IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0110

STATE OF MONTANA,

Plaintiff and Appellee,

v.

FRANK WAYNE REINKE,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twenty-Second Judicial District Court, Stillwater County, the Honorable Matthew J. Wald, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
ANDERS K. NEWBURY
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
anders.newbury@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT AND APPELLANT

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

NANCY L. ROHDE
Stillwater County Attorney
RYAN C. ADDIS
Deputy County Attorney
P. O. Box 179
Columbus, MT 59019

ATTORNEYS FOR PLAINTIFF AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Montana Code Annotated

Rules

Constitutional Authorities

STATEMENT OF THE ISSUES

1. Whether the District Court erroneously denied Frank's motion for a suppression hearing to consider body-camera footage challenging the legality of Frank's warrantless arrest.

2. Whether, alternatively, defense counsel ineffectively moved for a suppression hearing without sufficient clarity to preserve the claim and failed to challenge the legality of the searches leading to the discovery of drug and paraphernalia evidence.

3. Whether the District Court erred in ruling that Frank "opened the door" to an allegation that Frank had assaulted his six-year-old son.

4. Whether Frank's right to be present was violated by his absence from the critical pretrial conference at which counsel conceded prejudicial evidence could be admitted.

5. Whether the District Court erred in imposing costs Frank did not have the ability to pay.

STATEMENT OF THE CASE

The State initially charged Frank W. Reinke (Frank) with assault on a minor, felony possession of dangerous drugs, *i.e.*, methamphetamines, and possession of drug paraphernalia, *i.e.*, two glass pipes containing alleged drug residue and a torch-style lighter. (D.C. Doc. 8.)

Frank filed a motion to suppress the drug and paraphernalia evidence and dismiss the charges. (D.C. Doc. 24.) The court denied the

motion without holding an evidentiary hearing. (Order Denying Motion to Dismiss and Suppress, D.C. Doc. 27, attached as Appendix A.)

After repeatedly failing to obtain the complaining witness's testimony for trial, the State dismissed the assault charge. (D.C. Doc. 36 at 3-6; D.C. Doc. 37; D.C. Doc. 42.) Eleven days before trial, the State added two additional counts of felony criminal possession of dangerous drugs, *i.e.*, one count of possession of lysergic acid diethylamide (LSD) and one count of possession of heroin. (D.C. Doc. 69, 72.)

Frank was convicted of all counts after a two-day trial, during which the jury learned Frank possessed a "large" amount of marijuana on the day of his arrest and, over Frank's objection, that he had been arrested for allegedly assaulting his son, without any instructions from the court regarding the proper use of that evidence. (Tr. 149, 340-41, 283; D.C. Doc. 79 at 1-3; D.C. Doc. 92.)

Frank was sentenced to serve a cumulative sentence of five years in the custody of the Department of Corrections (DOC) followed by a five-year suspended DOC commitment and to various financial obligations, including a pre-sentence investigation report (PSI) fee and

cost of counsel that Frank argued he was unable to pay. (Oral Imposition of Sentence, 11/23/2022 Tr. at 7, 32-34, attached as App. D; Judgment and Sentence, D.C. Doc. 106, attached as Appendix E.) Frank timely appealed. (D.C. Doc. 109.)

STATEMENT OF THE FACTS

Frank's six-year-old son, R.R., "mean[t] the world to" Frank, who was doing his best "trying to make it" as a single father. (Tr. at 258-59[1]; 11/23/22 Tr. at 27.) It was Fourth-of-July weekend and Frank wanted to take R.R. camping. (Tr. at 258-59.)

So, on Saturday evening, July 3, 2021, Frank borrowed his mother's car and drove himself and R.R. out of Billings for R.R.'s first camping trip of the year. (Tr. at 258-59.) Frank eventually found a suitable campsite at Itch-Kep-Pe Park in Columbus. (Tr. at 260.) A male at a neighboring campsite brought over a lantern to assist Frank as he set up the tent in the dark. (Tr. at 263.) Frank noticed sunglasses, kite string, and a torch-style lighter had been left on the table. (Tr. at 264.)

[1] All transcript citations refer to the transcript of the September 19-20, 2022, jury trial, unless otherwise noted.

Frank and R.R. slept in until mid-morning, when R.R. went to play with other children at the campground. (Tr. at 265-66.) Frank had a medical marijuana card to treat his chronic pain and had some joints in the car, along with a glass pipe for smoking dabs, a concentrated form of marijuana. (Tr. 267-68, 271.) Frank took a hit or two from a joint. (Tr. at 266-67.) While cleaning up and breaking camp, Frank discovered baggies and a glass pipe lying on the ground near the picnic table where he had found the other items the previous night. (Tr. at 268-69.) Frank suspected the baggies contained drugs and the pipe had been used to smoke methamphetamine. (Tr. at 269, 272, 278.) Because R.R. and other children were playing in the area, Frank put the baggies in his pocket to keep them out of reach until he could safely dispose of them. (Tr. at 270.) Worried the glass pipe would break if placed in a pocket, Frank put it on the cot in his tent. (Tr. at 270.) Frank continued breaking camp and trying to get R.R. to take his ADHD medications, eat breakfast, and get ready to go. (Tr. at 281.)

Facts Developed Prior to Frank's Arrest for Assault

Bear Moore (Bear), an itinerant homeless individual who does not own a cell phone or maintain a regular mailing address, was at the

campsite next to Frank's. (D.C. Doc. 37 at 3-5; D.C. Doc. 6, *hereinafter* "Affidavit," at 1.) At approximately 11:44 A.M., Bear flagged down Columbus Police Department Officer Jarod Vance (Officer Vance), who was conducting a traffic stop nearby. (Affidavit at 1.) Bear apparently alleged "an older male was physically assaulting a young child" and directed Officer Vance to Frank's campsite. (*Id*.) Officer Vance asked Frank what had happened, and Frank explained he had disciplined R.R. by giving "him a whopping [sic] on the ass." (*Id*. at 2.)

