

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0026

STATE OF MONTANA,

Plaintiff and Appellee,

v.

THOMAS WOJTOWICZ,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John Brown, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	2
I. The offense	2
II. The warrant for a blood sample	11
III. Procedural history	12
A. Pretrial motions	12
B. The trial evidence regarding Wojtowicz's blood test results	13
C. Wojtowicz's motion to dismiss	16
D. Connie Kellogg's testimony	16
E. Wojtowicz's testimony.....	17
F. The verdict and sentence	21
SUMMARY OF THE ARGUMENT	21
ARGUMENT	23
I. The district court correctly denied Wojtowicz's motion to suppress	23
A. Standard of review.....	23
B. Sergeant Haydon's question about the location of Wojtowicz's keys did not violate the constitution because Wojtowicz had not been seized and Sergeant Haydon had particularized suspicion to investigate for DUI.....	24
1. Sergeant Haydon's brief questioning of Wojtowicz was not a seizure	25

2. Even if a seizure occurred, Sergeant Haydon had particularized suspicion to support his question regarding the location of Wojtowicz's keys.....	30
C. Wojtowicz has provided nothing to show he had a protected interest in the business receipt.....	34
II. The district court correctly admitted the results of Wojtowicz's blood test over his objection for lack of foundation	35
A. Standard of review.....	35
B. The record shows the State followed the statutory and regulatory procedures necessary to admit Wojtowicz's blood test results	35
III. The State presented sufficient evidence to show that Wojtowicz had actual physical control of his vehicle	37
A. Standard of review.....	37
B. Viewing the evidence in a light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Wojtowicz was in actual physical control of his vehicle.....	38
CONCLUSION.....	41
CERTIFICATE OF COMPLIANCE.....	41

TABLE OF AUTHORITIES

Cases

<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984)	33
<i>Brown v. State</i> , 2009 MT 64, 349 Mont. 408, 203 P.3d 842	25, 30, 31, 33
<i>City of Missoula v. Metz</i> , 2019 MT 264, 397 Mont. 467, 451 P.3d 530	32
<i>Florida v. Bostick</i> , 501 U.S. 429 (1991)	26
<i>Illinois v. Wardlow</i> , 528 U.S. 119 (2000)	31
<i>Johnston v. Palmer</i> , 2007 MT 99, 337 Mont. 101, 158 P.3d 998	24, 34, 37, 40
<i>State ex rel. McGrath v. Twenty-First Judicial Dist.</i> , 2001 MT 305, 307 Mont. 491, 38 P.3d 820	35-36
<i>State v. Ballinger</i> , 2016 MT 30, 382 Mont. 193, 366 P.3d 668	26
<i>State v. Dupree</i> , 2015 MT 103, 378 Mont. 499, 346 P.3d 1114	29
<i>State v. Elison</i> , 2000 MT 288, 302 Mont. 228, 14 P.3d 456	25, 33
<i>State v. English</i> , 2006 MT 177, 333 Mont. 23, 140 P.3d 454	37
<i>State v. Hagen</i> , 283 Mont. 156, 939 P.2d 994 (1997)	39
<i>State v. Hamilton</i> , 2002 MT 263, 312 Mont. 249, 59 P.3d 387	38, 39
<i>State v. Hoover</i> , 2017 MT 236, 388 Mont. 533, 402 P.3d 1224	31

<i>State v. Hudson,</i> 2005 MT 142, 327 Mont. 286, 114 P.3d 210	38, 40
<i>State v. Incashola,</i> 1998 MT 184, 289 Mont. 399, 961 P.2d 745	36
<i>State v. Laster,</i> 2021 MT 269, 406 Mont. 60, 497 P.3d 224	33
<i>State v. Marcial,</i> 2013 MT 242, 371 Mont. 348, 308 P.3d 69	34
<i>State v. McMaster,</i> 2008 MT 294, 345 Mont. 408, 191 P.3d 443	31
<i>State v. Noli,</i> 2023 MT 84, 412 Mont. 170, 529 P.3d 813	25, 30, 34
<i>State v. Peterson,</i> 236 Mont. 247, 769 P.2d 1221 (1989)	39
<i>State v. Pratt,</i> 286 Mont. 156, 951 P.2d 37 (1997)	31, 32
<i>State v. Questo,</i> 2019 MT 112, 395 Mont. 446, 443 P.3d 401	passim
<i>State v. Rodriguez,</i> 2011 MT 36, 359 Mont. 281, 248 P.3d 850	31
<i>State v. Sharp,</i> 217 Mont. 40, 701 P.2d 959 (1985)	32
<i>State v. Shields,</i> 2005 MT 249, 328 Mont. 509, 122 P.3d 421	40
<i>State v. Sommers,</i> 2014 MT 315, 377 Mont. 203, 339 P.3d 65	38, 39, 40, 41
<i>State v. Staker,</i> 2021 MT 151, 404 Mont. 307, 489 P.3d 489	34-35
<i>State v. Strom,</i> 2014 MT 234, 376 Mont. 277, 333 P.3d 218	27

<i>State v. Wagner,</i> 2003 MT 120, 315 Mont. 498, 68 P.3d 840	30
<i>State v. Weber,</i> 2016 MT 138, 383 Mont. 506, 373 P.3d 26	35, 37
<i>State v. Wilkins,</i> 2009 MT 99, 350 Mont. 96, 205 P.3d 795	26, 30
<i>Terry v. Ohio,</i> 392 U.S. 1 (1968)	25, 26, 31, 33
<i>United States v. Mendenhall,</i> 446 U.S. 544 (1980)	27, 28, 29

Other Authorities

Administrative Rules of Montana	
Rule 23.4.220	35, 36
Montana Code Annotated	
§ 46-5-401(1)	25, 30, 33
§ 61-8-401	38, 40
§ 61-8-401 (2019)	12
§ 61-8-404(1)(a)	35, 36
§ 61-8-404(1)(b)(ii) (2019)	35, 36
§ 61-8-405(1)	35, 36
§§ 61-8-1001, et seq.	12
§ 61-8-1002	12
Montana Constitution	
Art. II, § 10.....	25
2021 Montana Laws	
Chapter 498, § 2	12
United States Constitution	
Amend. IV.....	25, 26

STATEMENT OF THE ISSUES

1. Whether the district court correctly denied the Appellant's motion to suppress because he had not been seized and the officer had particularized suspicion to investigate for driving under the influence when he asked where the keys were, and the Appellant did not have a reasonable expectation of privacy in the business receipt.
2. Whether the district court clearly abused its discretion in admitting the Appellant's blood test results over his foundation objection when the testimony showed the State followed all statutory and regulatory requirements to obtain and test the results.
3. Whether the evidence showing the Appellant was in actual physical control of his vehicle, viewed in a light most favorable to the prosecution, was sufficient to support the jury's guilty verdict.

STATEMENT OF THE CASE

On May 26, 2021, the State charged the Appellant, Thomas Wojtowicz (Wojtowicz), with felony driving under the influence (DUI), based on actual physical control. (District Court Documents (Docs.) 1-3.)

Wojtowicz filed various pretrial motions. (Docs. 45-54.) After an evidentiary hearing, the district court denied Wojtowicz's motion to suppress

evidence regarding the location of his keys and the State's acquisition of a receipt from a business based on his right to privacy and right to be free of unreasonable searches and seizures. (Docs. 64-65, 82.)

After a two-day trial, a jury convicted Wojtowicz. (Docs. 98.1, 100, 106.) Wojtowicz appeals the denial of his motion to suppress, the district court's admission during trial of the blood test results and the toxicology report over his objection for lack of foundation, and the sufficiency of the evidence supporting the jury's finding that he was in actual physical control of his vehicle. (Appellant's Brief (Br.) at 12-18, 23-33.)

