40.) "I'm gonna go up there and figure out what is going on." (Ex. A at 11:35–11:45.)

Montana Highway Patrol Officer Mackenzie Gifford arrived to assist. (Ex. A at 11:40–11:50.) Cordova brought Gifford up to speed; "No one has IDs besides this back left guy, . . . they are all moving around, looking back here right now. And she's revoked, I'm gonna give her a

ticket for revoked. We haven't gotten read backs on all of 'em yet so, I'm just hanging out." (Ex. A at 11:50–12:10.)

Next, Cordova instructed Smock to remain in the car, as he was going to go "talk with" O'Howell after dispatch advised him of O'Howell's active warrant from Lewis and Clark County. (Ex. A at 12:10–12:45; 12/10/20 Tr. at 26.) Cordova and Gifford patted O'Howell down and placed him in handcuffs. (Ex. A at 12:40–14:35.) Cordova told O'Howell he was merely being detained, but he was under arrest. (Ex. A at 14:35–14:55; 12/10/20 Tr. at 26–28.) O'Howell did not have any drugs or dangerous items on him. (5/3/21 Tr. at 102.)

Cordova asked dispatch to confirm O'Howell's warrant and told Smock he was going to give her a ticket. (Ex. A at 15:20–15:45.) He asked for Smock's phone number and wrote a citation. (Ex. A at 15:55–16:45.)

Suddenly, Hamlin exited the sedan, Laird crawled into the front, and drove away. (Ex. A at 17:15–17:35.) Cordova rushed to try and stop Laird but failed; Gifford pursued him in her patrol car. (Ex. A at 17:15–17:40.) Cordova grabbed Hamlin. (Ex. A at 17:30–17:45.) Cordova took O'Howell to jail, leaving Smock and Hamlin on the side of the highway.

(D.C. Doc. 2 at 3.) After law enforcement stopped Laird, they searched the car, and inside found 116.7 grams of methamphetamine in multiple bags, snort tubes, and over 25 syringes—some appeared to be loaded and ready for use, and others appeared to already be used. (5/3/21 Tr. at 109, 115, 119–125, 131; State’s Exhibit 41.) Cordova found most of the meth wedged under the rear passenger seat. (5/3/21 Tr. at 132.)

II. The trial.

O’Howell denied knowledge of any plan to distribute Hamlin’s meth. (5/4/21 Tr. at 68–69, 92–93, 100–01, 103–05.) Hamlin already pled guilty to CPDD with Intent to Distribute based on the meth wedged in the back seat. (5/3/21 Tr. at 132–33.) Hamlin refused to testify despite a State subpoena, so the jury never heard the specifics underlying Hamlin’s plea. (5/3/21 Tr. at 197.)

The State sought to prove O’Howell was part of a “four-person agreement” to commit the crime of possessing dangerous drugs with the intent to distribute by proving the following: Hamlin had drugs and wanted to sell them in Billings. (5/3/21 Tr. at 76–77.) Hamlin linked up with Laird in Helena, then O’Howell, who recruited Smock to drive them all to Billings. (5/3/21 Tr. at 77–78.) Cordova foiled the plan after

a routine traffic stop resulted in the seizure of a large amount of methamphetamine, paraphernalia, and criminal convictions for Smock, Laird, and Hamlin. (5/3/21 Tr. at 78–79.)

O’Howell helped in “two significant ways.” (5/3/21 Tr. at 79.)

O’Howell “went and got a car and a driver so they could make the trip to Billings, . . . [a]nd then he also helped [Hamlin] by actually driving the car from Helena to Townsend.” (5/3/21 Tr. at 79.) “The whole point of this was to get some drugs, share some drugs, sell some drugs.” (5/3/21 Tr. at 80.)

Cordova testified how his attention was first drawn by the two men staring at him, which led to the traffic stop. (5/3/21 Tr. at 89–99.) After Laird drove away, Cordova helped catch him, searched the car, and seized the drugs and paraphernalia found inside. (5/3/21 Tr. at 105, 115–32.)

A. Smock’s testimony.

Smock was initially charged with CPDD with Intent to Distribute, which was later dropped as part of a plea agreement in which she pled guilty to drug possession for a little bag of meth stashed under the driver seat. (5/3/21 Tr. at 178, 183–84, 191.) Smock was not “going to

take someone else's charges" since she was not aware of all the other meth in her car. (5/3/21 Tr. at 178, 183–84.) She made an agreement with the State to testify against O'Howell, and the others. (5/3/21 Tr. at 190–91.)