Officer Vance had graduated from the law enforcement academy only five days prior. (Tr. at 120.) At trial, he candidly admitted he was "not an expert, by any means" in identifying the signs of illegal drug use. (Tr. 122.) Nevertheless, Officer Vance thought Frank's pupil size, speech pattern, sweat rate, and jaw muscles indicated that he was "under the influence of a CNS stimulant." (Affidavit at 2.)

Officer Vance separated Frank and his crying child to interview R.R. R.R. indicated Frank had disciplined him for failing to clean up after playing in the creek. (*Id*. at 2.) R.R. stated he had received a "spanking" on the buttocks and the chest and that, during this interaction, R.R. had fallen into a tree and scratched his arm. (*Id*. at 2-

3.) Officer Vance then advised Frank he was under arrest for assaulting R.R., placed him in handcuffs, and stood him at the front of the patrol car. (*Id*. at 3.)

Post-Arrest Investigation

Officer Vance began emptying Frank's front pants pockets, repeatedly questioning Frank about whether he had anything he was "not supposed to have." (Ex. 1 at 0:20-1:20, offered, admitted, and played for jury, Tr. at 134; *see also* Affidavit at 4.) Officer Vance pulled out the baggies Frank had found at the campsite. The baggies contained substances that field tested positive for morphine and methamphetamine and what Officer Vance believed to be blotter paper for LSD. (Affidavit at 3.) Frank denied the suspected drugs were his and explained he had found them at the campsite. (Tr. at 133.) After securing Frank in a patrol vehicle, Officer Vance saw a glass pipe tucked into a blanket on the cot inside of Frank's partially-zipped-up tent. (Tr. at 130-31; Affidavit at 3-4.) Deputy Bruursema retrieved it without a warrant. (Tr. at 183-84.) Deputy Bruursema also entered the vehicle without a warrant and seized the tin box containing Frank's medical marijuana. (Tr. at 166-67, 173.) The vehicle was then taken to

a city impound lot. (Tr. 148, 173.) Officer Vance later interviewed R.R. a second time, photographed his alleged injuries, and took a statement from Bear. (Affidavit at 4.)

Officer Vance obtained a search warrant for the car, pursuant to which he seized suspected marijuana, two pill bottles containing tablets and a capsule, a bundle of cash, a second glass pipe, and a blue torch-style lighter. (Tr. 147-49, 173; Affidavit at 4-5.)

The substances seized from Frank's pocket were subsequently analyzed at the State Crime Lab, where they tested positive for methamphetamine, heroin, and LSD. (Tr. 251-52.) Officer Vance did not send the glass pipes to the lab for residue testing. (Tr. 155-56, 254.)

Motion to Suppress and Dismiss

In his motion to suppress evidence and dismiss the charges, Frank challenged the legality of his warrantless arrest for assault on a minor, arguing Officer Vance did not have sufficient facts giving rise to probable cause to believe he committed that offense at the time of his arrest. (D.C. Doc. 24 at 1, 3-4.) He argued all the drug evidence subsequently seized from his person, his tent, and the car, should be suppressed as fruit of that illegal arrest. (*Id.* at 4 ("Mr[.] Reinke asserts

that his arrest was plainly illegal, and that any evidence obtained as a result of it must be suppressed . . . .").) Relying on the body-camera footage provided in discovery,[2] Frank contested various facts set forth in the charging documents, including that R.R. bore obvious visible signs of injury or exhibited an unusual level of duress beyond what would be expected when a six-year-old is separated from his father and questioned about an incident, and that Frank was anything but calm and cooperative when speaking with the officer. (*Id*. at 2.) Frank further asserted the video showed Bear, whom the State acknowledged did not identify himself immediately, provided only vague allegations regarding what he allegedly witnessed before Officer Vance arrested Frank, and even after the arrest, did not provide detailed contact information and refused to appear on video. (D.C. Doc. 24 at 1-2; Affidavit at 1.) Frank represented the video further indicated that R.R. and Frank told Officer Vance that Frank had "spanked" [R.R.] with an "open hand" only in order to discipline him for not doing what he was told. (D.C. Doc. 24 at 2.) Yet, Frank argued, Officer Vance made

[2] With the exception of the State's trial exhibit showing the search incident to Frank's arrest, the body-camera footage is not part of the appellate record. (Ex. 1.)

untrue or exaggerated statements to the officers present regarding what R.R. had reported during his interview, *e.g.*, stating repeatedly that Frank "threw" his son into a tree. (*Id*. at 1-2.) Frank requested a suppression hearing, "if necessary." (*Id*. at 1, 4.) Frank also moved to "dismiss[] the assault on a minor charge" on the ground that even considering the post-arrest facts stated in the affidavit, it failed to establish probable cause to believe he had committed that crime. (*See id*. at 1, 3-4.)

The court denied the motion to suppress evidence without holding a hearing and without addressing Frank's argument regarding the legality of his arrest. (App. A.) The court mischaracterized Frank's suppression motion as resting "solely on the basis that the Assault on a Minor *charge* lacked probable cause," declined to consider Frank's arguments regarding the body-cam footage, and concluded the totality of the circumstances set forth in the affidavit of probable cause, including Bear's post-arrest statement, constituted sufficient evidence to support the assault charge in the Information. (*Id*. at 2, 4-5 (emphasis added).)

Motions in Limine

Defense Counsel filed a motion in limine to exclude any reference to the alleged assault. (D.C. Doc. 78 at 1-2.) Counsel also moved to exclude any reference to the uncharged items found in the car. (D.C. Doc. 79 at 1-3; D.C. Doc. 88 at 3.) The State agreed to avoid the assault allegation unless Frank took the stand and opened the door to its admission, and proposed advising the jury, "Defendant came into contact with the Columbus Police Department" on the offense date. (9/15/2022 Tr. at 12; D.C. Doc. 86 at 5-6, 10.)