STATEMENT OF THE FACTS

I. The offense

At around 1 p.m., on May 7, 2021, John Barrick (Barrick) looked out of his second-story office window in Big Sky and saw a man walk out of a business complex, step off the curb, tumble on the asphalt, and crawl his way across the parking lot on his hands and knees. (8/15/21 Trial Transcript (Tr.) at 155-57, 209.) From about 40 feet away, Barrick watched the man crawl to his vehicle—a green Ford Escape—and get into the driver's seat. (*Id.* at 157-58.) Barrick did not know the man, but he recognized him because a few minutes earlier he had walked by him outside a bar in the business complex. (*Id.* at 157, 162-63.) Barrick called the

police because he was concerned that the man was impaired and that he might drive and hurt himself or someone else. (*Id.* at 158-59, 163-64.) About five minutes after his call, Barrick saw a police officer arrive and contact the man in the vehicle. (*Id.* at 159-60, 170.)

Sergeant Daniel Haydon, who was the area supervisor for the Gallatin County Sheriff's Office, responded to the call. (*Id.* at 165, 168-69.) Dispatch had informed Sergeant Haydon that a caller saw a man come out of a bar and restaurant, tumble in the parking lot, crawl to a vehicle, and enter it. (*Id.* at 169, 213.) Sergeant Haydon immediately drove to the public parking lot, which was adjacent to various public roadways. (*Id.* at 168-72, 209-10; State's Trial Exhibit (Ex.) 1 at 00:00-00:45.)¹ He arrived in his patrol car, but he was wearing regular clothes and had his firearm and badge on his belt. (8/15/21 Tr. at 169, 172-73, 210.)

Sergeant Haydon saw people, pedestrians, and multiple vehicles in the area. (*Id.* at 172.) He located the vehicle that matched the caller's description and a license plate number that dispatch had provided. (*Id.* at 173, 210-11.) Sergeant Haydon

¹ The district court admitted Sergeant Haydon's dash camera recording, which the State played for the jury. (8/15/21 Tr. at 181-85 (State's Ex. 1).) The State's description of the offense is based primarily on the audio recording and Sergeant Haydon's testimony.

parked his patrol vehicle without blocking the Ford Escape,² and he did not activate his lights or sirens. (*Id.*; State's Ex. 1 at 00:00-00:45.) Shortly after Sergeant Haydon arrived, a second deputy arrived in a patrol vehicle, who also did not block the Ford Escape. (State's Ex. 1 at 01:05-01:30; 8/15/21 Tr. at 193.)

As he walked toward the vehicle, Sergeant Haydon made eye contact with the man in the driver's side mirror. (8/15/21 Tr. at 173.) The man, who Sergeant Haydon later identified as Wojtowicz, was smoking a cigarette, and he had a dog in the vehicle. (*Id.* at 174-76, 217.) Sergeant Haydon testified that the windows of the vehicle were down and music was playing. (*Id.* at 174, 216-17.) Sergeant Haydon contacted Wojtowicz and said, "Hello. How are you sir?"³ (State's Ex. 1 at 00:45-00:55.) Sergeant Haydon informed Wojtowicz that someone had called in who was concerned about his vehicle. (*Id.* at 00:55-01:05.) Sergeant Haydon asked Wojtowicz where he was headed. (*Id.* at 01:00-01:05) Wojtowicz said, "Nowhere, I'm waiting for a ride." (*Id.* at 01:00-01:10.) Sergeant Haydon said, "But you're in your car, what do you mean you're waiting for a ride." (*Id.* at 01:05-01:15.)

² This pointed the dash camera away from Wojtowicz's vehicle, so the first several minutes of the encounter are not captured on video. (State's Ex. 1 at 00:00-09:35.) The equipment recorded the audio of the entire interaction. (*Id.* at 00:00-37:20.)

³ The quoted statements are based on the State's own transcription of the audio recording.

Sergeant Haydon said he was not “tracking” Wojtowicz’s responses, but he verified that Wojtowicz owned the vehicle. (*Id.* at 01:10-01:45.)

After a brief exchange, Wojtowicz said he was not driving. (*Id.* at 01:35-02:00.) Sergeant Haydon said, “I mean, you’re sitting in the driver’s seat, where are your keys?” (*Id.* at 01:40-01:50.) Wojtowicz picked up the keys from the center console and showed them to Sergeant Haydon. (*Id.* at 01:40-01:50; 8/15/21 Tr. at 175, 217-18, 229.) The keys were not in the ignition. (8/15/21 Tr. at 217.) Sergeant Haydon had the following exchange with Wojtowicz:

Sergeant Haydon: You got your keys with ya, you’re sitting in, sitting in your driver’s seat, and you’re not, but you’re not driving?

Wojtowicz: No, I’m not, totally not.

Sergeant Haydon: OK. You obviously understand this looks a lot like somebody getting ready to drive.

Wojtowicz: I’m not driving I swear to my life.

(State’s Ex. 1 at 01:45-02:10.)

Sergeant Haydon testified: “As I began speaking with [Wojtowicz], his speech was slurred and he kind of had a, like, a dazed, slack expression on his face, and I could smell the odor of alcohol coming from his breath as I spoke to him.” (8/15/21 Tr. at 174.) Sergeant Haydon asked Wojtowicz how much he had to drink that day. (State’s Ex. 1 at 02:05-02:10.) Wojtowicz told Sergeant Haydon that he

had a couple shots and a glass of wine.⁴ (*Id.* at 02:05-02:15.) Wojtowicz has maintained throughout that he was intoxicated. (State's Ex. 1 at 02:05-02:15, 10:45-11:05, 11:55-12:00; 8/15/21 Tr. at 178, 225; 8/16/21 Tr. at 107, 119, 124.)

Sergeant Haydon asked Wojtowicz who was coming to pick him up, and Wojtowicz said a woman named Connie Kellogg. (State's Ex. 1 at 02:15-02:25; 8/15/21 Tr. at 174-75, 214.) Sergeant Haydon asked Wojtowicz if he had already called her. (State's Ex. 1 at 02:20-02:30; 8/15/21 Tr. at 176-77, 214.) Wojtowicz said yes, and Sergeant Haydon asked Wojtowicz if he could show him. (*Id.*) Wojtowicz showed Sergeant Haydon the call log on his phone. (*Id.*) The log showed two recent calls to a number listed as Connie that lasted 15 seconds and 0 seconds, respectively. (*Id.*)

This caused Sergeant Haydon to question whether Wojtowicz had actually talked to Connie. (State's Ex. 1 at 03:25-04:30; 8/15/21 Tr. at 177.) Wojtowicz said the plan was “a known fact.” (State's Ex. 1 at 03:30-03:45.) Wojtowicz then told Sergeant Haydon that Connie was going to pick him up after she got off work at 4 p.m., which was almost three hours later. (*Id.* at 03:40-04:20; 8/15/21 Tr. at

⁴ The State later obtained a receipt from the bar indicating Wojtowicz had purchased three shots and one glass of wine, which the district court admitted during trial as State's Ex. 4. (8/15/21 Tr. at 206-07; Doc. EXHIBITS at 15. The district court record included an electronic document titled “DC-21-201 EXHIBITS.pdf.” The State cites this document as Doc. EXHIBITS.)

177.) Sergeant Haydon said, "That doesn't sound to me like she knows that she's coming." (State's Ex. 1 at 04:00-04:10.) They had the following exchange:

Wojtowicz: I'm not driving, dude. I swear to God.

Sergeant Haydon: (chuckles) That's what it looks like.

Wojtowicz: No, no, I'm not driving. I don't have my key in the car. I have nothing like that.

Sergeant Haydon: Well, you got your key in the center console to unlock it and roll down the windows and get in the driver's seat.

Wojtowicz: Yeah, (inaudible).

(*Id.* at 04:15-04:40.) Sergeant Haydon testified that Wojtowicz said he planned to stay in the vehicle and listen to music until Connie picked him up. (*Id.* at 25:00-25:20; 8/15/21 Tr. at 177.)