Smock and O'Howell were friends. (5/3/21 Tr. at 170.) O'Howell asked her to give him and his friends a ride from Helena to Billings. (5/3/21 Tr. at 170–71.) Smock barely knew Laird and had never met Hamlin. (5/3/21 Tr. at 172.) She was reluctant to go because she had visitors at her house, but eventually agreed. (5/3/21 Tr. at 171–72.) Smock believed O'Howell asked for the ride so his friends could get to Billings. (5/3/21 Tr. at 173.) She and O'Howell did not discuss any plan to distribute drugs. (5/3/21 Tr. at 173.)

O'Howell drove initially. (5/3/21 Tr. at 174.) They stopped at a gas station and Hamlin paid for the gas. (5/3/21 Tr. at 174–75.) There, O'Howell told Smock that Hamlin had "some stuff on him." (5/3/21 Tr. at 175.) Smock interpreted "stuff" to mean drugs. (5/3/21 Tr. at 175.) "So pretty much [Hamlin] was probably going to get us high, or something like that, I guess is probably what [O'Howell] meant." (5/3/21 Tr. at 192.) O'Howell did not say how much Hamlin had. (5/3/21 Tr. at 175.)

Nor did O’Howell say, “He’s going to give us some,” or, “He’s going to sell us some,” or, “He’s going to use.” (5/3/21 Tr. at 175–76.) Smock had not yet seen any syringes, anyone shooting up, nor anyone snorting anything. (5/3/21 Tr. at 179.) There was no discussion about getting drugs from Hamlin. (5/3/21 Tr. at 176.)

But upon leaving the gas station, Smock drove so O’Howell could get high. (5/3/21 Tr. at 177–79.) He was going to shoot up with a syringe that Hamlin handed him. (5/3/21 Tr. at 179–80.) Smock did not know whether Hamlin gave any drugs to Laird. (5/3/21 Tr. at 180.) She never saw O’Howell use the syringe because moments later, Cordova began following and pulled them over. (5/3/21 Tr. at 180–81.)

B. Laird’s testimony.

Laird testified that he pled guilty to Criminal Endangerment for his driving behavior after leaving in Smock’s car and possession of drug paraphernalia, while four or five other drug charges got dismissed. (5/4/21 Tr. at 20, 43–46.) His plea agreement required that he testify against O’Howell and the others. (5/4/21 Tr. at 44.)

Laird’s girlfriend asked him to find Hamlin a ride from Helena to Billings. (5/4/21 Tr. at 21.) Hamlin’s car broke down in Missoula; he

found his way to Helena and wanted to return home to Billings. (5/4/21 Tr. at 22, 43.) Hamlin had drugs, so he and Laird got high, then Laird tried finding a ride. (5/4/21 Tr. at 22.)

Laird contacted O’Howell because he knew O’Howell wanted to pick his dog up in Billings. (5/4/21 Tr. at 22–23, 30.) Laird claimed to tell O’Howell that Hamlin had a large amount of drugs and would “hook [them] up with some” along the way, and once they got to Billings, would give them some for the ride back. (5/4/21 Tr. at 23, 29–30.)

O’Howell arranged a ride with Smock. (5/4/21 Tr. at 24.) Once Smock arrived with a car, the four went to two different stores in Helena in search of a pipe to smoke meth. (5/4/21 Tr. at 25.) Neither store had it, so they headed toward Townsend. (5/4/21 Tr. at 25.) Hamlin brought meth, some of which was in syringes. (5/4/21 Tr. at 25–26.) Laird also claimed that a backpack found in the car belonged to O’Howell, and that it contained several syringes. (5/4/21 Tr. at 27.)

The State asked Laird if “at some point along the way, was there any discussion that [Hamlin] had drugs that he was trying to sell somewhere[.]” (5/4/21 Tr. at 25.) Laird answered, “Yeah. I mean -- well, me and [O’Howell] both knew that there was more drugs. . . . I don't

believe [Smock] knew how much drugs were in the car. But we talked -- I told -- we were talking about it, and I told them, like, 'Hey, when we get to Billings, we'll get high, and [Hamlin] will give you guys some drugs for letting us use the car and some money for going all the way there.'" (5/4/21 Tr. at 25.)

O'Howell drove first, but later switched with Smock. (5/4/21 Tr. at 31.) Laird asked Smock to assume the wheel because O'Howell was swerving, not because O'Howell wanted to get high. (5/4/21 Tr. at 31.) Laird assumed O'Howell was already high. (5/4/21 Tr. at 31–32.) Smock was driving when they got pulled over. (5/4/21 Tr. at 34.)

C. O'Howell's testimony.

O'Howell testified to living near Smock in Helena. (5/4/21 Tr. at 69.) He had known Smock for a couple of years and received rides from her before. (5/4/21 Tr. at 71–72.) She often let him drive. (5/4/21 Tr. at 83.) He knew Smock used drugs, but was unaware whether she was using in May of 2020. (5/4/21 Tr. at 72–73.)

