IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0500

CITY OF WHITEFISH,

Plaintiff and Appellee,

v.

JOSHUA THOMAS ZUMWALT,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Amy Eddy, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the municipal court properly denied Zumwalt's motion to suppress when officers observed Zumwalt through his windows when they were standing in common areas of an apartment complex that contained no fences, gates, or signage indicating that access was prohibited.

2. Whether the municipal court properly exercised its discretion in overruling the Appellant's objection to testimony from two officers regarding their opinions that, based on their personal observations and extensive experience with intoxicated individuals, the Appellant was highly intoxicated when they arrived, and his level of intoxication appeared consistent throughout the investigation.

STATEMENT OF THE CASE

On January 2, 2020, Appellant Joshua Thomas Zumwalt was cited with driving under the influence of alcohol or drugs (DUI), failure to notify after striking an unattended vehicle, and failure to carry proof of insurance. (Doc. 0.01.) Zumwalt filed two motions to suppress, claiming there was an illegal search and that the search warrant for Zumwalt's blood relied on the false assertion that he had a prior DUI conviction. (Docs. 0.11, 0.12.)

The City responded to Zumwalt's motion to suppress based on an alleged search but declined to respond to the motion to suppress Zumwalt's blood results.

(Doc. 0.19.) The municipal court granted Zumwalt's motion to suppress his blood results. (Doc. 0.20.) Following an evidentiary hearing, the municipal court denied Zumwalt's motion to suppress due to an alleged search. (Doc. 27, attached to Appellant's Br. as App. B.) The court found there was no search and that even if there was, officers had independent sources for any information they gleaned from the alleged search. (*Id.*)

The municipal court held a jury trial on October 29, 2020, but the trial resulted in a mistrial after the jury could not reach a unanimous verdict. (Trial 2020102906 at 0:25-4:00.)

The court held a second trial on May 6, 2021. (Doc. 0.56.) On the prosecution's motion, the court dismissed the no insurance and failure to notify charges. (5/6/21 Trial 2021050601 at 0:24-0:54.) The jury convicted Zumwalt of DUI. (5/6/21 Trial 2021050605 at 0:57-1:11.)

Zumwalt appealed to the district court, arguing the municipal court erred by denying the motion to suppress and by permitting two officers to testify regarding their opinion about Zumwalt's level of intoxication throughout the investigation because it was not lay opinion and lacked the foundation necessary for expert testimony. (Doc. 4.)

The district court affirmed Zumwalt's conviction. (Doc. 7, attached to Appellant's Br. as App C.)

STATEMENT OF THE FACTS

I. Initial contact with Zumwalt

On January 2, 2020, Whitefish Police Department Officer Chase Garner, Officer Reece Stahlberg, and Sergeant Rob Veneman responded to a report of a crash in the parking lot of the Chair 3 apartment complex in Whitefish, Montana. (8/18/20 Hr'g at 5:13-5:21.) Dispatch advised that a vehicle had struck another vehicle in the parking lot and that the driver had entered an apartment. (*Id*.)

Once on scene, officers met with Clint Slosson and his girlfriend in the parking lot that serviced the apartment complex and a hair salon that was attached to the complex. (*Id.* at 5:30-5:41; City's Trial Ex. B [hereinafter Ex. B][1] at 0:30-1:32; 5/6/21 Trial 2021050603 at 29:28-30:12.) Slosson pointed out a truck and explained that the driver "staggered that way," pointing toward apartment number nine. (Ex. B at 0:30-1:07.)

Officer Stahlberg examined the truck Slosson identified. (*Id.* at 2:00-2:30.) The truck was parked with the rear tires on the sidewalk rather than in the parking lot. (*Id*.) Officer Stahlberg noted that the truck had minimal damage, "just some scratches." (*Id.* at 2:39-2:45.) Unfortunately, Slosson's girlfriend's car did not fare as well; the front end was smashed into the front passenger's side tire. (*Id.* at 10:16-10:36.) While the officers walked toward unit nine, dispatch informed

[1] Admitted as City's Ex. A without objection at the 8/18/20 Hr'g at 16:11.

Officer Stahlberg that the truck's registered owner was Joshua Zumwalt. (*Id.* at 2:58-3:00.)

When the officers arrived near unit nine, Officer Garner walked up the sidewalk and knocked on the door. (*Id.* at 3:05.) Officer Stahlberg stood near the front sidewalk that ran between the parking spots and the apartments, roughly ten feet from Zumwalt's front window. (*Id.* at 2:58-5:05; 8/18/20 Hr'g. at 7:02-7:34.) Sergeant Veneman immediately walked around to the rear of the apartment complex "to ensure [Zumwalt] wasn't trying to leave the rear of the apartment." (8/18/20 Hr'g at 42:22-42:34.) The officers believed Zumwalt was inside based on the information from dispatch and Slosson. (*Id.* at 16:47-16:56.)

"Once [Sergeant Veneman] got around to the back of the apartment to the common area that runs along the back side of the apartment complex there, [he] could clearly see through the window that there was an individual standing near the front door of the apartment." (*Id.* at 42:34-42:45.) Sergeant Veneman "relayed that information via radio to the other officers." (*Id.* at 42:48; Ex. B at 3:40-3:44.)

Officer Garner knocked twice more, stating, "Hello, Whitefish Police." (Ex. B. at 4:34.) While Officer Stahlberg stood roughly ten feet from the front window in the front sidewalk area, he saw someone or their shadow walk by the window.[2]

[2] In Officer Stahlberg's body-worn camera video, a dark shadow or object is visible in the window's lower right corner. The object appears to move. (Ex. B. at 4:40-4:50.)

(*Id.* at 4:49-4:55; 8/18/20 Hr'g at 8:25-8:32, 20:46-20:49.) Officer Garner knocked again, saying, "Whitefish Police. Come to the door, please." (Ex. B. at 5:31-5:35.)

"[T]he apartment complex runs east and west, and there's a sidewalk that runs through the common area between the two buildings back towards the laundry room that's on the very west side of that building and back towards the playground which is back behind the buildings as well." (Ex. B. at 44:25-44:42.) Officer Stahlberg walked toward the grassy area behind the complex using this sidewalk. (8/18/20 Hr'g at 5:05.)

The area behind the apartment complex was "completely open, there's no—nothing's closed off from each apartment." (*Id.* at 10:25-10:31.) "There [was] no fences, or gates, or anything that would separate one apartment from another." (*Id.* at 45:24-45:36.) Zumwalt's back window was located in this back area on the north side of the complex, "very close to" the common laundry room window. (*Id.* at 10:31-10:46.) Sergeant Veneman said that he would not expect the "normal public" to congregate by this window, but specifically noted that nothing was blocking this area off from any of Zumwalt's neighbors. (*Id.* at 50:43-50:54.)