Sergeant Haydon twice used his cell phone to call the number Wojtowicz had used to call Connie, and she did not answer. (State's Ex. 1 at 04:15-04:50; 8/15/21 Tr. at 177.) Sergeant Haydon told Wojtowicz that the circumstances showed he was in actual physical control of his vehicle. (State's Ex. 1 at 05:55-06:50; 8/15/21 Tr. at 178, 191-92.) He explained that Wojtowicz had come to his vehicle, unlocked it, rolled down the windows, sat in the driver's seat, and had the key within reach of his hand. (*Id.*) He said he could not confirm Wojtowicz's story that he was waiting for a ride because Wojtowicz's phone calls showed that he did

not spend any time on the phone with Connie and she had not answered Sergeant Haydon's calls. (*Id.*)

Based on Wojtowicz's actual physical control of the vehicle, his slurred speech, and his admission that he had been drinking, Sergeant Haydon asked Wojtowicz to get out of the vehicle so he could administer field sobriety tests (FSTs) to determine whether Wojtowicz was safe to operate the vehicle. (State's Ex. 1 at 08:00-09:00; 8/15/21 Tr. at 178, 191-92.) As Wojtowicz exited, he was "very, very unsteady," and he had a limp, which Wojtowicz said was due to him breaking his leg "in December." (State's Ex. 1 at 07:40-07:55; 8/15/21 Tr. at 179.)

After Wojtowicz exited his vehicle, he reiterated that he was not driving and offered various explanations for what he was doing. (*Id.* at 09:35-14:50.)⁵ Wojtowicz said he put the key in the ignition just for a second to turn the radio on and then took the key out and put it back in the center console. (*Id.* at 10:25-10:45; 8/15/21 Tr. at 216.) Wojtowicz said that he got in the front seat to listen to music, but he would have switched to the backseat while he was waiting for a ride. (State's Ex. 1 at 09:45-10:10, 11:05-11:20.) Wojtowicz said he gave Connie a ride to work that morning, which caused Sergeant Haydon to believe that Connie did not have a vehicle to give Wojtowicz a ride. (*Id.* at 13:30-13:50; 8/15/21 Tr. at

⁵ At this point, Sergeant Haydon moved his patrol vehicle, and the dash camera recorded the remainder of the interaction. (State's Ex. 1 at 09:20-37:20.)

229.) After discussing the circumstances with Wojtowicz, Sergeant Haydon administered the FSTs. (State's Ex. 1 at 09:35-14:50.)

Due to Wojtowicz's injured leg, Sergeant Haydon did not administer the walk-and-turn or one-legged-stand FSTs. (8/15/21 Tr. at 179, 213-14, 222-25, 230-32.) Sergeant Haydon had Wojtowicz perform nonstandardized FSTs. (*Id.* at 166-68, 180, 188-91, 222-25, 230-31; State's Ex. 1 at 14:45-17:30.) The results of the tests showed Sergeant Haydon that Wojtowicz was having difficulty performing divided attention tasks. (8/15/21 Tr. at 189-91.) Sergeant Haydon asked Wojtowicz to provide a preliminary breath test. (*Id.* at 191; State's Ex. 1 at 17:00-19:50.) Wojtowicz refused. (*Id.*)

Based on the totality of the circumstances, Sergeant Haydon determined Wojtowicz was under the influence of alcohol and informed Wojtowicz that he was under arrest for DUI. (State's Ex. 1 at 19:45-20:15; 8/15/21 Tr. at 192.) Sergeant Haydon asked Wojtowicz what they should do about the dog in his vehicle, and Wojtowicz reiterated that Connie was coming to pick him up. (State's Ex. 1 at 20:25-23:35; 8/15/21 Tr. at 192.) Sergeant Haydon again tried to call Connie at the cell number Wojtowicz provided, but no one answered. (*Id.*) Wojtowicz provided a phone number for the Conoco gas station where Connie worked, so Sergeant Haydon called that number. (*Id.*) Connie answered. (*Id.*)

Sergeant Haydon arranged with Connie to have someone pick up the dog. (State's Ex. 1 at 21:30-23:35; 8/15/21 Tr. at 192, 219-21.)⁶ He asked Connie if she was planning to pick Wojtowicz up, he asked if she lived with him, he asked if she had a vehicle at work, and he again asked if she had talked with Wojtowicz at any time about picking him up. (*Id.*) After the call, Sergeant Haydon told Wojtowicz that Connie had told him she could not leave work, she had not talked to Wojtowicz about picking him up, and she had planned on seeing Wojtowicz after work. (*Id.*)

Sergeant Haydon placed Wojtowicz in the patrol vehicle and waited at the scene until someone picked up the dog. (State's Ex. 1 at 27:30-35:00; 8/15/21 Tr. at 193-98.) While they were waiting, Sergeant Haydon read Wojtowicz the implied consent advisory form.⁷ (*Id.*) Sergeant Haydon asked Wojtowicz if he would provide a breath sample for the Intoxilyzer 8000. (*Id.*) Wojtowicz refused. (*Id.*) Sergeant Haydon informed Wojtowicz that he would be requesting a telephonic warrant for a blood sample. (*Id.*)

Due to the scattered nature of the conversation, Sergeant Haydon discussed the security of Wojtowicz's vehicle with him multiple times. (State's Ex. 1 at

⁶ Connie's responses are not included in the audio recording, but she testified at trial as detailed below. (State's Ex. 1 at 21:30-23:35; 8/16/21 Tr. at 74-89.)

⁷ The district court admitted the implied consent advisory form as State's Ex. 2. (8/15/21 Tr. at 193-95; Doc. EXHIBITS at 13.)

23:35-24:00, 25:40-26:15, 31:20-31:50, 34:50-35:15; 8/15/21 Tr. at 196-97.)

Wojtowicz indicated that he wanted the windows rolled up and the vehicle unlocked. (*Id.*) Sergeant Haydon told Wojtowicz that he had an obligation to secure the vehicle. (*Id.*) Prior to leaving the parking lot, Sergeant Haydon rolled up the windows of Wojtowicz's vehicle, locked it, and retrieved Wojtowicz's cell phone and keys. (State's Ex. 1 at 35:00-36:05; 8/15/21 Tr. at 196-97.) The vehicle had power locks and windows, so Sergeant Haydon used the keys to turn on the auxiliary power so he could roll up the windows and lock Wojtowicz's vehicle. (*Id.*)

II. The warrant for a blood sample

Sergeant Haydon immediately requested a telephonic search warrant for a sample of Wojtowicz's blood, which the district court granted. (8/15/21 Tr. at 197-98; Doc. EXHIBITS at 1-11.)⁸ At approximately 2:20 p.m., Sergeant Haydon transported Wojtowicz to the nearby Big Sky Medical Center, where medical personnel drew two vials of Wojtowicz's blood. (8/15/21 Tr. at 198-203; 8/16/21 Tr. at 8-21.) After Sergeant Haydon obtained the samples, he transported Wojtowicz to the Gallatin County Detention Center and delivered the samples to the sheriff's evidence technician. (8/15/21 Tr. at 202-03, 205.)

⁸ The search warrant documents were admitted as exhibits during the pretrial evidentiary hearing. (Doc. 65.)

III. Procedural history

On May 26, 2021, the State charged Wojtowicz with felony DUI, in violation of Mont. Code Ann. § 61-8-401 (2019),⁹ based on his actual physical control of the vehicle. (Docs. 1-3.)

A. Pretrial motions

On March 25, 2022, Wojtowicz filed five pretrial motions. (Docs. 45-54.) Wojtowicz moved to suppress: (1) statements based on his *Miranda* rights; (2) evidence regarding the location of his keys during the encounter and the State's acquisition of a business receipt based on his rights to privacy and to be free of unreasonable searches and seizures; (3) evidence obtained from the blood test warrant; and (4) evidence obtained from the FSTs. (Docs. 45-48, 50-52, 54.) Wojtowicz also filed a motion in limine to prohibit the introduction of evidence related to his criminal history of DUI offenses. (Docs. 49, 53.) After an evidentiary hearing, the district court granted Wojtowicz's motion in limine and denied his motions to suppress. (Docs. 64-65, 82.)¹⁰

⁹ This statute has been repealed. 2021 Mont. Laws, ch. 498, § 2. The DUI offenses have been recodified in Mont. Code Ann. §§ 61-8-1001, et seq., but the new DUI statute, Mont. Code Ann. § 61-8-1002, did not take effect until January 1, 2022. *Id.*

¹⁰ Wojtowicz did not provide a transcript of the May 24, 2022 evidentiary hearing on his pretrial motions. (Docs. 64-65.)