O'Howell contacted Smock after his friend, Bonnie, asked if he could give her friend a ride to Billings. (5/4/21 Tr. at 65–67, 77.) Bonnie was Laird's girlfriend at the time; O'Howell knew Laird through

Bonnie. (5/4/21 Tr. at 65–67, 71.) Hamlin was also Bonnie’s friend. (5/4/21 Tr. at 71.) He lived in Billings and came to Helena to visit his son at the hospital after the child’s surgery and wanted to go home. (5/4/21 Tr. at 67–69.) O’Howell wanted to retrieve his dog in Billings. (5/4/21 Tr. at 66.) The State pressed O’Howell about the purpose of the trip, claiming no one’s testimony mentioned getting a dog. (5/4/21 Tr. at 105.) However, Laird mentioned O’Howell wanting to retrieve his dog three different times. (5/4/21 Tr. at 23, 30–31, 41.)

O’Howell recalled driving first. (5/4/21 Tr. at 68.) He explained that the headlights from oncoming traffic were somewhat blinding at night, which caused him to swerve a bit. (5/4/21 Tr. at 68.) This was why Smock began driving in Townsend. (5/4/21 Tr. at 68.) O’Howell also recalled telling Smock that Hamlin would pay for the gas but denied telling her that Hamlin had some “stuff” on him. (5/4/21 Tr. at 93.)

D. Closing argument and jury instructions.

In closing argument, the State highlighted the primary issue to be decided: “[T]he whole question is did [O’Howell] actually know what was going on there?” (5/4/21 Tr. at 127.)

The State argued that Laird provided testimony about Hamlin's intent to "go to Billings and sell drugs," and "before [Hamlin] even gets to Billings, he's going to distribute drugs by sharing it with his buddies." (5/4/21 Tr. at 114.) No one testified about a plan Hamlin concocted to sell drugs in Billings. Laird did testify about sharing drugs in the vehicle, claiming Hamlin told him, "I'll give you some drugs," and Laird "told [O'Howell] that he would get some money from [Hamlin] and some drugs, and we'd get high on the way." (5/4/21 Tr. at 23–24.)

The jury received two instructions on accomplice testimony. (Exhibits at 19, 21.) One stated, in part, "It is a question of fact for the jury to determine from the evidence and from the law as given to you by me whether or not in this particular case the witnesses [] Laird or [] Hamlin or [] Smock is or is not legally accountable within the meaning of the law. . . . A conviction cannot be had on the testimony of one legally accountable unless the testimony is corroborated by other evidence that in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense." (Exhibits at 19.) The verdict form did not include any language asking the jury to determine

whether Laird and/or Smock were legally accountable for the same offense. (D.C. Doc. 54.) The jury convicted O’Howell of Accountability for CPDD with Intent to Distribute and Criminal Possession of Drug Paraphernalia. (D.C. Doc. 54.)

STANDARD OF REVIEW

The standard of review for a district court’s ruling on a motion to suppress is whether the court's findings are clearly erroneous and whether those findings were applied correctly as a matter of law. *State v. Carrywater*, 2022 MT 131, ¶ 11, 409 Mont. 194, 512 P.3d 1180 (citing *State v. Wilson*, 2018 MT 268, ¶ 21, 393 Mont. 238, 430 P.3d 77). A finding is clearly erroneous if it is not supported by substantial credible evidence, if the trial court misapprehended the effect of the evidence, or if review of the record gives the Court a firm conviction that a mistake has been made. *Carrywater*, ¶ 11 (citing *State v. Harning*, 2022 MT 61, ¶ 13, 408 Mont. 140, 507 P.3d 145).

Whether there is sufficient evidence to corroborate testimony of an accomplice is a question of law. *State v. Tollie*, 2022 MT 59, ¶ 12, 408 Mont. 129, 506 P.3d 1021 (citing *State v. Fey*, 2000 MT 211, ¶ 5, 301 Mont. 28, 7 P.3d 358). This Court reviews a district court's legal

conclusions for correctness. *Tollie*, ¶ 12 (citing *State v. Bales*, 1999 MT 334, ¶ 43, 297 Mont. 402, 994 P.2d 17). Questions regarding the sufficiency of corroborating evidence are viewed in the light most favorable to the prosecution. *Tollie*, ¶ 12 (citing *State v. Torgerson*, 2008 MT 303, ¶ 25, 345 Mont. 532, 192 P.3d 695). Sufficiency of the evidence may be challenged on appeal even if the issue is not raised by the defendant at trial. *State v. Sutton*, 2018 MT 143, ¶ 13 n 3, 391 Mont. 485, 419 P.3d 1201 (citing *State v. Skinner*, 2007 MT 175, ¶ 21, 338 Mont. 197, 163 P.3d 399).