Prior to voir dire, the court held a conference with counsel. (Pre-trial Evidentiary Conference, Tr. at 4-5, attached as Appendix B.) Although Frank was not present, his counsel did not object. (*Id*. at 4.) Defense Counsel stated he was withdrawing the objection to the marijuana evidence in exchange for the State "agree[ing] to keep all the other photographs [of the pill bottles and contents] out." (*Id*. at 6-7.) When Frank subsequently arrived, the District Court advised, "[w]e've dealt with some pretrial matters." (*Id*. at 13.)

Trial

In its case-in-chief, the State presented video footage of Officer Vance searching Frank's pockets while he was handcuffed by the patrol car without explaining how Frank came to be handcuffed. (Tr. 123, 134-37; Ex. 1; Ex. 2.) The State also admitted no less than six photographs of what two officers testified to being a "large" quantity of "suspected marijuana," including pictures of it being weighed and being displayed next to the suspected meth, heroin, and LSD. (Tr. 144-45, 149, 153-55, 180-84; Ex. 3.3-3.5, offered, admitted, and published to jury, tr. at 138-39; State Ex. 4.14-4.15, 4.22, offered and admitted at tr. 151.). The State introduced photographs of the glass pipe found in Frank's tent and the glass pipe and blue torch lighter found in the vehicle, which it alleged constituted drug paraphernalia. (Tr. 139-40, 154; Ex. 3.1-3.2, 4.17, 4.18 offered and admitted at Tr. 138-39, 151; D.C. Doc. 8 at 2; Doc. 86 at 8.)[3]

[3] The State also briefly referenced a second lighter—which Frank testified he found at the campsite—as potential paraphernalia in closing arguments. (Tr. 264, 316.)

Frank took the stand in his defense and testified he found the drugs and glass pipe on the ground, intending to dispose of them, but that he "didn't have a chance" because he "was talking to [his] son" before the "police showed up." (Tr. at 269-71.) He testified the other glass pipe and lighter found in the vehicle were his, and were used for smoking dabs, a concentrated form of marijuana. (Tr. at 271-72.)[4]

On cross-examination, the State pressed Frank regarding why he hadn't thrown out the drugs immediately, prompting Frank to respond that he was "running around," "trying to be a father," and that all he "was trying to be that day [wa]s trying to be a parent." (Excerpted Trial Transcript, Tr. at 276-83, attached as Appendix C.) A series of unrecorded sidebars occurred. (App. C at 268, 272-73, 282.) Later, outside the presence of the jury, the court indicated the State had argued that the "door was opened" by Frank's statements to questioning regarding the assault allegation. (App. C at 286-89.) The court explained it agreed that Frank's statements on cross-examination had opened the door for the "State to indicate that what he may have been

[4] The court instructed the jury that items used for marijuana consumption were not paraphernalia. (Tr. 298; D.C. Doc. 92 at 24.)

doing when he wasn't throwing the drugs away was assaulting his son." (App. C at 286-89, 291.) Ultimately, the jury heard the following exchange:

> [Prosecutor]: Mr. Reinke, throughout your examination on direct and cross you said a few times that you were just trying to care for your son. Isn't it true that the reason why the officers first had contact with you, though, is because you had reportedly assaulted your son?
>
> [Frank]: Yes.

(App. C at 283.) No limiting instruction was given. (App. C 282-86; D.C. Doc. 92.) In closing, the State encouraged the jury to "think back" to the allegation when evaluating Frank's defense. (Tr. at 330.)

Sentencing

At sentencing, Frank requested the cost of assigned counsel and PSI fee be waived in light of Frank's financial situation. (11/23/2022 Tr. at 7.) The prosecutor objected, pointing to defense counsel's work "through trial and such." (11/23/2022 Tr. at 9.) The court did not question Frank about his finances or—beyond summarily mentioning a generic "financial situation that we have here"—make any on-the-record analysis of Frank's ability to pay, concluding: "I'm not going [to]

waive the PSI fee. I'll reduce cost of counsel to $250.00." (App. D at 33-34.) The court also imposed and recommended various surcharges and fees. (*Id.*; App. E at 2-4, 6-7.)

STANDARDS OF REVIEW

On review of the denial of a motion to suppress evidence, this Court reviews supporting findings of fact for clear error and conclusions and applications of law de novo for correctness. *State v. Zeimer*, 2022 MT 96, ¶ 21, 408 Mont. 433, 510 P.3d 100. Whether a suppression hearing is required under § 46-13-302(2), MCA, is a question of law. *See State v. Tucker*, 2008 MT 273, ¶ 34, 345 Mont. 237, 190 P.3d 1080 (citing §§ 46-13-104(2), -302(2), MCA).

While evidentiary rulings are generally reviewed for an abuse of discretion, related interpretations or applications of law are reviewed de novo for correctness. *State v. Torres*, 2021 MT 301, ¶ 21, 406 Mont. 353, 498 P.3d 1256.

Whether a criminal defendant's right to the effective assistance of counsel has been violated is a mixed question of fact and law. *State v. Miller*, 2022 MT 92, ¶ 10, 408 Mont. 316, 510 P.3d 17; *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861. Ineffective assistance of

counsel (IAC) claims must be raised on direct appeal if the facts supporting the claim appear on the face of the record, *i.e.*, where the record reveals why counsel acted as he or she did, or where there could be no "legitimate reason for what counsel did." *See State v. Kougl*, 2004 MT 243, ¶¶ 14-17, 323 Mont. 6, 97 P.3d 1095 (citation omitted). Where the defense has "nothing to lose" in making a motion "the trial court would have been obligated to grant," there is "no plausible justification" for defense counsel's failure to do so. *Kougl*, ¶¶ 17, 21.

Whether a defendant's right to be present was violated is a question of constitutional law subject to plenary review. *State v. Zitnik*, 2023 MT 131, ¶¶ 10-11, 413 Mont. 11, 532 P.3d 477. Plain error review is appropriate where an unpreserved claim of error "implicate[s] a criminal defendant's fundamental constitutional rights, . . . where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996) (overruled in part on other grounds) (adopting current test for plain error review). *Accord State v. Valenzuela*, 2021

MT 244, ¶¶ 10, 12, 27, 405 Mont. 409, 495 P.3d 1061 (reviewing unpreserved double jeopardy claim and finding no error).