On appeal, Wojtowicz challenges the district court’s denial of his second motion to suppress regarding his keys and the receipt. (Br. at 18-23.) To support its denial of this motion, the district court reasoned that the keys were in plain view of Sergeant Haydon during the encounter, and he later obtained possession of the keys to secure Wojtowicz’s vehicle as a gratuitous bailee. (Doc. 82 at 17-20.) The district court found Wojtowicz did not have a reasonable expectation of privacy in the receipt that the State obtained from the bar. (*Id.*)

B. The trial evidence regarding Wojtowicz’s blood test results

The district court began Wojtowicz’s jury trial on August 15, 2022. (Docs. 98.1, 100.) The State offered testimony from three witnesses who addressed Wojtowicz’s blood samples: Sergeant Haydon, David Singh (Singh), the lab technician at the Big Sky Medical Center who took Wojtowicz’s blood samples, and April Mitchell (Mitchell), the forensic toxicologist with the Montana State Crime Lab (Crime Lab) who tested Wojtowicz’s blood samples for alcohol concentration. (8/15/21 Tr. at 165-232; 8/16/21 Tr. at 7-51.)

Sergeant Haydon testified that the Crime Lab provided the sheriff’s office with the materials necessary to take Wojtowicz’s blood samples in a sealed kit. (8/15/21 Tr. at 199-200.) Sergeant Haydon brought the sealed kit to Singh at the Big Sky Medical Center and stayed with Singh while he used the materials to obtain Wojtowicz’s blood samples. (*Id.* at 198-202; 8/16/21 Tr. at 11-17.) Singh

testified that he had examined the vials and they looked to be in good condition. (8/16/21 Tr. at 11.) Singh drew two vials of Wojtowicz's blood, packaged the vials in bubble wrap, and sealed it with evidence tape. (8/15/21 Tr. at 198-203; 8/16/21 Tr. at 8-21.) Singh and Sergeant Haydon placed the sealed package in a box and sealed the box with evidence tape so it could be securely mailed to the Crime Lab. (8/15/21 Tr. at 202; 8/16/21 Tr. at 13-14.) Singh testified that nothing happened during this process that could have contaminated the blood samples. (8/16/21 Tr. at 15-17.) Later, the sheriff's office mailed the samples to the Crime Lab, and Sergeant Haydon requested that the samples be tested for alcohol concentration. (8/15/21 Tr. at 202-05; 8/16/21 Tr. at 29-30.)

On May 28, 2021, Mitchell tested the blood samples at the Crime Lab. (8/16/21 Tr. at 33.) Mitchell testified that the two vials of Wojtowicz's blood were in good condition when she received them and were suitable for accurate testing. (*Id.* at 29-32.) Mitchell testified extensively about her qualifications, her experience, and the testing equipment and processes that the Crime Lab uses to receive evidence and test blood samples for alcohol concentration. (*Id.* at 23-29, 45-47, 50-51.) Mitchell testified that the test results of Wojtowicz's blood samples were reliable and showed "0.274, plus or minus 0.020 grams of ethanol per 100 milliliters of whole blood." (*Id.* at 40-44, 51.)

The district court admitted the test results and the toxicology report that Mitchell prepared as the State's Trial Exhibit 3. (*Id.* at 34-41; Doc. EXHIBITS at 14.) Wojtowicz objected to Mitchell's testimony about the test results and the toxicology report based on a lack of foundation. (8/16/21 Tr. at 34-41.) The district court initially overruled the objection but allowed Wojtowicz to voir dire Mitchell. (*Id.* at 35-37.) Wojtowicz questioned Mitchell about the vacuum capability of the vials and established that Mitchell did not know the expiration date of the vial seals. (*Id.* at 35-37.) Mitchell explained, however, that the vacuum capability of the tubes did not undermine the reliability of the sample unless the volume of blood was insufficient for testing. (*Id.* at 35-38.) She said the volumes of Wojtowicz's samples were sufficient for accurate testing and reliable results. (*Id.*)

The district court overruled the objection and instructed the State to proceed with its questioning. (*Id.* at 38.) Wojtowicz objected again, and the district court allowed him to continue his voir dire examination. (*Id.* at 39.) Wojtowicz asked a few more questions about the hypothetical consequences of an expired vacuum seal on the vials. (*Id.* at 39-40.) Mitchell reiterated that an expired vacuum seal would not destroy a sample but might cause the vial not to act as a vacuum for the blood draw, which could impact sample volume. (*Id.*) Mitchell acknowledged that she did not know every single thing that could go wrong if a vacuum seal failed. (*Id.*)

The State renewed its position and argued there was sufficient foundation for the test results because Mitchell “testified that the blood sample was collected. It was received there. There’s nothing unusual about how it was received, and then her opinion the test results were reliable.” (*Id.* at 40.) The district court overruled Wojtowicz’s objection and said the “testimony would go to the weight, that’s for the jury to consider.” (*Id.*)

C. Wojtowicz’s motion to dismiss

At the conclusion of the State’s case, Wojtowicz moved to dismiss the case and argued the State did not prove that he was in actual physical control of the vehicle. (8/16/21 Tr. at 56.) The district court denied the motion. (*Id.* at 56-57.)

D. Connie Kellogg’s testimony

Connie Kellogg (Kellogg) testified that Wojtowicz, her boyfriend, dropped her off at work between 8 and 9 a.m., on May 7, 2021. (*Id.* at 75-76.) Kellogg said that Wojtowicz had not had anything to drink at that time and he did not appear intoxicated. (*Id.* at 81.) Kellogg acknowledged that she did not know what Wojtowicz did after he had dropped her off. (*Id.* at 83.)

Kellogg worked at the Conoco gas station on the corner of the entrance road to Big Sky. (*Id.* at 77.) Kellogg acknowledged that she did not have a car there on May 7, 2021, but she said that she had planned to get a ride up to the town center in Big Sky after work to meet Wojtowicz, and she could have driven him home.

(*Id.* at 78-79, 83.) Kellogg said she had planned to be done working that day at 2 p.m., not 4 p.m., as Wojtowicz had told Sergeant Haydon. (*Id.* at 81.) Kellogg testified that she had not talked to Wojtowicz prior to the call from Sergeant Haydon or received any messages from Wojtowicz to determine where they were going to meet. (*Id.* at 85, 88.)

Kellogg recalled getting cell phone calls on the day of Wojtowicz's arrest that she did not answer because she was working. (*Id.* at 77, 84.) On direct examination, Kellogg testified that she had only received two phone calls that were both from Wojtowicz's phone. (*Id.* at 77.) Kellogg added, "So the cop was calling me from [Wojtowicz]'s phone." (*Id.* at 78.) On cross-examination, Kellogg acknowledged that she had missed calls from a number she did not recognize. (*Id.* at 84-85.) Kellogg recalled getting a call from Sergeant Haydon on the gas station phone. (*Id.* at 79-80, 84.) She testified on direct examination that she did not recall whether Sergeant Haydon had asked her if she had a plan to pick up Wojtowicz that day. (*Id.* at 79-80.) On cross-examination, Kellogg said, "I think I said I wasn't picking him up at that time yet." (*Id.* at 85.) On redirect, Kellogg said Sergeant Haydon's question was unclear. (*Id.* at 87-88.)