SUMMARY OF THE ARGUMENT

Cordova unlawfully extended the stop and unlawfully seized O’Howell by requesting his identification and information when O’Howell had done nothing wrong. Cordova’s suspicions about how Hamlin and Laird looked at him provided only a hunch, not particularized suspicion. Cordova failed to diligently effectuate the purpose of the traffic stop so he could investigate the men. This violated O’Howell’s constitutional rights. The evidence derived from the stop should have been suppressed.

O’Howell’s conviction cannot stand on the uncorroborated testimony of two accomplices. No one testified about a plan to help Hamlin sell or distribute drugs in Billings. The only evidence that O’Howell knew Hamlin intended to distribute drugs was Laird’s and Smock’s testimony about Hamlin sharing meth in exchange for a ride. If sharing the meth in the car was the distribution plan, both Smock and Laird were accomplices. Their testimony required corroboration; no other evidence corroborated O’Howell’s knowledge.

ARGUMENT

I. Cordova pursued an ill-defined hunch to extend a traffic stop and seize O’Howell because two men in the back of a car looked at him funny.

An officer who impermissibly extends a detention just to fish for further evidence of wrongdoing breaches the protections afforded by the Fourth Amendment. *Harning*, ¶ 24. Cordova unlawfully extended a legitimate traffic stop into a criminal investigation without particularized suspicion of wrongdoing. Cordova had reason to stop Smock for speeding and her invalid license, but had no reasonable justification to request identification from O’Howell, nor Hamlin and Laird. Cordova attached nefariousness to his hunch about Hamlin’s and

Laird's repeated looks, then used the traffic stop as a pretext to investigate the group further. Instead of diligently handling Smock's traffic violations, Cordova investigated O'Howell and the others when he requested their identification, questioned Smock about them, and "just h[ung] out" while waiting for dispatch to provide information about the passengers.

The Fourth and Fourteenth Amendments of the United States Constitution and Article II, Sections 10 and 11 of Montana's Constitution protect individuals from unwarranted searches and seizures, including brief traffic stops, absent a compelling state interest. *Wilson*, ¶ 25. Montana's Constitution provides greater privacy protection than the United States Constitution. *State v. Noli*, 2023 MT 84, ¶ 28, ___ Mont. ___, ___ P.3d ___; *State v. Deshaw*, 2012 MT 284, ¶ 27, 367 Mont. 218, 291 P.3d 561. Evidence secured through a violation of the Fourth Amendment is inadmissible in both federal and state courts. *Mapp v. Ohio*, 367 U.S. 643, 655–59 (1961); *Carrywater*, ¶ 12. Illegally obtained evidence is inadmissible in proceedings against the accused to deter the state from violating its citizens' constitutional

rights. Mont. Code Ann. § 46-13-302; *State v. Laster*, 2021 MT 269, ¶ 35, 406 Mont. 60, 497 P.3d 224.

An officer may stop a vehicle or person when there exists “a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense.” Mont. Code Ann. § 46-5-401(1). A peace officer who has lawfully stopped a person or vehicle may request the person's name and present address and an explanation of the person's actions and, **if the person is the driver** of a vehicle, demand the person's driver's license. Mont. Code Ann. § 46-5-401(2)(a) (emphasis added). A police officer's request for identification constitutes a seizure, even when the officer has not deployed emergency lights, or deployed a weapon, because a person would not feel free to leave without producing the identification. *State v. Strom*, 2014 MT 234, ¶ 13, 376 Mont. 277, 333 P.3d 218; *see also State v. Ballinger*, 2016 MT 30, ¶ 20, 382 Mont. 193, 366 P.3d 668. The State carries the burden to prove law enforcement had particularized suspicion. *Carrywater*, ¶ 14.

Particularized suspicion requires more than an ill-defined hunch or guesswork. *State v. Reeves*, 2019 MT 151, ¶ 11, 396 Mont. 230, 444

P.3d 394; *see also United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

The legal standard to determine whether particularized suspicion exists is objective reasonableness. *State v. Kaufman*, 2002 MT 294, ¶ 11, 313 Mont. 1, 59 P.3d 1166. In evaluating the reasonableness of an investigative stop courts must examine whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *U.S. v. Sharpe*, 470 U.S. 675, 682 (1985); *Laster*, ¶ 13. There must be objective data from which an experienced officer can make certain inferences; and a resulting suspicion that the person is, or was recently, engaged in wrongdoing. *State v. Broken Rope*, 278 Mont. 427, 430–31, 925 P.2d 1157 (1996). “[S]pecificity in the information upon which police action is predicated” is the essential justification underlying a *Terry* stop. *Cortez*, 449 U.S. at 418 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, n. 18 (1968)).