Criminal sentences eligible for statutory sentence review are reviewed de novo for legality. *State v. McGhee*, 2021 MT 193, ¶ 11, 405 Mont. 121, 492 P.3d 518; *State v. Gable*, 2015 MT 200, ¶ 6, 380 Mont. 101, 354 P.3d 566. A determination regarding a defendant's ability to pay fees and charges is a factual finding reviewed for clear error—*i.e.*, if it is "not supported by substantial credible evidence, if the court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been made." *State v. Dowd*, 2023 MT 170, ¶ 7, 413 Mont. 245, 535 P.3d 645.

SUMMARY OF THE ARGUMENT

Officer Vance had a hunch that Frank was high. But, with little experience or expertise on the matter, Officer Vance opted to arrest Frank for assault instead and then searched Frank's pockets for "anything [he was] not supposed to have." Frank wanted a chance to prove his arrest had been illegal, pointing to facts that, if true, would show that Officer Vance did not have probable cause to believe Frank

had assaulted, rather than lawfully disciplined, his son. But the District Court denied Frank's request for a hearing.

Frank's trial should have had nothing to do with the assault allegation, which had been dropped with Bear's disappearance. But the State wasn't satisfied with simply prosecuting the charged drug crimes. It repeatedly (and, ultimately, successfully) sought to admit the unproven and wholly irrelevant allegation that Frank had assaulted his son. And the State painted Frank as either a habitual substance abuser or dealer by repeatedly presenting the jury with (again, wholly irrelevant) evidence of the "large" quantity of "suspected marijuana" found in the vehicle. The violation of Frank's right to be present at the critical pretrial evidentiary conference denied Frank his best opportunity to head off such efforts. Ultimately, Frank was arrested and searched on an unsubstantiated suspicion of drug use, and then tried with an unsubstantiated allegation of child abuse. Neither was lawful.

ARGUMENT

I. The District Court erroneously failed to hold a suppression hearing when Frank presented facts that, if true, would have rendered his arrest unlawful as unsupported by probable cause.

Evidence discovered or seized as a result of an illegal search or seizure is generally subject to suppression pursuant to the exclusionary rule. *State v. Peoples*, 2022 MT 4, ¶ 27, 407 Mont. 84, 502 P.3d 129. If a defendant's motion to suppress raises facts that, "if true, would show that the evidence should be suppressed," the "court shall hear the merits of the motion" at a hearing. Section 46-13-302, MCA.

Under the Fourth Amendment of the United States Constitution and Article II, Section 11 of the Montana Constitution, an arresting officer must have probable cause to make a warrantless arrest. *Peoples*, ¶¶ 12, 15. Probable cause exists if, "*at the time of the arrest*," there were "facts and circumstances within [the] officer's personal knowledge, or related to the officer by a *reliable* source . . . sufficient" for a reasonable belief of wrongdoing. *State v. Ditton*, 2009 MT 57, ¶ 21, 349 Mont. 306, 203 P.3d 806 (emphasis added). A probable-cause-to-arrest determination turns on a consideration of the "totality of the circumstances," including the officer's training. *See State v. Nalder*,

2001 MT 270, ¶ 16, 307 Mont. 280, 37 P.3d 661; *State v. Van Dort*, 2003 MT 104, ¶ 19, 315 Mont. 303, 68 P.3d 728. Probable cause requires "something more" than a "mere suspicion." *Van Dort*, ¶ 19.

Frank argued in his motion to suppress that "his arrest was plainly illegal," and requested an order "setting this matter for a [suppression] hearing" or directly "suppress[ing] the evidence obtained as a result of the illegal arrest." (D.C. Doc. 24 at 4.) Pointing out that Bear was "not questioned in detail until *after* Mr. Reinke had been arrested" and, even then, declined to give detailed contact information or appear on video, Frank challenged whether Officer Vance had "enough evidence" at the time "to warrant an arrest." (*Id*. at 2-3 (emphasis in original).) *See State v. Martinez*, 2003 MT 65, ¶ 49, 314 Mont. 434, 67 P.3d 207 (tip may not support probable cause unless police "know the identity of the informant" and can "trust from experience or presumption that the informant is telling the truth"); *Ditton*, ¶ 21 (information from "reliable source" relevant to probable cause).

Moreover, Frank pointed to evidence from outside the charging documents that would show that Officer Vance did not, at the time of

Frank's arrest, have probable cause to arrest Frank. (D.C. Doc. 24.) Frank argued video evidence contradicted numerous facts set forth in the affidavit of probable cause including the existence of visible obvious injuries and the child's emotional state, and indicated Officer Vance lacked experience and had exaggerated the facts as stated by Frank and R.R. Frank asserted the video made clear that Frank had merely "spanked" R.R. with an open hand while disciplining his child. (D.C. Doc. 24. *See* Affidavit 1-2 (stating that Frank "struck" R.R.))

According to Frank's version of events, the facts and circumstances known to Officer Vance at the time of the arrest were: a tip from a then anonymous source (later identified as Bear, who ultimately declined to testify under oath at trial); a father who said he "who[o]ped" his son on the "ass" to discipline him; and a crying six-year-old without visible injuries who said his father had "spanked" him for misbehaving, which did not feel good, and that he had fallen into a tree. If true, these facts would show that, at the time of the arrest, Officer Vance was aware of facts and circumstances indicating that Frank "correct[ed]" R.R. in a manner well within the "reasonable and necessary" range of acceptable parental discipline pursuant to § 45-3-

107, MCA, and his fundamental right to "direct the upbringing and education" of his child. *See Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 534 (1925); *State v. Wilder*, 748 A.2d 444, 453-54 (Me. 2000) (collecting cases on parental use of force in discipline, concluding that a "gross deviation" from prevailing norms causing more than "transient pain" required to convict parent). If true, these facts would demonstrate that Officer Vance lacked probable cause to arrest Frank for assault, and that the drug and paraphernalia evidence should be suppressed as fruit of that unlawful arrest. Frank was entitled to an evidentiary hearing under § 46-13-302, MCA.