E. Wojtowicz's testimony

Wojtowicz testified. (*Id.* at 90-127.) Wojtowicz said that on the morning of May 7, 2021, he drove Kellogg to work, drove to a trailhead to take his dog for a

walk, drove to the hardware store, and drove to the Big Sky town center. (*Id.* at 93-95.) At around 11:30 a.m., Wojtowicz drove to a bar and restaurant called the Rocks. (*Id.* at 95-96.) Wojtowicz said he left his phone, his keys, and his dog in his vehicle when he went into the bar, and he left the vehicle unlocked with the windows down. (*Id.*)

While Wojtowicz was in the bar, several people came in and out. (*Id.* at 96-97.) He testified that he stayed at the bar for “an hour or so for sure.” (*Id.* at 98.) He drank a glass of wine and probably had three or four shots because various people were buying rounds for everyone. (*Id.* at 97-98.) He said he did not remember exactly how many shots he had, and that he was “wasted” when he left the bar. (*Id.* at 119.) Wojtowicz left the bar around 12:51 p.m. and went straight to his vehicle. (*Id.* at 106-07.) He said he left the bar because he could not drink anymore, he needed to check on his dog, and he wanted to get his cell phone to call Kellogg. (*Id.* at 98.)

Wojtowicz said he had trouble walking when he went outside because he had broken his leg six or seven years before, and it swelled up and got sore at times. (*Id.* at 99-100, 111-12.) He remembered falling down when he stepped off the curb, but he did not remember crawling across the parking lot. (*Id.* at 99-101.) He said he may have crawled to get himself back up, but he was standing when he reached his vehicle. (*Id.* at 101.) Wojtowicz said he got in the driver’s seat of his

vehicle, retrieved his phone from the center console, and called Kellogg. (*Id.* at 101-02.) Wojtowicz said he wanted to “tell [Kellogg] where I was and that I would not be able to drive and pick her up, and to come get me.” (*Id.* at 101.) Kellogg did not answer Wojtowicz’s call, and he did not leave a message. (*Id.* at 101-02.)

After his call to Kellogg, Wojtowicz remained in the driver’s seat of his vehicle and lit a cigarette. (*Id.* at 102.) Wojtowicz’s keys were in the center console where his phone had been, and he was not wearing his seatbelt. (*Id.* at 102-03.) Wojtowicz said he always wore his seatbelt when he drove. (*Id.* at 126.) He did not remember if he put the keys in the ignition. (*Id.* at 103, 105.) He did not recall turning on the radio, but he acknowledged that the audio recording showed he had told Sergeant Haydon he was listening to the radio when Sergeant Haydon contacted him. (*Id.*) Wojtowicz said his vehicle did not require the key to be in the ignition to play music. (*Id.* at 105.)

Wojtowicz testified that he had been sitting in his car for about five minutes when Sergeant Haydon arrived. (*Id.* at 105.) He said all the windows of the vehicle were down and his door was slightly open—“So I was kind of hanging on, like, my door.” (*Id.* at 103-04.) Wojtowicz said that Sergeant Haydon approached quickly and pushed his door closed. (*Id.* at 103-05.) Sergeant Haydon testified on rebuttal that he did not believe the door was open when he approached Wojtowicz’s vehicle, he did not push the door closed, and it did not appear that Wojtowicz was

attempting to get out of the vehicle. (*Id.* at 131, 134.) Sergeant Haydon said he was concerned based on the report, but he did not run to Wojtowicz's vehicle. (*Id.* at 132-33.) He said, "I engaged in a conversation, made consensual contact in a friendly manner." (*Id.* at 131.)

When asked what Sergeant Haydon said to him when he approached, Wojtowicz responded: "I don't really recall. I don't know if he asked me what I was doing or something along those lines. I told him right from the get go, I said that I'm wasted and I am not driving. And that's when we got into [sic] about the phone calls." (*Id.* at 107.) Wojtowicz testified that Sergeant Haydon did not give him a chance to explain anything. (*Id.* at 107.) Wojtowicz said he could have told Sergeant Haydon that he met Kellogg every day after work, but they had not finalized their plans yet that day. (*Id.* at 107-08.) Wojtowicz later acknowledged that Sergeant Haydon was patient with him during their interaction. (*Id.* at 120.)

Wojtowicz said he had not intended to go anywhere, and he probably would have taken his dog to a grassy area near his car and stayed there while he waited for Kellogg. (*Id.* at 108-09, 111, 123.) But Wojtowicz acknowledged on cross-examination that he had not taken his dog to the grassy area, and he was sitting in the driver's seat of his vehicle when Sergeant Haydon contacted him. (*Id.* at 123.) Wojtowicz also acknowledged that he had had everything necessary to drive his vehicle. (*Id.* at 122-24.) He testified that he was able to get to his car and

open the door, he was sitting in the driver's seat when Sergeant Haydon contacted him, the vehicle was operable, he had the keys in the center console, and he had been driving the vehicle about an hour and a half before. (*Id.*)

F. The verdict and sentence

On August 16, 2022, the jury convicted Wojtowicz of felony DUI. (Docs. 98.1, 100, 106-07; 8/16/21 Tr. at 208-09.)

On November 9, 2022, the district court committed Wojtowicz to the Department of Corrections for three years, all suspended. (Docs. 116, 118.) The district court imposed a \$5,000 fine and various conditions of his suspended sentence, including the completion of treatment court. (*Id.*)

SUMMARY OF THE ARGUMENT

The district court correctly denied Wojtowicz's motion to suppress. Wojtowicz provides nothing to undermine the district court's conclusion that he did not have a reasonable expectation of privacy in the business receipt, and Sergeant Haydon's question, "where are your keys?" did not violate Wojtowicz's constitutional rights.

Wojtowicz's rights were not even implicated, because Wojtowicz had not been seized. Sergeant Haydon contacted Wojtowicz on foot in a public parking lot and took no coercive action to restrain his liberty. Sergeant Haydon asked

Wojtowicz where his keys were within one minute of contacting him, and Wojtowicz showed the keys without objection. Even if this Court disagrees, any seizure did not violate Wojtowicz's rights because Sergeant Haydon had particularized suspicion to investigate for DUI. Sergeant Haydon responded to a caller who reported seeing a man crawl to his vehicle outside a bar. Five minutes later, Sergeant Haydon contacted Wojtowicz, who was sitting in the driver's seat of the described vehicle, and immediately observed various signs that Wojtowicz was intoxicated. Sergeant Haydon's question about Wojtowicz's keys was not an unlawful search because it did not exceed the scope or duration of the stop made pursuant to the particularized suspicion exception to the warrant and probable cause requirement.

The district court correctly admitted the results of Wojtowicz's blood test over Wojtowicz's objection for lack of foundation. The State provided evidence showing that the State followed all the statutory and regulatory procedures necessary, and the witnesses explained that the vials were in good condition, the samples were sufficient for reliable testing, and nothing happened during the collection or testing process that would compromise the sample or results.

This Court should not reverse the jury's guilty verdict because the evidence, viewed in a light most favorable to the State, shows that any rational trier of fact could have found beyond a reasonable doubt that Wojtowicz was in actual physical

control of his vehicle. The State's evidence showed Wojtowicz was in the driver's seat of an operable vehicle, he had turned the radio on and rolled down the windows, the keys were in the center console, he had crawled to his vehicle five minutes before, he had driven around town all morning, and he had parked the vehicle in a public parking lot. The evidence sufficiently supported the jury's verdict because Wojtowicz was in a position to cause or control the vehicle's movement in some manner or direction.

ARGUMENT

I. The district court correctly denied Wojtowicz's motion to suppress.

A. Standard of review

This Court reviews "a district court's ruling on a motion to suppress evidence to determine whether the court's factual findings are clearly erroneous and whether the court's interpretation and application of the law are correct."

State v. Questo, 2019 MT 112, ¶ 9, 395 Mont. 446, 443 P.3d 401.

B. Sergeant Haydon’s question about the location of Wojtowicz’s keys did not violate the constitution because Wojtowicz had not been seized and Sergeant Haydon had particularized suspicion to investigate for DUI.