A traffic stop generally may not last longer than is necessary to effectuate its purpose, and its scope must be strictly tied to and justified by the circumstances which rendered its initiation permissible. Mont. Code Ann. § 46-5-403; *Terry*, 392 U.S. at 19. A lawful stop can morph

into a constitutional violation depending on how it is executed. *U.S. v. Evans*, 786 F.3d 779, 784 (9th Cir. 2015); *Wilson*, ¶ 25. A critical factor to consider is whether the officer's actions prolong the stop. *Evans*, 786 F.3d at 786.

In evaluating the totality of circumstances surrounding a stop, a court should consider the quantity, or content, and quality of the information available. *State v. Marino*, 2016 MT 220, ¶ 17, 384 Mont. 490, 380 P.3d 763. “When the only basis for suspecting a specific person of wrongdoing is inferences that could be drawn from the conduct of virtually any law-abiding person, the resulting suspicion cannot, by definition, be particularized.” *Carrywater*, ¶ 15 (quoting *Reeves*, ¶ 13). Attaching inferences of nefariousness to law-abiding behaviors is not particularized suspicion, and subjects drivers to the perils of profiling and other impermissible motives for initiating traffic stops. *Reeves*, ¶ 13; *see also Noli*, ¶ 55.

A. A cop cannot seize a car passenger because other passengers stared at him.

Strom should control the Court's decision here. An officer who demands ID from a passenger without objective data or a resulting

suspicion to justify the demand has unlawfully seized the passenger.

Strom, ¶¶ 16–17.

In *Strom*, a police officer on routine patrol in a public park saw a parked van with two occupants. *Strom*, ¶ 4. It was the only vehicle in the lot; the officer became suspicious. *Strom*, ¶ 4. After parking behind the van and approaching the driver, the officer noticed how young the driver looked, and asked for her driver's license. *Strom*, ¶ 5. The driver did not have one but provided her school ID. *Strom*, ¶ 5. The officer then asked *Strom*, seated in the passenger seat, for identification; *Strom* complied. *Strom*, ¶ 5. The officer instructed both to wait and took their IDs to check the driver's status and for warrants. *Strom*, ¶ 5. *Strom* had an active arrest warrant. *Strom*, ¶ 5.

At the detention center, *Strom* presented a baggy of methamphetamine, which resulted in a criminal charge for drug possession. *Strom*, ¶ 6. *Strom* moved to suppress evidence obtained from the stop, arguing the officer lacked particularized suspicion to perform an investigatory stop when he asked for her ID. *Strom*, ¶ 7. The trial court denied the motion to suppress. *Strom*, ¶ 7.

The officer testified that the only reason he asked Strom for ID was because the driver advised him that she did not have a license and he needed to see if a licensed driver could assume the wheel. *Strom*, ¶ 16. But the officer never established, nor did the van's occupants state whether Strom would drive the vehicle, or that she was licensed to drive. *Strom*, ¶ 16.

This Court saw no objective data or resulting suspicion that justified an investigation of Strom. *Strom*, ¶ 16. The Court held that there was no particularized suspicion to stop or seize the driver that could support or properly lead to the subsequent investigation of Strom. *Strom*, ¶ 17. The initial reason for requesting the driver's license was her youthful appearance, which was the only evidence supporting an investigation into her identity and driving status. *Strom*, ¶ 17. Montana law permitted persons as young as 13 to obtain a license under certain conditions. *Strom*, ¶ 17. While the apparent youthfulness of a driver may constitute particularized suspicion to stop and check a driver's status, that concern was not the reason this officer stopped and approached the van. *Strom*, ¶ 17. Rather, the stop commenced upon the officer's assessment of suspicious activity, for which there was no

objective data to support, thus the evidence should have been suppressed. *Strom*, ¶¶ 17–18.

Cordova had a hunch something illegal may be in Smock’s car based solely on the “suspicious” looks from Hamlin and Laird at the gas station. Cordova ran the car’s plate “[b]ecause of suspicious activity inside of the vehicle with them looking at [him].” Cordova sought a legitimate reason to stop the car so he could investigate his hunch further.

He found one after learning the car’s owner had a revoked license and determining Smock was speeding. Though these were lawful reasons to pull the car over, as in *Strom*, Cordova had no objective data that could support a request of O’Howell’s ID and an investigation of him.