Standing roughly two to three feet from Zumwalt's window in this open grassy area behind the complex, Officer Stahlberg and Sergeant Veneman saw Zumwalt standing by the front door. (Ex. B at 6:15-6:17.) At the suppression hearing, Officer Stahlberg and Sergeant Veneman testified that Zumwalt's back

window was completely unobstructed—that there were no blinds. (8/18/20 Hr'g at 13:17-13:27, 27:35-27:41, 42:48-42:57.) Nearly a year and a half later, at the second trial, Sergeant Veneman testified that the back window blinds were "partially open" rather than completely open. (5/6/21 Trial 2021050604 at 1:01:30-1:02:42.)

Officer Stahlberg returned to the front of the complex and told Officer Garner that Zumwalt was standing right by the door. (*Id.* at 6:38-6:47.) Officer Garner knocked and said, "Joshua, Whitefish Police. Come to the door, please." (*Id.* at 7:00-7:04.) The officers told Zumwalt they had seen him and asked him to "come talk to [them], please." (*Id.* at 7:15-7:20.)

Officer Stahlberg, who was standing roughly ten feet away from the apartment complex, walked through the grassy area toward Zumwalt's front window, stopping about a foot away from the window. (*Id.* at 7:41-7:43; 14:11-14:23.) Officer Stahlberg told Officer Garner that he could see Zumwalt standing right behind the door. (*Id.* at 7:43-7:47.) Officer Garner told Zumwalt they could see him standing by the door and told him to open it. (*Id.* at 7:50-7:53.)

Zumwalt opened the door and said, "Hello?" (*Id.* at 7:52-7:57.) Officer Garner asked Zumwalt if he knew he had hit someone's car, and Zumwalt said, "No, I did not." (*Id.* at 8:07-8:11.) Officer Garner asked if he could show him

what he was talking about. (*Id.* at 8:12-8:18.) Zumwalt said he had no shoes on but agreed to get some and come outside. (*Id.* at 8:18-8:25.)

II. Trial

Lilia Daniels owns and maintains the Chair 3 apartment complex in Whitefish, Montana. (5/6/21 Trial 2021050603 at 29:28-29:33.) Daniels explained that the parking lot in front of the complex is shared between the apartment tenants and visitors to her sister's hair salon, which is also located in the complex. (*Id.* at 29:33-30:12.) Daniels said a security camera on the property covers part of the parking lot. (*Id.* at 30:12-30:45.) Security camera footage captured on January 2, 2020, was admitted without objection. (*Id.* at 30:45-30:50.)

In the first clip, a truck backed up at a sharp angle toward the front of a parked sedan. (Trial Ex. A, Video at 0:00-0:03.) As the truck accelerated backward and crashed into the sedan, a loud crunching sound could be heard on the video captured from across the parking lot. (*Id.* at 0:03-0:10.) In the next clip, the truck pulled forward and backed up again. (Trial Ex. A, Video_01.)

In the third video clip, a bearded man with a hat exited the truck and walked around to the back side of the truck. (Trial Ex. A, Video_02 at 0:00-0:04.) The truck's back tires were parked on the sidewalk, and the man braced himself on the back of the truck as he walked around it. (*Id.* at 0:04-0:06.) The man looked back

over his shoulder toward the truck as he walked down the sidewalk and then looked down at his phone before continuing down the sidewalk out of frame. (*Id.* at 0:06-0:25.)

Slosson testified he had been in his apartment gaming on January 2, 2020, around 12:30 in the morning when he heard what sounded like someone dragging a snowplow through the lot. (Trial 2021050603 at 35:35-36:00.) Slosson looked out the window and saw a vehicle backing up. (*Id.* at 36:30-36:40.) About ten seconds later, Slosson said he realized the vehicle seemed to be parked further back than it should be. (*Id.* at 37:10-37:24.) Slosson had seen the driver get out of his truck and described him walking behind it and heading toward Zumwalt's apartment unit. (*Id.* at 37:24-37:47.) Slosson said the man looked either not completely coherent or possibly impaired based on how he was walking. (*Id.* at 37:52-38:03.) Slosson recognized the truck and knew the driver was a neighbor but did not know his name. (*Id.* at 38:30-39:00.) Slosson had never seen anyone else drive the truck. (*Id.* at 39:20-39:30.)

After going outside and discovering that his girlfriend's vehicle was damaged, Slosson woke his girlfriend up and called law enforcement. (*Id.* at 40:20-41:40.) Slosson told dispatch he thought the driver was impaired. (*Id.* 41:03-41:12.) Slosson said it was probably ten minutes or less before he called law enforcement. (*Id.* at 41:12-42:13.) Slosson could not remember exactly how long it

took for law enforcement to respond but said he stayed outside the whole time and agreed it might have been about 15 minutes. (*Id.* at 42:55-43:25, 47:34.)

A few days after the incident, Slosson contacted Zumwalt for insurance information. (*Id.* at 45:35-46:21.) During the conversation, Slosson told Zumwalt there was surveillance camera footage, and eventually gave Zumwalt a copy. (*Id*.) Zumwalt told Slosson that he did not remember what had happened that night. (*Id.* at 46:21-46:24.)

Officer Garner, Officer Stahlberg, and Sergeant Veneman testified about arriving on the scene and their initial contact with Zumwalt at his apartment. Officer Stahlberg explained that he had been a police officer for thirteen years, had done two DUI investigation certification programs, including the Advanced Roadside Impaired Driving Enforcement (ARIDE), and had been involved in over 100 DUI investigations. (5/6/21 Trial 2021050604 at 0:30-0:57.) Sergeant Veneman had a total of 20 years with law enforcement, had formerly been certified as a Drug Recognition Expert, had completed an additional 80 hours of training related to impaired driving beyond that conducted at the law enforcement academy, and had done 40 hours of clinical training in Arizona detecting drug and alcohol impairment in inmates who came into the jail. (*Id.* at 56:45-56:59.) Officer Garner had been with the Whitefish Police Department for nearly 7 years, had completed the ARIDE course and the impaired driver training at the law

enforcement academy, and had been involved in approximately 150 DUI investigations. (*Id.* at 1:16:03-1:16:44.)

After Zumwalt exited his apartment, Officer Stahlberg "could clearly smell the odor of an alcoholic-type beverage coming from his person, his speech was clearly slurred to [Officer Stahlberg]," Zumwalt "drifted" to his right as he walked, and when they got to the vehicles in the parking lot, Zumwalt used his right arm to brace himself against the vehicle. (*Id.* at 12:00-13:00.) Officer Stahlberg also noticed that Zumwalt struggled to follow Officer Garner's simple instructions. (*Id.* at 13:17-13:40.)