Wojtowicz asserts the State committed an unlawful warrantless search when “The officer demanded he give over the key location.” (Br. at 7, 23.)¹¹ Based on his limited analysis,¹² it appears Wojtowicz’s only challenge is to the interaction he had with Sergeant Haydon at approximately one minute after the initial contact. (See State’s Ex. 1 at 00:45-00:55 (first contact).) Wojtowicz told Sergeant Haydon that he was not driving. (State’s Ex. 1 at 01:30-01:45.) Sergeant Haydon said, “I mean, you’re sitting in the driver’s seat, where are your keys?” (*Id.* at 01:40-01:50.) Wojtowicz said, “Uh, down here somewhere.” (*Id.*) Wojtowicz readily picked up the keys from the center console and showed them to Sergeant Haydon. (*Id.* at 01:40-02:10; 8/15/21 Tr. at 175, 217-18, 229.)

Wojtowicz provides no authority to support his conclusory argument that this was an unlawful search. At the time Sergeant Haydon asked the question,

¹¹ In his statement of facts, Wojtowicz asserts “The officer conducted a search of Mr. Wojtowicz’ vehicle without a search warrant when he asked Mr. Wojtowicz to ‘show him where the keys to the vehicle were located,’ as they were not in the ignition.” (Br. at 7.) This does not quote Sergeant Haydon. It appears that this quotes an uncited factual assertion in Wojtowicz’s motion to suppress. (See Doc. 46 at 2:12-14.)

¹² See *Johnston v. Palmer*, 2007 MT 99, ¶ 30, 337 Mont. 101, 158 P.3d 998 (“[I]t is not this Court’s obligation to conduct legal research on behalf of a party, to guess at his or her precise position, or to develop legal analysis that may lend support to that position.”).

Wojtowicz had not been seized, which is necessary to implicate his constitutional protections. *See Questo*, ¶¶ 11-19. Even if Wojtowicz’s constitutional rights were implicated, Sergeant Haydon had particularized suspicion for a temporary investigative stop for DUI. *See* Mont. Code Ann. § 46-5-401(1); *Brown v. State*, 2009 MT 64, ¶ 20, 349 Mont. 408, 203 P.3d 842. A temporary investigative stop is a recognized exception to constitutional warrant and probable cause requirements, which allowed Sergeant Haydon to ask questions reasonably related to the investigation. *State v. Noli*, 2023 MT 84, ¶ 30, 412 Mont. 170, 529 P.3d 813; *State v. Elison*, 2000 MT 288, ¶¶ 32-33, 302 Mont. 228, 14 P.3d 456. The question was not an unlawful search. *See id.*

1. Sergeant Haydon’s brief questioning of Wojtowicz was not a seizure.

The Fourth Amendment of the United States Constitution protects citizens from unreasonable searches and seizures by government officials. Montanans are afforded broader protection from unreasonable searches and seizures under the right to privacy in Mont. Const. art. II, § 10. *Questo*, ¶ 12. However, these constitutional protections do not exist to prevent all interaction between citizens and police. *See id.* ¶ 17 (“police encounters may not constitute ‘seizures’ or investigative stops, despite an officer’s inclination to investigate”); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (“Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons.”). The “central inquiry . . . is

the reasonableness under all the circumstances of a particular governmental invasion of a citizen's personal security." *Questo*, ¶ 13 (quoting *State v. Wilkins*, 2009 MT 99, ¶ 8, 350 Mont. 96, 205 P.3d 795).

Police officers enjoy the liberty, possessed by every citizen, to address questions to other persons. *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring). The United States Supreme Court has "held repeatedly" that "mere police questioning does not constitute a seizure" for purposes of the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Id.* A seizure occurs "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Questo*, ¶ 13 (internal quotations omitted). A person has been "seized" if a reasonable person "would have believed that he was not free to leave." *Id.* (quoting *State v. Ballinger*, 2016 MT 30, ¶ 18, 382 Mont. 193, 366 P.3d 668).

Sergeant Haydon did not initiate a traffic stop of Wojtowicz's vehicle, so this Court "must first determine whether a seizure occurred that required particularized suspicion." *Questo*, ¶ 13. To make this determination, a court must consider "all the

circumstances” surrounding the police encounter. *Id.* ¶ 17 (quoting *State v. Strom*, 2014 MT 234, ¶ 10, 376 Mont. 277, 333 P.3d 218). Factors indicating that a person has been seized may include those cited by the United States Supreme Court in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980): “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *Questo*, ¶ 13 (internal quotations omitted). Application of these factors “var[ies] depending on the setting in which the conduct occurs.” *Id.* (quoting *Strom*, ¶ 10).

In *Questo*, ¶¶ 13-19, this Court applied the *Mendenhall* factors to similar circumstances and held no seizure had occurred. The officer in *Questo*, ¶¶ 2-4, contacted the defendant pursuant to a tip from employees at a Boys and Girls Club, who said the defendant smelled of alcohol when he picked up his children. The officer was familiar with the defendant and located him parked at a fuel pump in a public location. *Id.* ¶ 3. The officer parked his patrol vehicle a significant distance from the defendant’s vehicle, did not activate his lights or siren, approached the defendant alone and on foot, did not draw his weapon, and did not use harsh language or a harsh tone. *Id.* The officer briefly questioned the defendant. *Id.* ¶ 4. The defendant denied consuming alcohol that day but agreed to perform FSTs and

provide a preliminary breath test. *Id.* ¶¶ 4-5. The test results showed signs that the defendant was impaired. *Id.* ¶ 5.

This Court affirmed the district court's denial of the defendant's motion to suppress. *Id.* ¶¶ 11-19. This Court explained that the officer's approach to the defendant "was a routine police encounter that did not require particularized suspicion." *Id.* ¶ 19. The officer's investigative motive based on the tip was irrelevant because the officer did nothing to restrain the defendant's liberty when he approached and questioned him. *Id.* ¶ 18. The officer thereafter acquired particularized suspicion for further investigation upon the defendant's voluntary participation in his questioning and testing. *Id.* ¶ 19.

Like the circumstances in *Questo*, ¶ 15, Sergeant Haydon did not restrain Wojtowicz's liberty by approaching and questioning him. At no point prior to Wojtowicz showing his keys did Sergeant Haydon display any coercive behavior that would meet the *Mendenhall* factors. *See id.* ¶ 13. Sergeant Haydon contacted Wojtowicz in a public parking lot. He parked his patrol vehicle near the curb without blocking Wojtowicz's vehicle. He did not activate his lights or siren. He was not in uniform. He approached Wojtowicz alone and on foot. He did not draw his weapon. He did not use harsh language or a harsh tone, and Wojtowicz admitted during trial that Sergeant Haydon was patient with him throughout the encounter.

Wojtowicz's limited challenge to the location of his keys also limits the coercive nature of the circumstances. Wojtowicz showed Sergeant Haydon his keys within the first minute of their encounter.¹³ The audio recording only supports the conclusion that Wojtowicz's participation in this brief interaction was voluntary. Sergeant Haydon began by saying, "Hello. How are you sir?" (State's Ex. 1 at 00:45-00:55.) Wojtowicz did not hesitate to respond to Sergeant Haydon, and he answered Sergeant Haydon's simple follow-up questions without objection. (*Id.* at 00:50-2:10.) Within one minute, Sergeant Haydon asked Wojtowicz, "where are your keys?" (*Id.* at 01:40-01:50.) Wojtowicz said, "Uh, down here somewhere," he picked up the keys from his center console, and he showed them to Sergeant Haydon. (*Id.* at 01:40-02:10; 8/15/21 Tr. at 175, 217-18, 229.)