The District Court erred in excluding the reasonableness of Frank's parental discipline from the probable cause determination. (App. A at 4.) Of course, administering a "spanking" (as R.R. put it) or "a who[o]ping on the ass" (as Frank put it) to one's child meets the primary elements of the assault on a minor statute, namely that an adult purposely or knowingly cause "physical pain" to someone under age fourteen. *See* § 45-5-201(1)(a), -212(1), MCA; § 45-2-101(5), MCA. The same could be said of a parent who swiftly clutches the arm of a young child running into traffic. Yet the law does not render all parents

felons: § 45-3-107, MCA, justifies a parent's use of force "reasonable and necessary to restrain or correct" one's child. An arresting officer is not free to disregard plainly "exculpatory evidence that would negate a finding of probable cause." *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014 (9th Cir. 2015). The same is true if the facts are exculpatory pursuant to an affirmative defense, rather than the primary elements listed under the charging statutory section. *Washington v. Napolitano*, 29 F.4th 93, 106-07 (2d Cir. 2022); *Jocks v. Tavernier*, 316 F.3d 128, 135 (2d Cir. 2003); *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999); *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1061 (7th Cir. 2004). Ruling otherwise would put almost all parents—as well as peace officers, prison guards, concealed carry permit holders, and members of the armed forces—who conduct themselves in accordance with their lawful rights and duties in jeopardy of arrest, forced to await trial for vindication of their known innocence. *See* §§ 45-3-106, -109, 111, -116 MCA.

The cases cited by the District Court do not hold otherwise. (App. A at 4.) All three are with regard to charging decisions, not probable cause to arrest. *State v. Dunfee*, 2005 MT 147, ¶ 34, 327 Mont. 335, 114

P.3d 217; *State v. Elliott*, 2002 MT 26, ¶¶ 24, 26, 308 Mont. 227, 43 P.3d 279; *State v. Arrington*, 260 Mont. 1, 6, 858 P.2d 343, 346 (1993). *Arrington* held only that a statutory rule of evidence applicable at trial did not apply to the probable cause determination. 260 Mont. at 6, 858 P.2d at 346. *Elliot*, ¶¶ 24, 26, simply states that probable cause requires only a "probability," not a "conclusiv[e] determin[ation]." And *Dunfee*, ¶ 17, simply establishes that the State is "not required *to set forth evidence* showing [the defendant] may have been acting in self-defense," not that an arresting officer is free to disregard plainly obvious exculpatory evidence.

The District Court also erroneously failed to distinguish between pre-arrest and post-arrest facts in the affidavit, and expressly declined to consider Frank's proffer of evidence, incorrectly concluding that it need only make "a wholly legal determination." (App. A at 2-4.)[5] *See Nalder*, ¶ 16 (probable cause depends upon "totality of the

[5] The District Court order also states that: "Other officers aided in the investigation also and the consensus of the officers was that Reinke was likely under the influence of a drug of some sort." (App. A at 2.) Nothing in the affidavit of probable cause or any other part of the record suggests that anyone other than Officer Vance believed Frank was under the influence of a narcotic. This factual finding is therefore clearly erroneous and should be disregarded on appeal. *See Torres*, ¶ 21.

circumstances"). But Frank's motion was not one in which "the facts are uncontested," thereby obviating the need for a hearing. *See Tucker*, ¶ 34. The District Court erred as a matter of law in conflating Frank's challenge to probable cause for *arrest* with his independent challenge to probable cause to, after subsequent investigation, file *charges*. This Court should reverse the District Court's order and remand with instructions to hold an evidentiary hearing to consider video footage and other relevant evidence before reaching a determination on whether Officer Vance had knowledge of sufficient facts and circumstances *at the time of the arrest* to warrant a reasonable belief that Frank had committed assault on a minor.

II. Alternatively, Defense Counsel was ineffective in filing his motion to suppress.

The Sixth and Fourteenth Amendments of the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee the right to effective assistance of counsel in criminal prosecutions. *Whitlow*, ¶ 10. To succeed on an IAC claim, the defendant must prove that counsel's performance was deficient and prejudiced the defendant. *Whitlow*, ¶ 10; *Miller*, ¶ 40. An IAC claim based upon a "failure to litigate a Fourth Amendment claim

competently" must be supported by proof that the "Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 374-75 (1986).

A. If this Court concludes that the motion to suppress did not sufficiently preserve Frank's request for a suppression hearing, Defense Counsel was ineffective in failing to brief the matter with sufficient clarity.

Frank maintains that his suppression motion plainly set out both his argument that "his arrest was plainly illegal," independent of his challenge to the subsequent charging decision, and his request to "set[] th[e] matter for a hearing." (D.C. Doc. 24 at 4.) However, the State's response erroneously took Frank's suppression argument as "contingent solely upon the Defendant's motion to dismiss [the assault charge] for lack of probable cause." (D.C. Doc. 26 at 12). Defense Counsel did not file a reply contesting the State's mischaracterization, which the District Court ultimately adopted. (*See generally*, D.C. Record; App. A at 5.) If this Court concludes that Frank's motion did not adequately preserve his challenge to the arrest's lawfulness and his request for a

suppression hearing, this Court should alternatively find counsel's lack of clarity constituted ineffective assistance.

Though the record is silent as to Defense Counsel's thought process in drafting Frank's suppression motion, review on direct appeal would be warranted because there could be no "legitimate reason" for drafting a motion with insufficient clarity to result in a court ruling on the merits of the argument made. *See Kougl*, ¶ 15. Because counsel's motion set forth facts that, if true, would result in a finding that Officer Vance lacked probable cause to arrest him and, thus, in suppression of the evidence, if he had clearly set forth the basis for the motion and requested a hearing, the claim was meritorious and the court "would have been obligated to grant" the request for a hearing. *Kougl*, ¶ 17. As such, counsel's performance prejudiced Frank's defense and this Court should remand for that hearing now.