On cross-examination, the defense asked Officer Stahlberg whether he had asked Zumwalt if he drank in the apartment. (*Id.* at 33:57-35:00.) Officer Stahlberg explained that based on the totality of the circumstances, they did not believe Zumwalt drank in the apartment. (*Id.*)

On redirect, the City noted Officer Stahlberg's testimony on cross-examination that he did not believe Zumwalt had drank after the crash and asked how he came to that belief. (*Id.* at 51:15-51:20.) Defense objected, claiming it was speculation, and the court overruled the objection. (*Id.* at 51:20-51:37.) Officer Stahlberger said that he did not believe Zumwalt drank after the crash because of Zumwalt's "state of intoxication." (*Id.* at 51:37-51:42.) Officer Stahlberg said he did not "believe he would have consumed that amount of alcohol." (*Id.* at 51:42-51:44.) The defense

objected based on speculation and foundation. (*Id.* at 51:44-51:46.) The court sustained the objection based on foundation. (*Id.* at 51:46-51:56.) The following exchange subsequently occurred:

> Prosecution: How many DUI investigations have you conducted?
>
> Officer Stahlberg: Well over 100.
>
> Prosecution: And how many in addition to those have you just assisted?
>
> Officer Stahlberg: Probably equally the same.
>
> Prosecution: Okay. And have you seen individuals at different states of intoxication?
>
> Officer Stahlberg: Absolutely.
>
> Prosecution: Have you been able to get breath samples or blood samples to see what their actual blood or breath alcohol levels are?
>
> Officer Stahlberg: Yes.
>
> Prosecution: And you have been able to compare what a person's breath alcohol level is in comparison to what their behavior is?
>
> Officer Stahlberg: Yes.
>
> Prosecution: Okay, and have you had education on, um, or do you have personal experience on when you consume alcohol and when it affects you, essentially?
>
> Officer Stahlberg: Yes.
>
> Prosecution: And have you had DUI investigations where you have had to deal with folks who have drank at different times and then had to determine their levels of intoxication?

Officer Stahlberg: Yes.

Prosecution: Is that sufficient, your honor?

(*Id.* at 51:59-52:52.)

The defense asked to be heard outside of the jury's presence, and the court agreed to take a short recess. (*Id.* at 52:52-53:06.) The prosecutor asked if she could just not waste the jury's time, and the court interjected, stating that, while there were some important issues, they were getting bogged down in the minutiae. (*Id.* at 53:06-53:30.) The court reminded the prosecutor that it was redirect, and said that if she could get to the point quickly through an appropriate question to "please do" so. (*Id.* at 53:30-53:34.)

The prosecution continued:

Prosecution: Have you seen folks, then, at varying levels of intoxication?

Officer Stahlberg: Yes.

Prosecution: And would you be able to say that this is what I think folks look like at a low breath alcohol level and this is what I have personally seen folks look like at a high breath alcohol level?

Officer Stahlberg: Yes.

Prosecution: And how did that compare here?

Officer Stahlberg: I believe he was at a high intoxication level.

Prosecution: Okay, and would that factor into why you did not believe it was the case?

> Officer Stahlberg: Correct. Yes.
>
> Prosecution: Anything else that would factor into that?
>
> Officer Stahlberg: The fact that we saw him for approximately five minutes inside the apartment.
>
> Prosecution: Okay.
>
> Officer Stahlberg: Where we actually had eyes on him, and he was not consuming alcohol.
>
> Prosecution: Did you take into account the manner in which his behavior—
>
> Defense: Objection, leading.
>
> Prosecution: Uh, can I finish the question first?
>
> Judge: Yeah, I don't know what your question is going to be.
>
> Prosecution: How did his manner of parking affect your decision, your belief, that he did not drink while he was in his apartment?
>
> Officer Stahlberg: Oh, it was definitely not a very typical manner in which people park.

(*Id.* at 53:34-54:50.)

Officer Garner testified that when Zumwalt opened the apartment door, he noticed Zumwalt's eyes were "glossy and bloodshot, his speech was very slurred, and there was a strong odor of an alcoholic beverage coming from his breath." (*Id.* at 1:21:29-1:21:36.) Officer Garner took Zumwalt to the detention center to conduct the Standardized Field Sobriety Tests (SFSTs) because the parking lot was slushy. (*Id.* at 1:22:39-1:22:46, 1:57:28-1:57:32.) Officer Garner's body-worn

camera documenting the tests was admitted without objection. (*Id.* at 1:24:15-1:24:25.)

During the SFSTs, Zumwalt showed seven out of eight indicators of impairment on the walk-and-turn test and three out of four on the one-leg stand. (*Id.* at 1:24:50-1:25:45; Trial Ex. C.) Officer Garner also noted that Zumwalt had difficulty following instructions and explained that when he told him to go to the first door on his left, Zumwalt kept walking past the door. (5/6/21 Trial 2021050604 at 1:50:30-1:50:56.)

After Officer Garner explained the different indicators of impairment he observed in Zumwalt, the following exchange occurred:

> Prosecution: . . . Have you, um, in your field investigations have you seen folks you have later verified via breath or blood sample, have varying levels of blood alcohol levels?
>
> Officer Garner: Various levels?
>
> Prosecution: Right, so have you seen folks that provide you a breath sample close to 0.08?
>
> Officer Garner: Yes.
>
> Prosecution: Have you seen folks—how high have you seen folks?
>
> Defense: Objection, relevance.
>
> Prosecution: I'm laying the foundation to ask him a question. I laid it with a previous witness. I am just trying to do this ahead of an objection.
>
> Judge: I think we will allow it, to a point.

> Prosecution: How high have you seen folks?
>
> Officer Garner: Uh, I've seen folks in the upper threes.
>
> Prosecution: Okay, um, and did it appear the defendant, um, did it appear the defendant's level of intoxication was increasing while you were with him?
>
> Defense: Objection, speculation and foundation?
>
> Prosecution: I believe I have set the foundation, your honor.
>
> Judge: I'm going to allow just that question.
>
> Prosecution: During the time that you have spent with him, so you were there, uh, him, did it appear that his level of intoxication increased?
>
> Officer Garner: No.

(*Id.* at 1:50:56-1:52:14.)

In closing arguments, the prosecutor noted that the defense's theory of the case throughout the entire trial was that the prosecution could not prove that Zumwalt was intoxicated while driving. (*Id.* at 2:15:00-2:15:10.) The prosecutor noted all the evidence that established Zumwalt was intoxicated while driving. First, the prosecutor noted the video the jurors saw that showed Zumwalt crashing his Toyota Tundra into Slosson's girlfriend's vehicle. (*Id.* at 2:15:10-2:16:00.) The prosecutor noted the angle of the truck as it backed up and accelerated into the car, noting the truck did not slide into the car. (*Id.*)

The prosecutor also noted how loud the crash was, yet Zumwalt appeared oblivious. (*Id.* at 2:16:00-2:16:23.) The prosecutor noted that Zumwalt pulled forward and accelerated back again, this time up onto the sidewalk. (*Id.*) The prosecutor noted that Zumwalt had to hold onto the truck twice as he exited. (*Id.* at 2:18:00-2:18:04.) As he walked down the sidewalk toward his apartment, Zumwalt appeared to have trouble walking, favoring toward the left. (*Id.* at 2:18:04-2:18:30.)