Cordova had no justification to request identification from O’Howell, Hamlin, or Laird to find a licensed driver for Smock’s car, even though that was the reason Cordova gave the men before asking for their names and birthdates. The officer in *Strom* provided the same reason—he needed to see if a licensed driver could drive the vehicle. But like the officer in *Strom*, Cordova never established, nor did the sedan

occupants state whether any of them would drive for Smock, or that they had valid licenses. Cordova never asked Smock if she would permit one of the men to drive, nor did he ask the men if they were willing to drive. Plus, Cordova already asked O’Howell, Hamlin, and Laird if any had valid driver’s licenses and each replied that they did not. (Ex. B at 0:30–1:20.) Cordova unlawfully seized all three when he asked for ID. But for the unlawful seizure, no contraband would have been discovered.

B. Cordova did not diligently effectuate the purpose of the stop, he unlawfully expanded it by investigating O’Howell and the others.

Cordova’s conduct during the stop demonstrates it was just a pretext to investigate his hunch. In comparison to other cases where this Court found a lack of particularity to the officer’s suspicions, Cordova had even less.

Rather than effectuate the purpose of the stop—Smock’s speeding and revoked license—Cordova investigated the men. Upon contact with the driver, Cordova asked for her license, which Smock readily admitted she did not have. He asked for her registration and insurance cards, which were at home. At this point, Cordova had particularized suspicion

that Smock violated traffic regulations, but had zero reason to investigate O’Howell. An officer’s suspicions must be particular to the person being stopped. *Reeves*, ¶ 11.

Cordova did not ask Smock to identify herself, provide an alternate form of ID, her birthdate, or for an account of her conduct. Instead he asked O’Howell, Hamlin, and Laird for identification or valid drivers’ licenses, unlawfully seizing all three. *See Strom*, ¶ 13.

Cordova’s follow-up questions did not serve the purpose of the stop either. *See Noli*, ¶ 34 (officer may attempt to verify information provided by the subject, and ask for other related information, as long as the additional inquiry is both reasonably related in scope to the particularized suspicion and purpose that justified the stop and does not unreasonably prolong its duration). He asked whether O’Howell or the other men were on probation or parole. He asked for their names and birthdates before asking for Smock’s. Cordova had Smock sit in his patrol car to continue investigating O’Howell, Laird, and Hamlin. It was not to determine why Smock’s license was revoked, which is what Cordova told her. Nor would knowing the reason for the revocation help effectuate the purpose of the stop.

In the patrol car, Cordova immediately asked Smock questions to investigate the men. He asked if they were her friends, if they had warrants, and why none had identification. These questions were interspersed with legitimate questions to verify Smock's presence on the highway, but had nothing to do with Smock's license, nor her speeding. Instead of asking dispatch for information on Smock's driving history, or anything related to her license status, Cordova gave dispatch the names of O'Howell, Laird, and Hamlin. Again, he had no reason to investigate O'Howell.

Cordova then asked Smock a few questions about her driving history while waiting for information about the men. Eventually, he got direct and asked if there was something illegal in the car because, "[a]ll three of your guys are, sketching out, and looking back at us. They are doing something in there." Cordova asked about specific drugs. Smock denied that there were any drugs in the car. He asked Smock if it was her car even though she already said so and dispatch already confirmed it. Sensing that the reason for the stop was not moving forward, Smock asked if there was "anything else, is there any problems, or anything." Cordova said, "Well yea, look how fidgety this guy is. . . Right now, I

believe there is something illegal in that car. . . . I just wanna make sure there is nothing illegal in your car, okay? . . . Everyone is moving around. I'm gonna go up there and figure out what is going on.” Cordova still had not given Smock a warning or citation. He was hung up on how the men looked at him.

When Gifford arrived, Cordova advised her of his “suspensions” and essentially admitted to not effectuating the purpose of the stop: “*We haven’t gotten read backs on all of ‘em yet so, I’m just hanging out.*” Cordova had no reason to investigate the men, O’Howell in particular. His only reason for doing so was the way Hamlin and Laird looked at him. Looking at a cop funny does not amount to particularized suspicion of wrongdoing, nor did Cordova lawfully acquire any legitimate indicators afterward. Hamlin and/or Laird “kind of fidgeting with something on the floorboard” did not indicate a crime may be afoot. Cordova never described anything beyond suspicious looks and fidgeting. He never described any suspicious behavior from O’Howell.

This Court has found particularized suspicion lacking in at least three other *Terry* stop cases where the officers relied on more indicators than Cordova provided. In *Wilson*, a similar traffic stop based on lack of

registration, the patrolman claimed to have particularized suspicion of criminal activity that justified expanding the stop into a drug investigation based on the nervousness of the vehicle's occupants, the borrowed and messy vehicle, a “bizarre” travel story, and the driver's prior drug history. *Wilson*, ¶¶ 31–33. Based on these indicators, the patrolman conducted a canine sniff that led to the seizure of 262.2 grams of marijuana and drug paraphernalia. *Wilson*, ¶ 18. This Court found the patrolman’s indicators revealed only a generalized hunch, not an articulation of specific, objective facts demonstrating criminal behavior that justified expansion of the stop, and reversed Wilson’s conviction. *Wilson*, ¶¶ 34, 39.