B. Defense Counsel was ineffective when he failed to move to suppress evidence on the alternative basis that the warrantless search of Frank's pockets and warrantless seizure of a glass pipe from within his tent were themselves illegal, independent of the preceding arrest.

Defense Counsel failed to directly challenge the legality of the warrantless search of Frank's pockets and warrantless seizure of the

glass pipe from within his tent. Under the Fourth Amendment of the United States Constitution and Article II, Section 11 of the Montana Constitution, warrantless searches and seizures are per se unreasonable unless falling under recognized "narrowly delineated" exceptions. *Peoples*, ¶¶ 12, 15; *State v. Hardaway*, 2001 MT 252, ¶ 36, 307 Mont. 139, 36 P.3d 900. Article II, Section 10 of the Montana Constitution permits a "narrower range" of exceptions to the warrant requirement than the federal document and the burden of demonstrating applicability of a warrant requirement rests on the State. *Peoples*, ¶¶ 13, 15; *State v. Goetz*, 2008 MT 296, ¶ 40, 345 Mont. 421, 191 P.3d 489.

1. Search Incident to Arrest

In its response to Frank's motion to suppress, the State asserted Officer Vance's warrantless search of Frank's pockets was conducted pursuant to the "search incident to arrest" exception to the warrant requirement. (D.C. Doc. 26 at 12.) In *Hardaway*, the Montana Supreme Court held that a search-incident-to-arrest under the Montana Constitution—in contrast to its broader counterpart under the federal Constitution—must be justified as serving one of three purposes in

"preventing an arrestee" from: "[(1)] using any weapons he or she may have, [(2)] escaping, or [(3)] destroying any incriminating evidence in his or her possession," as codified by § 46-5-102, MCA. *Hardaway*, ¶ 57.

While testifying at trial, Officer Vance described a "search [of] pockets" as part of his standard arrest procedure, "like [he] do[es] with all of [his] cases." (Tr. at 124-26.) He did not testify to any belief that Frank's pockets contained evidence of assault or items rendering Frank dangerous or an escape risk. The body-cam footage is also bereft of any indication that fifty-six-year-old Frank—with his hands cuffed behind his back and surrounded by multiple officers—was an escape risk. (D.C. Doc. 1 at 3; Ex. 1; Ex. 2.) Frank's pockets could not possibly contain any evidentiary items related to the allegation that he spanked his child with an open hand. *See* § 46-5-102(3)-(4), MCA (limiting scope of search incident to arrest to fruits of "*the* crime" and evidentiary items related to "*the* offense" at issue (emphases added).) (Affidavit at 2, 4.) And the officer-safety rationale, as described in the context of a *Terry* frisk, only justifies a "pat-down" of the subject's "outer clothing" to discover readily recognizable weapons, not "random recovery of items from the suspect's clothing" or "diving reaches" into pockets. *Zeimer*, ¶¶ 39-40 (alterations

omitted); *State v. Laster*, 2021 MT 269, ¶¶ 19-20, 406 Mont. 60, 497 P.3d 224. Here, the record does not show any prior pat-down or other investigation giving rise to a reasonable suspicion that Frank's pockets contained weapons. To the contrary, the small and/or pliable items ultimately retrieved from Frank's pockets could not possibly have been mistaken for knives, guns, or clubs during a prior pat-down, even if one had occurred. Officer Vance did not question Frank about weapons, instead asking "what have you got in here" as he reached into Frank's pants pocket. (State Ex. 1 at 0:20-1:10.) *See Zeimer*, ¶ 40, ("[L]ack of factual justification" for search "belied the stated officer-safety purpose" and exposed it as "an unsupported pretext for invasively searching [subject's] pockets for the presence of illegal drugs").

Absent a valid *Hardaway* rationale, the emptying of Frank's pockets does not fit within the search-incident-to-arrest exception to the warrant requirement. *See Hardaway*, ¶¶ 57-58; § 46-5-102, MCA. A motion to suppress on these grounds would have been meritorious and the court "would have been obligated to grant" it, resulting in the three felony charges being dropped "absent the excludable evidence." *See Kougl*, ¶ 17; *Kimmelman*, 477 U.S. at 374-75.

2. Warrantless Entry into Frank's Tent to Seize Pipe

For search and seizure purposes, tents are treated like houses or temporary accommodations and an officer may not enter absent a warrant or exigent circumstances. *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993). Yet Defense Counsel failed to challenge Deputy Bruursema's warrantless entry into Frank's tent to seize the glass pipe off his cot. (Affidavit at 3-4.) The State's affidavit contended the pipe had been "observed in plain view" by Officer Vance upon approaching Frank's partially-zipped tent, and argued in its response to Frank's suppression motion that the "plain view doctrine" authorized the seizure. (Affidavit at 3; Ex. 3.1; D.C. Doc. 26 at 12-13.) However, while the "plain view" doctrine may authorize the warrantless seizure of obviously incriminating evidence in certain circumstances, it does not grant the officer an independent *right to enter* an area to retrieve it. *See State v. Loh*, 275 Mont. 460, 473-74, 914 P.2d 592, 600 (1996). Thus, an officer may not, absent a warrant or exigent circumstances, reach through an open window of a residence to retrieve plainly visible contraband. *See United States v. Naugle*, 997 F.2d 819, 823 (10th Cir. 1993). There were no exigent circumstances here: police transported

the tent—like the vehicle—to a secure location following arrest, and should have—just as for the vehicle—awaited a warrant to lawfully enter it. (Tr. at 186-87.) Because Frank's tent enjoys the same privacy protections as a house, the plain view doctrine did not authorize Deputy Bruursema to trespass and enter without a warrant to seize the pipe.