The prosecutor noted that Zumwalt told law enforcement he did not know he hit a vehicle; days after the incident, he also told Slosson that he did not remember what happened. (*Id.* at 2:20:00-2:20:12.)

The prosecutor noted the short timeline until law enforcement arrived, and "yet he appeare[d] incredibly intoxicated. He [wa]s not getting drunk, he already [wa]s drunk." (*Id.* at 2:20:12-2:21:03.) Zumwalt's speech was slurred, he was slow to respond, he smelled like alcohol, and he was confused. (*Id.* at 2:21:30-2:21:55.) The prosecutor noted all the evidence that showed Zumwalt's confusion remained consistent, including his inability to understand where the damage on the car was, and his inability to understand basic instructions in the parking lot, and again at the detention center. (*Id.* at 2:21:55-2:23:53.) The prosecutor noted that this confusion pointed to a high level of intoxication. (*Id.*)

In the defense's closing, the defense continued to argue that 23 to 25 minutes was sufficient for Zumwalt to have gotten that drunk and that officers should have asked more questions to determine that he had not gotten intoxicated after he crashed the truck. (*Id.* at 2:30:44-2:35:22.) The defense also argued that all the evidence that indicated Zumwalt was intoxicated could theoretically have alternate explanations. (*Id.* at 2:35:22-2:53:55.)

In rebuttal closing, the prosecutor noted that there was no evidence in the record that Zumwalt got drunk in the house and argued there was not enough time for him to get that intoxicated. (*Id.* at 2:58:00-2:58:42.) The prosecutor pointed to evidence in the record that indicated Zumwalt was out of view in the apartment for much less than 25 minutes. (*Id.* at 2:58:42-3:03:00.) The prosecutor said that "it's common sense that it takes time to get intoxicated, that you don't just immediately get impaired—" (*Id.* at 3:03:00-3:03:47.) The defense objected that the statement relied on facts not in evidence and the court overruled the objection. (*Id.* at 3:03:47-3:03:53.)

The prosecutor again stated it was common sense that you do not immediately get intoxicated, that "the body has to process it; this is a commonsense thing." (*Id.* at 3:04:09.) The prosecutor argued that 10 to 15 minutes was not enough to get that intoxicated because if someone is "downing alcohol," they "would get more

intoxicated." (*Id.* at 3:04:09-3:04:17.) The prosecutor said you are not going to be that intoxicated "the moment you drink." (*Id.* at 3:04:17-3:04:26.)

Following deliberation, the jury found Zumwalt guilty of DUI. (5/6/21 Trial 2021050605 at 0:57-1:11.)

SUMMARY OF THE ARGUMENT

Officers did not conduct a search when they viewed Zumwalt through his apartment windows because they were not within the curtilage of his apartment. Under federal case law, the common areas where officers stood are not part of the curtilage of Zumwalt's apartment because the areas are not enclosed, there is no indication Zumwalt used the areas at all, much less for any specific private purpose, and Zumwalt took no efforts to prohibit others from using the area.

This Court should not address whether the officers' observations of Zumwalt through his window constitute a search under Montana's Constitution because Zumwalt abandoned his claim under the state constitution on appeal. However, even if this Court reaches the merits, the observations did not constitute a search because Zumwalt did not take any steps to indicate a subjective expectation of privacy in the area behind the apartment complex, nor would one be reasonable when numerous other tenants and their guests could access this area.

Even if the observations constituted a search under the United States Constitution or the Montana Constitution, the subsequent investigation after Zumwalt came outside his apartment is not the fruit of the alleged search. The search only revealed that a man, presumed to be Zumwalt, was standing behind the apartment door. The officers knew his name, that he had gone into the apartment, and that no one had seen him leave independent of their observations. Further, their observations did not cause Zumwalt's field sobriety testing, his refusal to submit to alcohol concentration testing, or his statements to law enforcement outside his apartment. Zumwalt's assertion that he would not have come out but for their observation of him is mere speculation.

The trial court did not abuse its discretion in permitting the officers to testify to their opinions—based on their extensive experience with intoxicated individuals—that Zumwalt was extremely intoxicated when they first made contact and he remained extremely intoxicated. Even if it was an abuse of discretion, it was harmless because other evidence admitted established that Zumwalt was intoxicated when he drove, including his driving behaviors captured on video, his demeanor after exiting his truck captured on video and testified to by Slosson, and Zumwalt's appearance and behavior throughout the investigation.

ARGUMENT

I. Standard of review

This Court reviews an appeal of a district court's decision on appeal from a municipal court as if the appeal originally had been filed in this Court, applying the appropriate standard of review. *City of Helena v. Broadwater*, 2014 MT 185, ¶ 8, 375 Mont. 450, 329 P.3d 589.

This Court reviews the denial of a motion to suppress to determine if the trial court's findings of fact are clearly erroneous and whether its interpretation and application of the law is correct. *State v. Dunn*, 2007 MT 296, ¶ 7, 340 Mont. 31, 172 P.3d 110. Findings are clearly erroneous if they are unsupported by substantial evidence, the court misapprehended the effect of the evidence, or review of the record convinces this Court that a mistake has been made. *Id.*

A trial court has broad discretion in determining the admissibility of evidence, and this Court reviews the district court's rulings for an abuse of discretion. *State v. Strizich*, 2021 MT 306, ¶ 17, 406 Mont. 391, 499 P.3d 575. "An abuse of discretion occurs when the district court acts arbitrarily or unreasonably, resulting in substantial injustice." *Id.* (citation omitted).

II. The municipal court properly denied Zumwalt's motion to suppress.

On appeal, Zumwalt argues that all evidence from the officers' entire investigation after he exited his apartment should be suppressed because the officers were not lawfully in the area behind his apartment complex when they saw into his window. (Appellant's Br. at 20-27.) Zumwalt asserts that, but for the officers' statement that they could see him behind the door, he would not have come outside. (*Id.* at 27-31.)

Zumwalt's assertion that the officers were within the curtilage of his apartment dwelling when they observed him is not supported by federal case law. Further, the only information officers learned through their observation that was not already known through independent sources was that the male inside the unit was standing near the door. The officers' investigation after Zumwalt exited his apartment was not caused by the officers' observation of him behind the door, and, therefore, the investigation does not fall within the scope of the exclusionary rule.

A. The officers were not within the curtilage of Zumwalt's unit when they observed him standing by the door through the windows.

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated." U.S. Const. amend. IV. Traditionally, the home has been afforded the highest protection. *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 585 (1980) ("Freedom" in one's own

"dwelling is the archetype of the privacy protection secured by the Fourth Amendment"). The proponent of a motion to suppress has the burden of establishing that his rights were violated by an alleged search. *Rakas v. Illinois*, 439 U.S. 128, 132 n.1 (1978).