In *Carrywater*, an officer expanded a traffic stop into a drug investigation based on two occupants of a car switching drivers, acting nervous, and the driver’s jaw protruding in a manner that the officer associated with meth users. *Carrywater*, ¶ 25. This Court found that the officer’s “concerns were not the building blocks of particularized suspicion, but inferences based on inarticulable hunches attaching nefariousness to conduct entirely consistent with a law-abiding person.” *Carrywater*, ¶ 26.

In *Broken Rope*, an officer ran a records check on the license number of a car containing two men that pulled into a gas station, and discovered the registered owner had a warrant for fish and game violations. *Broken Rope*, 278 Mont. at 428. The car's owner and Broken Rope went inside; the officer planned to approach them once they returned to the vehicle. *Broken Rope*, 278 Mont. at 428–29. Upon exiting the store and seeing the officer, Broken Rope began using the telephone, moving around the parking lot, staring at the officer, and put his hands in his pockets. *Broken Rope*, 278 Mont. at 429. The officer stopped Broken Rope, frisked him, and found drugs and weapons. *Broken Rope*, 278 Mont. at 429. This Court found that “there is nothing inherently suspicious about Broken Rope using a pay telephone, moving around in a convenience store parking lot, putting his hands in his pockets or staring at a sheriff's deputy[,]” and found no basis to suspect Broken Rope of criminal activity. *Broken Rope*, 278 Mont. at 432.

If the indicators in *Wilson*, *Carrywater*, and *Broken Rope* do not amount to particularized suspicion of wrongdoing, Cordova's fall short too. The quantity and quality of information Cordova relied on is less. Cordova based his suspicions of O'Howell on Laird and Hamlin

repeatedly looking at him. He also saw some fidgeting around. These are vague, generalized behaviors that are not suspicious unless nefariousness is attached, and are less specific than the indicators this Court found to be lacking in *Wilson*, *Carrywater*, and *Broken Rope*. Cordova was simply—and impermissibly—fishing for actual evidence of wrongdoing in violation of O’Howell’s constitutional right to privacy.

Cordova unlawfully extended the traffic stop to investigate the passengers based on a hunch there was something illegal in the car. All because Hamlin and Laird looked at him funny. He had no objective data justifying an investigation of O’Howell. O’Howell did nothing but get into the car after Cordova grew suspicious of Laird and Hamlin. The State gained its evidence against O’Howell only after Cordova’s unlawful stop. The evidence should have been suppressed.

II. The State failed to corroborate the accomplices’ testimony that O’Howell knew about Hamlin’s intent to distribute meth.

The State may not prove someone guilty of a crime by simply pointing to evidence provided by an accomplice or someone else who is also legally accountable for that crime. *Tollie*, ¶ 14. Because such witnesses are motivated to avoid or ameliorate their own punishment,

accomplice testimony is inherently untrustworthy and cannot, without corroboration, sustain a conviction. *Tollie*, ¶ 14. To convict someone based on accomplice testimony, the State must corroborate that testimony with “other evidence that in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense.” *Tollie*, ¶ 14; Mont. Code Ann. § 46-16-213.

Whether accomplice testimony is sufficiently corroborated depends on the circumstances of each case. *Tollie*, ¶ 15 (citing *State v. Kemp*, 182 Mont. 383, 387, 597 P.2d 96, 99 (1979)). Accomplice testimony cannot be corroborated by other evidence that simply describes the occurrence or circumstances of a crime; the other evidence must raise some independent connection with the defendant that is apparent without reference to the accomplice testimony. *Tollie*, ¶ 15 (citing *Kemp*, 182 Mont. at 387, 597 P.2d at 99). Sufficient corroborating evidence may be circumstantial and need not extend to every fact from an accomplice's testimony. *Tollie*, ¶ 15. Sufficient corroborating evidence need not make out a prima facie case against a defendant, but it must raise more than a suspicion of the defendant's involvement in

the charged crime. *Kemp*, 182 Mont. at 387, 597 P.2d at 99; *see also* *State v. Case*, 190 Mont. 450, 455–56, 621 P.2d 1066, 1070 (1980); *State v. Woods*, 221 Mont. 17, 24 (1986). One accomplice cannot supply the independent evidence necessary to corroborate another accomplice. *Kemp*, 182 Mont. at 387, 597 P.2d at 99 (citing *State v. Bolton*, 65 Mont. 74, 88, 212 P. 504, 509 (1922)).