Like this Court's conclusion in *Questo*, ¶¶ 18-19, these circumstances show a routine police encounter that did not require particularized suspicion. It was not a seizure because Sergeant Haydon did not restrain Wojtowicz's liberty. *See id.* ¶¶ 11-19. This conclusion is consistent with various other cases where this Court has applied the *Mendenhall* factors to hold similarly. *See, e.g., State v. Dupree*, 2015 MT 103, ¶¶ 4, 15, 378 Mont. 499, 346 P.3d 1114 (no seizure when two

¹³ The second officer did not approach Wojtowicz's vehicle until after Wojtowicz showed Sergeant Haydon his keys. But the second officer's conduct was not coercive based on the *Mendenhall* factors either—he parked his patrol vehicle without blocking Wojtowicz's vehicle, he approached on foot, and he said little throughout the interaction.

officers approached a woman at a train station, informed her of a tip regarding her potential drug activity, and obtained consent to search); *Wilkins*, ¶¶ 3, 12, 14 (no seizure when an officer approached a car parked on a dark remote street late at night in cold weather); *State v. Wagner*, 2003 MT 120, ¶¶ 3, 31, 315 Mont. 498, 68 P.3d 840 (no seizure when an officer asked a man who had stopped at a gas station to accompany him outside for questioning).

This Court should affirm the district court's denial of Wojtowicz's motion to suppress because his brief conversation with Sergeant Haydon was not a seizure and did not implicate his constitutional rights.

2. Even if a seizure occurred, Sergeant Haydon had particularized suspicion to support his question regarding the location of Wojtowicz's keys.

A temporary investigative stop is an exception to constitutional warrant and probable cause requirements. *Noli*, ¶ 30. Montana Code Annotated § 46-5-401(1) requires law enforcement officers, before effecting a "stop," to have "particularized suspicion" that a person "has committed, is committing, or is about to commit an offense." To have a particularized suspicion to justify a temporary seizure, an officer must have: "(1) objective data and articulable facts from which he or she can make certain reasonable inferences; and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense." *Brown*, ¶ 20.

Whether particularized suspicion supports an investigative stop is a question of fact that this Court evaluates in the context of the totality of the circumstances.

State v. McMaster, 2008 MT 294, ¶ 13, 345 Mont. 408, 191 P.3d 443. This Court considers the quantity or content of the information available to the officer and the quality or degree of reliability of that information. *Id.* “[A] peace officer’s experience and training may be a factor in determining what sort of reasonable inferences he or she is entitled to make from his or her objective observations.”

Brown, ¶ 20.

The Court does not require “a checklist of factors [to] be satisfied before an officer may justify an investigative stop; rather, the question is whether the officer can point to ‘specific and articulable facts which, taken together with reasonable inferences from those facts, reasonably warrant the intrusion.’” *State v. Rodriguez*, 2011 MT 36, ¶ 18, 359 Mont. 281, 248 P.3d 850. “The particularized suspicion standard does not require that an officer be certain, or even ultimately correct, that a person is engaged in criminal activity.” *State v. Hoover*, 2017 MT 236, ¶ 18, 388 Mont. 533, 402 P.3d 1224 (citing *Illinois v. Wardlow*, 528 U.S. 119, 123-34 (2000); *Terry*, 392 U.S. at 27).

An officer may rely on information provided by a citizen informant in forming the basis of a particularized suspicion. *State v. Pratt*, 286 Mont. 156, 162, 951 P.2d 37, 41 (1997). Information provided by a citizen informant is

presumptively reliable, *State v. Sharp*, 217 Mont. 40, 46, 701 P.2d 959, 962 (1985), unless it is completely lacking in indicia of reliability, *Pratt*, 286 Mont. at 164-65, 951 P.2d at 42-43. This Court considers three factors to determine the reliability of an informant's report: (1) whether the informant identified himself; (2) whether the report was based on the informant's personal observations; and (3) whether the officer corroborated the information. *Id.*

Wojtowicz does not challenge the initial contact,¹⁴ but Sergeant Haydon had particularized suspicion to support a DUI investigation as soon as he arrived in the parking lot. Based on Barrick's report of his personal observations, Sergeant Haydon had been informed that a man had exited a business complex that included at least one bar, stumbled off the curb, fallen to the ground, crawled across the public parking lot, and entered a green Ford Escape. As soon as Sergeant Haydon arrived, he confirmed facts provided by Barrick. He found a man sitting in the driver's seat of a green Ford Escape that was parked in the described location. This met all three of the factors in *Pratt*, 286 Mont. at 165, 951 P.2d at 42-43, and provided particularized suspicion for a DUI investigation.

¹⁴ At the very least, Sergeant Haydon had an affirmative duty to contact Wojtowicz and ensure that he was not in need of help. *See City of Missoula v. Metz*, 2019 MT 264, ¶¶ 15-16, 397 Mont. 467, 451 P.3d 530 (community caretaker).

Even if this Court determines the report combined with Sergeant Haydon’s observations did not provide sufficient particularized suspicion to investigate DUI, Sergeant Haydon obtained it shortly after he contacted Wojtowicz. *See* Mont. Code Ann. § 46-5-401(1); *Brown*, ¶ 20. Sergeant Haydon almost immediately recognized that Wojtowicz’s speech was slurred, and he could smell the odor of alcohol on Wojtowicz’s breath. The totality of the circumstances allowed Sergeant Haydon to ask questions “reasonably related to the reason for the stop and designed to dispel his particularized suspicion.” *Elison*, ¶¶ 32-33. This included asking Wojtowicz where his keys were after Wojtowicz denied an intention to drive because it was reasonably related to whether Wojtowicz had committed, was committing, or was about to commit DUI. *See id.*; Mont. Code Ann. § 46-5-401(1).

Wojtowicz’s representation that Sergeant Haydon “demanded he give over the key location” is inconsistent with the record. (Br. at 23.) Sergeant Haydon simply asked, “where are your keys?” (State’s Ex. 1 at 01:40-01:50.) Wojtowicz could have refused to answer the question. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (a suspect detained during a *Terry* stop “is not obliged to respond” to questions). Instead, he showed the keys to Sergeant Haydon. The question was within the scope of the DUI investigation, and it did not unreasonably extend the duration of the stop. *See Elison*, ¶¶ 32-33; *State v. Laster*, 2021 MT 269, ¶ 13, 406 Mont. 60, 497 P.3d 224 (“The duration and scope of an investigative stop must

be carefully limited to its ‘underlying justification’”). Wojtowicz’s response did not convert the encounter into an unlawful search. Sergeant Haydon performed a lawful investigatory stop for DUI, which is an exception to constitutional warrant and probable cause requirements. *See Noli*, ¶ 30.

The district court found Wojtowicz’s keys were in plain view, which they were when Wojtowicz showed them to Sergeant Haydon. But this ignores—like Wojtowicz’s argument—that Wojtowicz produced his keys in response to Sergeant Haydon’s permissible question. This Court should affirm the district court’s denial of Wojtowicz’s motion to suppress because he was not seized and Sergeant Haydon had particularized suspicion to support any question reasonably related to his investigatory stop for DUI. *See State v. Marcial*, 2013 MT 242, ¶ 10, 371 Mont. 348, 308 P.3d 69 (This Court “will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason.”).

C. Wojtowicz has provided nothing to show he had a protected interest in the business receipt.

Wojtowicz provides no authority or analysis to support his argument that his constitutional rights were infringed by a subsequent investigation that produced a receipt from a business. *See Johnston*, ¶ 30 (this Court is not obligated to develop a legal argument to support a party’s position). The district court correctly found that Wojtowicz had no expectation of privacy in the receipt and correctly denied his motion to suppress. *See State v. Staker*, 2021 MT 151, ¶ 11, 404 Mont. 307,

489 P.3d 489 (“Absent a reasonable expectation of privacy, there is no constitutional intrusion, search, or seizure . . .”).

II. The district court correctly admitted the results of Wojtowicz’s blood test over his objection for lack of foundation.

A. Standard of review

This Court reviews “a district court’s evidentiary decisions for an abuse of discretion.” *State v. Weber*, 2016 MT 138, ¶ 11, 383 Mont. 506, 373 P.3d 26. “Whether a proper foundation has been laid for the introduction of exhibits into evidence rests with the trial court and its determination will not be overturned on appeal unless there is a clear abuse of discretion.” *Id.*

B. The record shows the State followed the statutory and regulatory procedures necessary to admit Wojtowicz’s blood test results.