Inextricably linked to the traditional protection of the privacy of the home is the curtilage doctrine, which extends Fourth Amendment protections to "the area around the home to which the activity of home life extends." *Oliver v. United States*, 466 U.S. 170, 182 n.112 (1984). However, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 350 (1967). "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

In determining whether an area is included within the curtilage, courts must determine whether the individual "reasonably may expect that the area in question should be treated as the home itself." *United States v. Dunn*, 480 U.S. 294, 300 (1987) (citing *Oliver*, 466 U.S. at 180). In *Dunn*, the United States Supreme Court

developed a four-factor test to determine whether an area is within the curtilage of a home: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* at 301.

While "[e]xpectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest[,]" "property concepts are instructive in determining the presence or absence of the privacy interests protected by that Amendment." *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (citation and internal quotation marks omitted). "One of the main rights attaching to property is the right to exclude others." *Id.* (citation omitted). *See also United States v. Roberts*, 747 F.2d 537, 542 (9th Cir. 1984) (homeowner had no reasonable expectation of privacy in the shared private road because he "had no control over the five other homeowners: they could have invited anyone, including police officers, to drive up the road").

The Ninth Circuit has determined that common areas in larger multi-unit dwellings are not part of the curtilage of an individual's private dwelling. *United States v. Nohara*, 3 F.3d 1239, 1241 (9th Cir. 1993). The other circuits have

concluded the same. *See, e.g., United States v. Hawkins*, 139 F.3d 29, 32 (1st Cir. 1998) (tenant did not have a reasonable expectation of privacy in an enclosed common basement that other tenants had access to); *United States v. Correa*, 653 F.3d 187, 188 (3d Cir. 2011) (tenant did not have a reasonable expectation of privacy in the common areas of multi-unit building with a locked exterior door); *United States v. Sweeney*, 821 F.3d 893, 902-03 (7th Cir. 2016) (basement in multi-unit building was not part of the curtilage of defendant's unit); *United States v. Brooks*, 645 F.3d 971, 975-76 (8th Cir. 2011) (backyard and basement of multi-unit complex not part of the curtilage of defendant's unit). Even the Sixth Circuit, which found that a tenant may have a reasonable expectation of privacy in locked common areas of a multi-unit dwelling, has declined to extend the holding to unlocked common areas. *Compare United States v. Carrieger*, 541 F.2d 545, 552 (6th Cir. 1976) *with United States v. Dillard*, 438 F.3d 675, 682-84 (6th Cir. 2006).

Zumwalt fails to address the curtilage factors except proximity to his unit. While proximity weighs in his favor—at least for the instances in which Officer Stahlberg and Sergeant Veneman were within a few feet of his unit—all the other factors indicate that where the officers stood was not within the curtilage of Zumwalt's unit.[3] Officers did not pass through any enclosure to get to the area

[3] Officer Stahlberg observed Zumwalt standing behind the door through the front window when standing near the sidewalk roughly ten feet away from the window. Even proximity does not weigh in Zumwalt's favor in this instance.

behind the complex, nor did they when they observed Zumwalt through the front window. Officers utilized a common walkway that leads to a shared laundry and playground to access the grassy area behind the complex. There is no indication in the record that Zumwalt utilized the area behind the complex for anything, much less any private use. There is no indication in the record that Zumwalt took any steps to indicate that the area at the back of the complex was his private area.

Zumwalt cites to dicta in *Florida v. Jardines,* 569 U.S. 1 (2013), suggesting that any time officers are close enough to see in someone's window, they are in a constitutionally protected area. (Appellant's Br. at 20-27.) However, officers in *Jardines* were not standing in an area utilized by numerous tenants. *Jardines,* 569 U.S. at 3. When they could not observe anything through Jardines's closed drapes, officers in *Jardines* brought a drug dog onto the porch of the defendant's home. *Id.* at 3-4.

By contrast, the officers in this case utilized a shared sidewalk that leads to a common laundry and play area to access the unfenced area behind the apartment complex. Further, federal appellate courts have continued to find that a tenant's Fourth Amendment rights are not violated by a search or seizure in a common area when the common area is not closed off and the tenant has failed to establish that the area is utilized for their own private use. *See, e.g., United States v. Lewis,* 62 F.4th 733, 741-42 (2nd Cir. 2023); *United States v. Trice*, 966 F.3d 506, 514-16

(6th Cir. 2020); *Sweeney*, 821 F.3d at 902-03, *cert. denied*, *Trice v. United States*, 141 S. Ct. 1395 (2021).

The officers here stood in a common area behind the complex near a sidewalk, a shared laundry room, and a playground. While the record does not indicate how many individual units are on the property, the record indicates that Zumwalt's unit was number nine. Zumwalt shared these common areas with the residents of at least eight other units. Any of those residents and their guests had the authority to utilize or pass through the area behind the complex. No fence or other structure prevented anyone from walking behind the complex on the way to the laundry, parking lot, or playground. Zumwalt could not reasonably have expected to be free from any intrusion into the grassy shared area behind the complex. *United States v. Eisler*, 567 F.2d 814 (8th Cir. 1977) (expectation of privacy necessarily implies that one will be free from any intrusion, not merely unwanted intrusions).

Officers could see Zumwalt with the naked eye without pressing their faces against Zumwalt's window. Officers saw Zumwalt through the back window just as any other passerby walking behind the complex might have. Zumwalt focuses on Sergeant Veneman's testimony at the second trial that he thought the back blinds were partially closed. (Appellant's Br. at 6-7.) However, Zumwalt does not claim that the municipal court's finding that the back window was unobstructed by any window coverings was clearly erroneous, nor would he succeed on such a

claim. Officer Stahlberg testified at both the suppression hearing and at trial that the back window was unobstructed, and Sergeant Veneman's testimony at the suppression hearing, which was much closer in time to the incident, was that the window was unobstructed.

Further, the degree to which the window shades were open is not a determining factor:

> Neither can the matter turn upon 'gaps' in the drawn blinds. Whether there were holes in the blinds or they were simply pulled the 'wrong way' makes no difference. One who lives in a basement apartment that fronts a public traveled street, or similar space, ordinarily understands the need for care lest a member of the public simply direct his gaze downward.

Minnesota v. Carter, 525 U.S. 83 (1998) (Kennedy, J., concurring). The question is whether the officers were in a constitutionally protected area when they saw Zumwalt. Federal case law establishes that the officers were not in a constitutionally protected area when they observed Zumwalt; thus, no search occurred when they observed him through his window.

B. This Court should decline to address whether officers violated Zumwalt's Montana Constitutional rights when they observed him through the window because he has abandoned his claim under the Montana Constitution on appeal.

This Court should decline to reach the merits of whether the Montana Constitution provides additional protection for Zumwalt beyond the United States Constitution in this context because Zumwalt did not address the claim on appeal.