Defense Counsel had no "legitimate reason" to omit this argument in its suppression motion, which the court "would have been obligated to grant." *See Kougl*, ¶¶ 15, 17. Had counsel briefed the issue, the resulting suppression of the (untested) residue-covered pipe located on Frank's cot would have undercut all of the charges by taking away one of the alleged paraphernalia items (Count IV) and undermining the implication that Frank was a drug addict who used the pipe to smoke any of the drugs in his pocket (Counts I-III). (Tr. 314-16.). *See Kimmelman*, 477 U.S. at 374-75.

III. The District Court erred in allowing the State to introduce the allegation that Frank assaulted his son.

Frank had a constitutional right to present a complete defense. *State v. Ripple*, 2023 MT 67, ¶ 14, 412 Mont. 36, 527 P.3d 951. Frank's only defense was that he "didn't have a chance" to immediately dispose of the alleged contraband because he had mitigated the danger to his

son and was distracted by more pressing issues, namely packing up camp and his interactions with his son before the "police showed up." (Tr. at 270-71.)[6] Yet the court needlessly penalized Frank's exercise of his right with admission of uncharged allegations.

A. The child abuse allegation was inadmissible in Frank's drug case.

The assault allegation served no legitimate purpose in challenging the credibility of Frank's defense. In cross-examination and closing arguments, the State legitimately attacked Frank's assertion that the distractions he testified to on direct rendered him unable to dispose of the alleged contraband. (Tr. at 277-80, 315-17.) However, its additional effort to, as the court put it, "indicate that what [Frank] may have been doing when he wasn't throwing the drugs away was assaulting his son" had nothing to do with the credibility of Frank's defense; it simply penalized Frank for presenting it. (Tr. at 291.)

Otherwise inadmissible evidence of other bad acts may be admitted for the purpose of "explaining or correcting a pertinent false

[6] Jury Instruction No. 23 provided that "possession" was the "knowing control of anything for a sufficient time to be able to terminate control." (D.C. Doc. 92 at no. 23.)

impression or assertion" given or made by the defense—*i.e.*, when the defense's own statements "open the door." *Torres*, ¶ 33; *McGhee*, ¶ 21. *See also* M. R. Evid. 404(a)(1); M. R. Evid. 607(a). But Frank never gave a "false impression." His brief testimony on direct examination that he was "talking to [his] son," trying to get him to eat breakfast and take ADHD medication before the "police showed up," did not assert benevolence or otherwise exclude the potential for abusive parenting. (Tr. at 267-71.) Neither did his one-word affirmative answer to counsel's question regarding "tak[ing] care of" R.R. (Tr. 267-68.) On cross-examination, Frank did make multiple references to "trying to be a father," but he never alleged that he was attempting to or succeeding at being a *good* father. (Tr. 279-82.) Rather, he testified to "running around" after his son. (*Id.*) And Frank's responses to the prosecution's repeated questioning regarding his activities prior to arrest must be viewed in light of the prohibition on rewarding State efforts on cross-examination to "set [a] trap" for the defendant to inadvertently open the door. *Torres*, ¶ 41.

Moreover, even if Frank's testimony did create a "false impression," such impression was not "pertinent" to the case. *McGhee*,

¶ 21; *Torres*, ¶ 33. The drug case at hand turned simply on whether the relation between Frank and the alleged contraband in his presence constituted "possession," not the nature of his parenting. The evidence was simply not relevant to any fact at issue**.**

But even if the evidence was relevant, it nonetheless was inadmissible under Rule 403. The court ruled that it would "maintain the least prejudice" by disallowing any details or specifics of the alleged incident. (Tr. 289-90.) However, this Court has recognized that even generic allegations of child sexual abuse are "highly inflammatory." *Lake*, ¶¶ 32, 35. While the alleged child abuse here was of a violent, rather than sexual, nature, the allegation was similarly likely to "provoke[e] hostility against" Frank. *State v. Lake*, 2022 MT 28, ¶ 32, 407 Mont. 350, 503 P.3d. In light of the "inherently prejudicial" nature of the evidence and the slim prospects for legitimate probative value, the assault allegation was inadmissible under Rule 403. *Lake*, ¶¶ 32, 35.

B. The State cannot bear its burden to show the child abuse allegation did not prejudice Frank's defense.

These same factors likewise demonstrate that the State cannot bear its burden of showing "no reasonable possibility" that the assault

allegation prejudiced Frank under the harmless error standard. *Zitnik*, ¶¶ 15, 28. The State had already presented video footage of Frank's arrest and, though the jury was never explicitly told the arrest's basis, it could easily infer that the allegation led to the arrest and would therefore ascribe far more credibility to the allegation than would have been merited otherwise. The State helped the jury connect these dots in closing by inviting it to "think back" to Frank's cross-examination "as to why? What was th[e] interruption?" precipitating his arrest. (Tr. at 330.) The State had no legitimate reason to present the evidence and the jury was never informed that the assault allegation dead-ended after the State failed to obtain testimony by the complaining witness, Bear. And the jury never received a cautionary limiting instruction. *See McGhee*, ¶ 16; *Lake*, ¶ 43; § 46-16-401(1), MCA, M. R. Evid. 105. (Tr. at 282-91, 309; D.C. Doc. 92.)

IV. Frank's right to be present was violated by his absence from the pretrial hearing at which his counsel withdrew an objection to admission of prejudicial marijuana evidence.

A. The trial court reversibly erred in conducting a critical stage of the proceedings in Frank's absence.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee criminal defendants the right to be present at all critical stages of the proceedings against them. *Zitnik*, ¶ 14. *See also* Mont. Const. Art. II, § 24. Yet, on the morning of the trial, the District Court conducted an in-chambers conference to discuss pending evidentiary motions with counsel in Frank's absence. (Tr. 4-5.) Defense Counsel did not object to his client's absence.