A. Smock and Laird were both accomplices.

Prior to determining whether evidence sufficiently corroborates an accomplice, it is necessary to determine who is an accomplice. *Tollie*, ¶ 16. Generally, there are three situations rendering someone an accomplice: (1) causing the other person to commit the crime; (2) being accountable according to the statutory definition of the crime; and (3) soliciting, aiding, or abetting the crime before or during its commission. *Tollie*, ¶ 16; Mont. Code Ann. § 45-2-302. If a witness's shared legal accountability is in dispute, the question is one of fact that may go to the jury. *Tollie*, ¶ 16 (citing *State v. Blackcrow*, 1999 MT 44, ¶ 21, 293 Mont. 374, 975 P.2d 1253).

Laird and Smock were both accomplices. Not only did both receive drug-related charges based on the drugs in the car, both aided in

Hamlin's plan to share meth. Though the State expected to prove Hamlin's intent was to sell drugs in Billings, the only evidence presented at trial supporting a distribution plan was Laird's and Smock's testimony that Hamlin would share drugs in exchange for the ride. (D.C. Doc. 30 at 8.) Laird testified Hamlin would "shar[e] it with his buddies" in exchange for a ride to Billings, which Laird helped coordinate. Laird also testified to visiting multiple stores in search of a pipe so the group could smoke Hamlin's meth. (5/4/21 Tr. at 24–25.) Because Laird was an accomplice, his testimony had to be viewed with distrust and required corroboration.

Corroboration could not come from Smock. Though she claimed to be unaware that Hamlin had any meth at the onset of the trip, she became aware once O'Howell told her Hamlin had "some stuff on him." When she testified that she understood O'Howell to mean Hamlin "was probably going to get us high," Smock admitted to knowing Hamlin had drugs and planned to share. She then assumed the wheel so O'Howell could get high with the loaded syringe he just received from Hamlin. And she continued driving. Smock aided Hamlin's plan to share meth by continuing to drive while it was being shared. This made Smock an

accomplice. Her testimony had to be viewed with distrust and required corroboration.

B. The State provided no evidence to corroborate that O’Howell knew the drugs would be sold or shared.

The jury received no evidence that O’Howell knew Hamlin planned to share his meth in exchange for a ride except from Laird and Smock. Nor was there any evidence presented that O’Howell was in on a plan to sell it. No picture or video admitted into evidence provided evidence of O’Howell’s knowledge. Cordova testified about the meth, syringes, snort tubes, and O’Howell’s presence in the car, but offered no evidence tending to show O’Howell had knowledge of the drugs or plan to share. Cordova found one syringe that appeared to be used next to the front passenger seat, which is where O’Howell sat. (5/3/21 Tr. at 127–28; Exhibit 39.) But Cordova did not see any drugs or paraphernalia in the passenger area when he arrested O’Howell. He found the syringe after Laird attempted to elude law enforcement for about 20 minutes. (5/3/21 Tr. at 137–38.) Smock testified that she never saw O’Howell use a syringe, only that he was about to use one moments before being pulled over. The syringe in Exhibit 39 did not corroborate Smock’s testimony.

O’Howell denied knowing Hamlin planned to share his meth, nor were any drugs or paraphernalia found on his person. The surrounding circumstances raised suspicion that O’Howell knew of Hamlin’s plans, but these circumstances did not provide evidence tending to show O’Howell’s knowledge.

The State offered no evidence independent from the accomplice testimony tending to prove O’Howell’s knowledge of a plan to distribute drugs, only suspicion. As a matter of law, the State’s evidence was insufficient to sustain the convictions.

CONCLUSION

Cordova acted on an inarticulable hunch when he unlawfully seized O’Howell and extended the traffic stop into a criminal investigation. O’Howell did nothing to justify Cordova’s request for his identification. The evidence obtained afterward should have been suppressed. With the evidence suppressed, O’Howell’s convictions cannot stand. This matter should be remanded with instructions to vacate the convictions and dismiss with prejudice.

Alternatively, if this Court finds that Cordova acted lawfully, O'Howell's conviction cannot stand because the testimony proving his knowledge that Hamlin planned to share his meth came from two accomplices and was not corroborated. On this basis the matter should be remanded with instructions to vacate the convictions and dismiss with prejudice.

Respectfully submitted this 5th day of June, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary 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 7,866, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jeff N. Wilson
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APPENDIX

Order on Motion to Suppress	App. A
Judgment and Commitment	App. B

CERTIFICATE OF SERVICE

I, Jeff N. Wilson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-05-2023:

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