This Court has repeatedly held that it will decline to address arguments that a party raised in the trial court but did not address on appeal. *See, e.g., Ford v. State*, 2005 MT 151, ¶ 35, 327 Mont. 378, 114 P.3d 244; *Skinner v. Allstate Ins. Co.*, 2005 MT 323, ¶ 9, 329 Mont. 511, 127 P.3d 359. Further, this Court does not "conduct legal research on appellant's behalf, [] guess as to his precise position, or [] develop legal analysis that may lend support to his position." *State v. Hicks*, 2006 MT 71, ¶ 22, 331 Mont. 471, 133 P.3d 206 (internal quotations and citation omitted); *see* M. R. App. P. 12(1)(g) (requiring the argument section of an appellant's brief to contain "citations to the authorities, statutes, and pages of the record relied on").

In the municipal court, Zumwalt challenged the officers' viewing him through his window as violating his Montana Constitutional rights, and exclusively cited Montana case law. (Doc. 0.12.)

On appeal to the district court, Zumwalt instead argued that the officers were in the curtilage of his apartment and, therefore, the search was illegal under federal case law. (Doc. 4 at 8.)

On appeal to this Court, Zumwalt argues that the officers were within the curtilage of his apartment unit when they observed him through his windows, and he cites federal case law in support of his assertion. (Appellant's Br. at 20-27.)

On appeal, Zumwalt fails to provide any analysis of how the Montana Constitution provides greater protection in this case. Notably, Zumwalt does not even cite Montana Constitution article II, § 10, let alone argue that Montana's heightened privacy protection provides greater protections under the specific circumstances of this case. Because Zumwalt failed to address his claim under the Montana Constitution on appeal, this Court should decline to address whether the Montana Constitution provides greater protection under the circumstances of this case.

C. Even if this Court addresses whether Zumwalt's rights under the Montana Constitution were violated, he has failed to establish that he had a subjective expectation of privacy in the area behind the apartment complex and, even if he had, such an expectation would not be reasonable.

Montana Constitution article II, § 11, prohibits unreasonable searches and seizures. Additionally, this Court has recognized that Montana Constitution article II, § 10, provides its citizens additional privacy protections and thus it reads the two provisions in conjunction when analyzing whether an unreasonable search has occurred. *State v. Staker*, 2021 MT 151, ¶ 9, 404 Mont. 307, 489 P.3d 489 (citation omitted). A criminal defendant seeking to suppress evidence carries the burden to prove that an illegal search occurred. *State v. Roper*, 2001 MT 96, ¶ 11, 305 Mont. 212, 26 P.3d 741.

"The threshold question in a search case is whether there is an expectation of privacy which society is prepared to recognize as objectively reasonable." *State v. Tackitt*, 2003 MT 81, ¶ 17, 315 Mont. 59, 67 P.3d 295 (citation omitted). "Assuming there is a reasonable expectation of privacy, the next question is whether or not the nature of the state's intrusion is reasonable under the circumstances." *Id.* (citations omitted). "Absent a reasonable expectation of privacy, there is no constitutional intrusion, search, or seizure." *Staker*, ¶ 11 (citations omitted).

In ascertaining if a person has an actual subjective expectation of privacy, this Court looks to the circumstances, including "the place of the investigation, the control exercised by the person over the property being investigated, and the extent to which the person took measures to shield the property from public view, to communicate that entry is not permitted, or to otherwise protect his property from intrusion." *State v. Hubbel*, 286 Mont. 200, 209, 951 P.2d 971, 977.

What a person knowingly exposes to the public, even in their home, is not afforded protection under the Constitution:

> . . . protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measure to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which render the activities clearly visible.

State v. Cotterell, 2008 MT 409, ¶ 39, 347 Mont. 231, 198 P.3d 254 (quoting *Ciraolo*, 476 U.S. at 213). An officer's mere observations of an item in plain view is not a search. *State v. Lewis*, 2007 MT 295, ¶¶ 25, 29, 340 Mont. 10, 171 P.3d 731. This is true even of observations of private land if they are made from public property. *State v. Bullock*, 272 Mont. 361, 284, 901 P.2d 61, 76 (1995).

In *Hubbel*, officers drove to the Hubbel residence that abutted Highway 93, drove up the driveway, and parked 70 to 75 feet away from the front door to avoid disturbing any evidence. *Hubbel*, 286 Mont at 205, 951 P.2d at 974. The area where they parked appeared to be a common area where visitors and the Hubbels could park. *Id.* Officers approached the home and, using flashlights, observed blood in the leaves and grass. *Id.* Proceeding on a sidewalk, they observed gunshot holes in the doors and wood missing from around the glass. *Id.* They saw blood and broken glass on a stoop below the door, a telephone with a severed cord, and an overturned chair on the porch. *Id.* Once they were on the porch, they saw a plastic drinking cup with ice and noticed a blood smear on the door. *Id.*

This Court held that the Hubbels had no expectation of privacy in the property around their home. *Id.* at 210, 951 P.2d at 977. This Court noted that the property abutted a heavily trafficked highway and lacked a fence, gate, or shrubs to shield the area or protect the property from public view. *Id.* This Court also noticed the lack of signage indicating entry was not permitted and the lack of obstruction

leading to the porch. *Id.* Because officers were not in an area where the Hubbels had evinced an expectation of privacy when they saw evidence in plain view, there was no search. *Id.*

In *Clausell v. State*, 2005 MT 33, ¶ 22, 326 Mont. 63, 106 P.3d 1175, this Court similarly found that Clausell "possessed no reasonable expectation of privacy in the exterior of his apartment." While waiting for a search warrant, law enforcement found a gun wrapped in a towel in a bucket immediately outside the back door of Clausell's apartment. *Id.*

Similarly, in *City of Whitefish v. Large*, 2003 MT 322, ¶ 17, 318 Mont. 310, 80 P.3d 427, this Court held that officers did not conduct a search when they observed the defendant in her carport. Large lived in a private condominium association. *Id.* ¶ 4. The parking lot and entrance were screened off from the public. *Id.* No signs indicated that the lot was private or that entry into the lot was prohibited. *Id.* ¶ 17. Large lived in unit number eight. *Id.* ¶ 4. Her carport was the farthest from the public road and was not visible from the road. *Id.* The carport was attached to and directly below her condominium unit. *Id.* It was "entirely enclosed on three sides and ha[d] a private stair which lead[] to the front door of her condominium." *Id.* This Court noted that, although the view of the carport from the public street was obstructed, "there was nothing to prevent other condominium unit owners and their visitors from viewing the interior of Large's carport." *Id.* ¶ 10.

Here, Officer Stahlberg first observed Zumwalt through his front window while Officer Stahlberg stood roughly ten feet from the window next to the front sidewalk area.[4] Officer Stahlberg and Sergeant Veneman also saw Zumwalt through his back window when they stood in the open grassy area behind the complex. The law enforcement officers did not climb gates or pass signs prohibiting entry behind the complex. Instead, they utilized the sidewalk that led to common laundry and play area to get behind the complex.