Evidence of alcohol in a person’s blood, including test results in testimony and reports, is admissible in a criminal DUI trial. Mont. Code Ann.

§§ 61-8-404(1)(a), -404(1)(b)(ii) (2019).¹⁵ To establish the foundational requirements for admission, the State must show the statutory and regulatory procedures were adequately followed as provided in Mont. Code Ann.

§§ 61-8-404(1)(a), -404(1)(b)(ii), -405(1), and Mont. Admin. R. 23.4.220. *State ex*

¹⁵ The State cites the 2019 version of the applicable DUI statutes unless otherwise noted.

rel. McGrath v. Twenty-First Judicial Dist., 2001 MT 305, ¶ 17, 307 Mont. 491, 38 P.3d 820; *State v. Incashola*, 1998 MT 184, ¶ 8, 289 Mont. 399, 961 P.2d 745 (A defendant charged with DUI “is entitled to the procedural safeguards contained in the [Administrative Rules of Montana].”).

Wojtowicz’s only objection at trial was based on the unknown expiration date of the vacuum seals on the vials used to collect his blood sample. (Br. at 17.) He does not, however, identify how this failed to comply with Mont. Admin. R. 23.4.220. Wojtowicz has not provided any statute or administrative rule that requires a witness to know the expiration date of the vacuum seals on the testing vials, and the testimony provided no indication that the vacuum seals were defective.

The State provided testimony that met the statutory and regulatory requirements to introduce the blood test results. *See* Mont. Code Ann. §§ 61-8-404(1)(a), -404(1)(b)(ii), -405(1); Mont. Admin. R. 23.4.220. The vials used were included in the collection kit provided by the Crime Lab. Both Singh and Mitchell testified that the vials appeared to be in good condition and said that nothing happened during the retrieval or testing procedures that would have compromised the sample or results. Mitchell testified that an unknown or unidentified defect in a vacuum seal may result in an insufficient amount of blood, but she also testified that the vials contained a sufficient volume for testing. Mitchell

specified that she did not believe any defect in the vacuum seals compromised the reliability of the results. This testimony provided adequate foundation for the admission of the test results and shows that the district court did not clearly abuse its discretion in overruling Wojtowicz's objection. *See Weber*, ¶ 11.

In its oral ruling, the district court said, "The testimony would go to to [sic] the weight, that's for the jury to consider." (8/16/21 Tr. at 40.) Wojtowicz argues that the district court erred by not providing a cautionary or limiting instruction to explain this ruling to the jury. Wojtowicz did not request an instruction below. He has not specified on appeal what the instruction would have entailed or why it was legally necessary. Wojtowicz is not entitled to any relief based on the absence of a jury instruction that he did not request during trial or explain on appeal. *See State v. English*, 2006 MT 177, ¶ 71, 333 Mont. 23, 140 P.3d 454 (this Court has long held that it "will not overturn a district court for an error it did not have the opportunity to address"); *Johnston*, ¶ 30 (this Court is not obligated to guess at a party's position or develop a legal argument to support it).

III. The State presented sufficient evidence to show that Wojtowicz had actual physical control of his vehicle.

A. Standard of review

This Court reviews "the sufficiency of evidence to support a guilty verdict in a criminal case to determine whether, after reviewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Hamilton*, 2002 MT 263, ¶ 10, 312 Mont. 249, 59 P.3d 387.

B. Viewing the evidence in a light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Wojtowicz was in actual physical control of his vehicle.

To convict Wojtowicz of DUI, the State had to prove that he was in actual physical control of a vehicle.¹⁶ Mont. Code Ann. § 61-8-401. “A person has ‘actual physical control’ of a vehicle when he or she has existing or present bodily restraint, directing influence, domination or regulation of a vehicle.” *State v. Hudson*, 2005 MT 142, ¶ 13, 327 Mont. 286, 114 P.3d 210 (citation and internal quotation marks omitted). To determine whether an individual had actual physical control of a vehicle, the factfinder may consider various factors under a totality-of-the-circumstances test. *State v. Sommers*, 2014 MT 315, ¶ 35, 377 Mont. 203, 339 P.3d 65 (including some appropriate factors to consider).¹⁷

Here, the evidence viewed in a light most favorable to the State supported the jury’s conclusion that Wojtowicz was in actual physical control of his vehicle.

¹⁶ Wojtowicz does not challenge the sufficiency of the evidence proving that he was under the influence of alcohol and his vehicle was on the ways of the State open to the public, *see* Mont. Code Ann. § 61-8-401. (Br. at 23-33.)

¹⁷ The district court included a jury instruction that listed the factors this Court specified in *Sommers*, ¶ 35. (Doc. 104 at Instr. 12.)

See Hamilton, ¶ 10. The State presented evidence showing that Wojtowicz was sitting in the driver's seat, the vehicle was operable, he had turned the radio on, the windows were down, the keys were readily available to him in the center console, he had crawled to his vehicle and entered it five minutes before,¹⁸ he had driven around town all morning, and he had parked the vehicle in the public parking lot before he went into the bar. Wojtowicz's testimony generally supported this evidence,¹⁹ and it demonstrated that Wojtowicz was "in a position to cause the vehicle to move, or control the vehicle's movement in some manner or direction."

Sommers, ¶ 35; *see also State v. Hagen*, 283 Mont. 156, 159-60, 939 P.2d 994, 997 (1997) (affirming conviction based on sufficiency of evidence proving actual physical control); *State v. Peterson*, 236 Mont. 247, 249-51, 769 P.2d 1221, 1222-24 (1989) (same).

Wojtowicz reiterates his defense that he had not intended to drive, and he was waiting for a ride. But this ignores that it is "the jury's duty to determine . . . which account of the incident . . . they believed more credible and worthy of

¹⁸ Despite Wojtowicz's testimony that he had been sitting in his car for five minutes when Sergeant Haydon contacted him, which is supported by other evidence, he repeatedly asserts in his brief that he had been sitting in his car for 19 minutes. (8/15/21 Tr. at 159-60, 170; 8/16/21 Tr. at 105; Br. at 23-33.)

¹⁹ Wojtowicz acknowledged that the video recorded him saying he had turned the radio on, but he questioned that in his testimony. (8/16/21 Tr. at 103.) Wojtowicz remembered falling in the parking lot, but he did not remember crawling. (*Id.* at 99.)

belief.” *Hudson*, ¶ 17. Wojtowicz presented his defense, and the jury rejected it. This Court does not substitute its “judgment for that of the jury, which is able to view firsthand the evidence presented, observe the demeanor of the witnesses, and weigh the credibility of each party.” *State v. Shields*, 2005 MT 249, ¶ 20, 328 Mont. 509, 122 P.3d 421. Moreover, the DUI statute does not require the State to prove an intent element. *Hudson*, ¶ 15. Any evidence that Wojtowicz did not intend to drive had no bearing on the sufficiency of the evidence showing that he was in actual physical control of his vehicle. *See id.*

Wojtowicz makes various policy arguments and alludes to due process concerns. Wojtowicz has failed to develop a cogent due process claim, *see Johnston*, ¶ 30, and all his arguments are undermined by the authority he provides. The purpose of “prohibiting actual physical control of a vehicle while under the influence is meant to prevent DUI at its inception.” *Sommers*, ¶ 20. It “is based on the policy of deterring intoxicated people from assuming physical control of a vehicle, even if they never actually drive.” *Id.* (quotations omitted). To effect this purpose, the DUI statute proscribes both driving and being in actual physical control of a vehicle. Mont. Code Ann. § 61-8-401. Actual physical control is an element of the offense and independent grounds to support a conviction, not a mere precursor. *Id.* Despite Wojtowicz’s disagreement with this almost 70-year-old

statutory prohibition, it is specifically designed to deter his conduct. *See id.*;
Sommers, ¶ 20.

CONCLUSION

The State respectfully requests this Court affirm Wojtowicz's conviction.

Respectfully submitted this 18th day of January, 2024.

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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 9,753 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-18-2024:

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