Zumwalt failed to meet his burden to establish that he had an actual subjective expectation of privacy in the area behind the apartment complex. The record establishes that he did not put up any signs indicating it was his private area; he did not put up any fences or screens, or otherwise indicate an expectation of privacy in the area behind the apartment complex.

Zumwalt attempts to explain away his failure to indicate an actual subjective expectation of privacy, claiming it is "common sense that [Zumwalt] could not have erected a fence or planted bushes." (Appellant's Br. at 26.) However, there is no evidence in the record that Zumwalt was prohibited from placing temporary

[4] The Municipal court's Order first stated that Officer Stahlberger stood "at the front sidewalk area" several yards away from Zumwalt's window and later said he was "standing on the front sidewalk." (Doc. 0.27 at 1, 3.) While testimony and video evidence affirm that Officer Stahlberg stood immediately next to the sidewalk, several yards away from Zumwalt's window, his feet are not directly on the sidewalk but instead next to it.

fencing, a sign, or planters with shrubbery behind his unit. There is no evidence in the record at all supporting any efforts on the part of Zumwalt to demonstrate an expectation that the area behind the complex and near his window was his private area. Further, if Zumwalt had been aware that he was not permitted to exclude others from that area, then even if he had an actual subjective expectation of privacy, it would not be one society would recognize as reasonable because he would have been on notice that any other tenant or their guests could access the area.

Officer Stahlberg and Sergeant Veneman could see Zumwalt through the window, with the naked eye, from several feet away. Other tenants and their guests can easily walk through the area behind the complex to access the play area or common laundry. Those guests would be able to see Zumwalt through his back window just as the officers did.

This Court does not need a categorical rule that no apartment dweller can have a reasonable expectation of privacy in common areas to find that Zumwalt did not have a reasonable expectation of privacy here. Nothing in the record supports that Zumwalt had any actual expectation of privacy in the area behind the apartment complex.

D. Even if the officers' observations of Zumwalt through his window constituted a search, the investigation after he voluntarily left his apartment is not a fruit of the alleged search.

The exclusionary rule provides that "under certain circumstances, evidence discovered or obtained as the direct or indirect result of a constitutionally invalid search or seizure is not admissible against the subject person in subsequent proceedings." *State v. Peoples*, 2022 MT 4, ¶ 27, 407 Mont. 84, 502 P.3d 129. The exclusionary rule is not "a personal right or remedy expressly or implicitly provided by, or rooted, in the Fourth and Fourteenth Amendments or Article II, Sections 10-11 of the Montana Constitution—it is a judicial remedy[.]" *Id.* ¶ 28. The exclusionary rule applies only where:

> (1) the prior illegality was a direct or indirect cause-in-fact of the police discovery of the evidence (*i.e.*, the police would not have discovered or acquired the evidence 'but for' the illegality) and (2) the discovery was the result of police 'exploitation of that illegality' rather than 'means sufficiently distinguishable to . . . purge[]' it of 'the primary taint' of the prior illegality.

Id. ¶ 27 (quoting *Hudson v. Michigan*, 547 U.S. 586, 591-92 (2006) (alteration in original). "Exclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence." *Hudson*, 547 U.S. at 592. The "but-for causality is only a necessary, not a sufficient, condition for suppression." *Id.*

Montana also recognizes three exceptions to the exclusionary rule. *Therriault*, ¶ 58. So called "fruit" or derivative evidence is admissible if it is

"(1) attenuated from the constitutional violation so as to remove its primary taint; (2) obtained from an independent source; or (3) determined to be evidence which would have been inevitably discovered apart from the constitutional violation." *Id.* (citation omitted). However, "[t]here is no question of attenuation until the connection between the primary illegality and the evidence obtained is established." *United States v. Crawford*, 372 F.3d 1048, 1058 (9th Cir. 2004), *cert. denied*, *Crawford v. United States*, 543 U.S. 1057 (2005); *See also*, *New York v. Harris*, 495 U.S. 14, 19 (1980) ("attenuation analysis is only appropriate where, as a threshold matter, courts determine that the challenged evidence is in some sense the product of illegal governmental activity").

In *Harris*, the United States Supreme Court held that Harris's statement taken at the station after he was illegally arrested in his home should not have been suppressed because it was not the product of Harris being in unlawful custody. *Id.* In *Crawford*, the court found there was no causal connection between a search of the defendant's residence that failed to produce any physical evidence and the defendant's subsequent statements at the FBI office after the search. *Crawford*, 372 F.3d at 1057-59.

In *Crawford*, an FBI agent, accompanied by four state agents, went to conduct a parole search on Crawford, who was on state parole. 372 F.3d at 1050-51. The FBI agent believed Crawford had been involved in a robbery two years

earlier, and while he did not expect to find evidence of the robbery during the search, he intended to use the search as a pretext to talk to Crawford about the robbery. *Id.*

Two state officers and the FBI agent entered Crawford's bedroom with weapons drawn. *Id.* The state officers searched while Crawford sat in the living room with the FBI agent, and the agent eventually asked him about the robbery. *Id.* When Crawford was not forthcoming, the FBI agent asked if he would prefer to meet with him privately, which Crawford agreed to. *Id.* The FBI agent took him to the FBI office and, eventually, Crawford admitted he had participated in the robbery. *Id.*

For purposes of analysis, the court in *Crawford* assumed that the parole search was illegal. *Id.* at 1054. The court noted that the search of Crawford's home had been fruitless. *Id.* at 1057. The only connection between the search and Crawford's confession at the FBI office was the officer's intent to use the search as a pretext to speak with Crawford about the robbery. *Id.* at 1058. The court found that "sequence should not be confused with consequence" and held that the fruitless search could not be said to have caused Crawford's later confession. *Id.*

Why Zumwalt decided to come outside is not in the record. Zumwalt never testified at either the suppression hearing or trial. Zumwalt's counsel below and on appeal merely speculated that he would have remained inside but for the officers

telling him they knew he was behind the door. When the officers approached Zumwalt's apartment, they already knew his name, that he had been seen going to his apartment, that his truck was still there, and that the reporting parties had not seen him leave. These were all discovered from sources independent of the officers' subsequent observations of Zumwalt through his windows. Further, one of these observations occurred when Officer Stahlberg stood several yards away from Zumwalt's window right next to a sidewalk that separated the parking lot from the apartments.

The officers' observations of Zumwalt's intoxication after he came outside, his statements, the subsequent SFSTs at the detention center, and his refusal to take a breath test are not fruits of the officers observing Zumwalt through a window. The officers' observations cannot be said to have "caused" his statements, the SFSTs, or his refusal.

III. The municipal court properly exercised its discretion in overruling Zumwalt's objection to the officers' opinion testimony based on their personal observations and experience, and even if it was error, it was harmless.

A. Officer Stahlberg and Officer Garner properly offered lay opinion testimony.

Montana Rule of Evidence 701 "authorizes a lay witness to give an opinion, which is based on the witness's perception, and is helpful for a clear understanding

of the witness's testimony or a fact in issue." *State v. Kaarma*, 2017 MT 24, ¶ 84, 386 Mont. 243, 390 P.3d 609 (citation and internal quotation marks omitted). On the other hand, Mont. R. Evid. 702 permits expert witnesses to use their "scientific, technical, or other specialized knowledge to assist the fact finder in understanding evidence or determining facts." *Id.* (citation and internal quotation marks omitted). "Expertise is based on knowledge, skill, experience, training, or education." *Id.*

A lay witness may testify about their personal observations of a person's level of intoxication. *State v. Carter*, 285 Mont. 449, 456, 948 P.2d 1173, 1177 (1997); *State v. Bradley*, 262 Mont. 194, 198, 864 P.2d 787, 789 (1993). "[M]ost adults are sufficiently experienced with people who have been drinking to offer an opinion that a person is, in fact, intoxicated from alcohol based on their personal observations." *State v. Nobach*, 2002 MT 91, ¶ 15, 309 Mont. 342, 46 P.3d 618. This Court has repeatedly condoned peace officers testifying as lay witnesses under Mont. R. Evid. 701 to their perceptions and conclusions based on extensive experience and training. *Kaarma*, ¶ 84 (collecting cases).

For example, an officer may testify about his inference that criminals believe gunshot residue will conclusively incriminate them based on his extensive experience dealing with criminals and administering gunshot residue testing. *State v. Zlahn*, 2014 MT 224, ¶ 33, 376 Mont. 245, 332 P.3d 247. An officer can also testify as a lay witness based on his training and experience that a defendant's

possession of a specific amount of methamphetamine indicates an intent to sell. *State v. Frasure*, 2004 MT 305, ¶¶ 8, 18, 323 Mont. 479, 100 P.3d 1013. An officer may also testify as a lay witness regarding the cause of an accident based upon his experience conducting accident investigations. *Hislop v. Cady*, 261 Mont. 243, 249, 862 P.2d 388, 392 (1993).

However, if an officer's testimony is based on "specialized, technical knowledge," it goes beyond the scope of Mont. R. Evid 701 and should not be admitted as lay opinion testimony. *Id.* ¶ 86 (citations omitted). For example, a highway patrol officer exceeded the scope of Rule 701 when he testified about the effects of prescription drugs on an individual's ability to drive. *Nobach*, ¶ 22. Similarly, an officer who testified regarding the relationship between velocity and blood splatter size, testified based on specialized, technical knowledge that exceeded the scope of Rule 701. *Kaarma*, ¶¶ 78-87. Likewise, permitting a paramedic to testify to the prospects of success of an earlier intubation of a patient, had an ambulance been properly dispatched, would exceed the scope of Rule 701. *Christofferson v. City of Great Falls*, 2003 MT 189, ¶ 49, 316 Mont. 469, 74 P.3d 1021.

Here, like officers in *Zlahn, Frasure,* and *Hislop,* Officers Stahlberg and Garner properly testified as lay witnesses, based on their extensive experience in dealing with intoxicated individuals, that they perceived Zumwalt to be intoxicated

from the first moment of contact and that he appeared to them to remain at a consistent level of intoxication. Just as most adults are sufficiently experienced with people who have been drinking to offer an opinion that a person is, in fact, intoxicated from alcohol based on their personal observations, most adults are experienced enough to testify to whether an individual seemed more, less, or consistently drunk over time based upon their personal observations.

The officers never testified to the science of absorption or elimination rates of alcohol, nor was that science necessary for them to testify that they have extensive experience dealing with individuals at varying levels of intoxication and that, based on their experience, Zumwalt appeared very intoxicated upon their first interaction and appeared to remain very intoxicated throughout the investigation. Officer Stahlberg and Officer Garner properly testified as lay witnesses based on their observations of Zumwalt and their experiences dealing with intoxicated people as law enforcement officers over the course of 13 and 7 years respectively.

B. Even if the court abused its discretion in permitting the opinion testimony, the error was harmless.

Trial errors are harmless if "the fact-finder was presented with admissible evidence that proved the same facts as the tainted evidence proved." *State v. Van Kirk*, 2001 MT 184, ¶ 43, 306 Mont. 215, 32 P.3d 735. If the evidence goes to an element of the crime charged and there is admissible evidence on the same element, the State must demonstrate "that the quality of the tainted evidence was

such that there was no reasonable possibility that it might have contributed to the defendant's conviction." *Id.* ¶ 44. A person commits a DUI if the person was under the influence of alcohol while driving or in actual physical control of a vehicle upon the ways of the state open to the public. Mont. Code Ann. § 61-8-401(1)(a) (2019).

The officers' testimony that Zumwalt appeared to be at the same level of intoxication throughout their interaction went to whether he was intoxicated at the time he was driving his vehicle. There were numerous other items of evidence that supported that Zumwalt was intoxicated when he drove. As the prosecution noted in closing, the security camera footage showed Zumwalt driving directly at the sedan at a 45-degree angle before he crashed into it. On the video, it does not appear that the truck slid into the car; he crashed into it after accelerating back at a sharp angle directly into the car. After pulling forward and trying again, Zumwalt drove backward, missed the car this time, but instead drove past the end of the parking lot and up onto the sidewalk. Zumwalt had to brace himself as he got out of his truck and walked around the back of it. Zumwalt's neighbor, Slosson, also testified that Zumwalt appeared intoxicated as he walked back toward his apartment. All of this occurred before Zumwalt entered his apartment.

Although the parties disputed the exact timeline, the evidence in the record narrowed the timeline from the crash until officers could see Zumwalt in his apartment to 10 to 25 minutes. The officers testified that Zumwalt's speech was

slurred, his eyes were glossy, he was confused, and he was unable to follow simple directions. Jurors saw similar behaviors when they watched Zumwalt conduct SFSTs at the detention center. Zumwalt also told the officers he did not remember hitting the car, and days after the incident, he said he did not remember what happened that night.

Even if the court abused its discretion in admitting the officers' opinions that Zumwalt appeared to remain at the same level of intoxication throughout their interaction, numerous other pieces of compelling information indicated Zumwalt drove while intoxicated. In light of the other evidence presented to the jury, there is no reasonable possibility that Zumwalt was convicted because the officers testified that, in their opinion, he remained the same amount of drunk throughout.

CONCLUSION

This Court should affirm the municipal court's denial of Zumwalt's motion to suppress and his conviction for DUI.

Respectfully submitted this 31st day of August, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,959 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Christine Hutchison
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CERTIFICATE OF SERVICE

I, Christine M. Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-31-2023:

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