1. Frank's presence violation is reviewable on appeal.

Unpreserved issues are generally only addressed pursuant to the plain error doctrine. *Zitnik*, ¶ 12. However, this Court recently acknowledged in *Zitnik* that it has, "on occasion," reviewed the merits of unpreserved right-to-be present claims "without applying a strict plain error analysis." *Zitnik*, ¶ 12 (citing cases). This Court should, as it implicitly did in the cases cited by *Zitnik*, recognize the obvious injustice of faulting a defendant for failing to object to a presence violation which itself robbed the defendant of awareness of the violation and opportunity to object. Here, the only notice the District Court

afforded Frank that his rights might have been violated occurred after the fact, when it casually advised that "[w]e've dealt with some pretrial matters." (Tr. at 13.)

Alternatively, this Court should follow the *Zitnik* Court's lead in finding that the requirements of the plain error doctrine are "easily satisfied" by the alleged presence violation, in any event. *Zitnik*, ¶ 13. First, Frank's "fundamental right to be present was implicated" when the court invited discussion of consequential evidentiary matters in Frank's absence. *See Zitnik*, ¶ 13 (defendant absent while addressing jury question). Second, Frank's absence may have robbed him of the opportunity to intervene when his counsel decided to drop a meritorious motion to exclude marijuana evidence ultimately used against him in an unfairly prejudicial manner. As in *Zitnik*, failure to review Frank's absence would leave unsettled the question of the fundamental fairness of the proceedings, compromise the integrity of the judicial process, and result in a manifest miscarriage of justice. *See Zitnik*, ¶ 13.

2. Frank's absence was at a "critical stage" and he did not waive his right to be present.

Upon reviewing a presence claim, the proper inquiry is whether: (1) Frank was absent from a "critical stage"; (2) Frank waived his right

to be present; and (3) the State can bear its burden of showing that the error was harmless. *Zitnik*, ¶ 15; *State v. Charlie*, 2010 MT 195, ¶ 45, 357 Mont. 355, 239 P.3d 934. A "critical stage" is "any step of the proceeding where there is a potential for substantial prejudice to the defendant." *Zitnik*, ¶ 16 (citation and internal quotation marks omitted). This Court held in *Matt* that an in-chambers conference with counsel regarding evidentiary issues was a critical stage of the trial at which the defendant had a right to be present. *See State v. Matt*, 2008 MT 444, ¶ 6-10, 22, 347 Mont. 530, 199 P.3d 244, *overruled on other grounds by Charlie*, ¶ 45. And in *Charlie*, counsel for both parties conferred with the district court by telephone without the defendant's presence regarding newly-discovered evidence and agreed to vacate the trial date to allow the defense time to review the evidence. *Charlie*, ¶ 7. The Court found the conference constituted a "critical stage" as it had a "reasonably substantial relation" to the defendant's "right to defend" himself. *Charlie*, ¶ 41.

The matters discussed outside Frank's presence here were likely even more impactful than the relatively routine evidentiary matters discussed in *Matt* or the agreement to delay trial in *Charlie*. *See Matt*,

¶ 20; *Charlie*, ¶¶ 7, 41. In Frank's absence, the parties not only forged agreements regarding admission of pipes, a torch lighter, pill bottles and their contents, and cash, but also discussed video redactions and a stipulated statement to avoid the assault allegation. (Tr. at 4-12.) Most notably, Defense Counsel withdrew the motion in limine—which the court referred to as the "main . . . [evidentiary] issue"—to exclude marijuana evidence. (Tr. at 5.)

Moreover, Frank did not waive his right to be present. Waiver of the right to be present must be made on the record and in person by the defendant, voluntarily, intelligently, and knowingly. *Matt*, ¶ 24. Defense counsel may not unilaterally waive defendant's right to be present. *Matt*, ¶ 26. Because the record contains no personal waiver by Frank of his right to be present, his absence at this critical stage constituted a violation of his fundamental rights. *See Matt*, ¶ 29.

3. The State cannot show that Frank's absence from the evidentiary discussions was harmless.

The State cannot bear its burden to show "no reasonable possibility" that the violation prejudiced Frank. *Zitnik*, ¶¶ 15, 28; *Charlie*, ¶ 45. If Frank had been present at the conference, he would have heard discussion of the stipulated statement and video redactions

intended to avoid bringing the assault allegation to the jury's attention. This might have led Frank to seek more guidance from counsel on the matter, potentially alerting him to the danger of opening the door to the allegation while testifying. *See Matt*, ¶ 21 (if present, defendant "could have observed" trial judge and prosecutor "demeanor" and arguments and rulings on evidentiary matters, or "decided to change his plea").

If Frank had been present, he would have witnessed his counsel drop the already-briefed motion to exclude marijuana evidence. The purposes of the right to be present are to allow the defendant to "observe[]" his or her attorney's performance, "provide[] information" to defense counsel, and "inform[] [defendant's] decision [whether] to pursue" an IAC claim. *See Matt*, ¶ 21. The marijuana was inadmissible under M. R. Evid. 401-04 as it was irrelevant to the actual charges, carried potential for jury confusion and unfair prejudice, and was laden with improper character or propensity inferences. The State's efforts to admit it under the "transaction rule" were meritless. (D.C. Doc. 86 at 8-9.) The rule does not circumvent Rules 403-04; it simply allows a witness to reference items "inextricably linked" to the charged offense where necessary to provide a "comprehensive and

complete" explanation of it. *State v. Rowe*, 2024 MT 37, ¶ 26 __Mont.__; § 26-1-103, MCA. The marijuana was not "inextricably linked" to the charges by dint of travelling in the same vehicle as Frank, any more than the vehicle's floormats were. *See Rowe*, ¶ 26 (finding it "difficult to logically fathom" a "non-propensity basis" for admitting allegation of crime subsequent to the charged offense under the transaction rule).

The wisdom of Defense Counsel's decision to withdraw the motion was thrown into doubt as early as voir dire, when a majority of prospective jurors expressed a belief that marijuana should not have been legalized or that it was a dangerous drug. (Tr. at 75, 299.) The State then repeatedly presented testimony regarding the marijuana as part of its case-in-chief, casting a haze of suspicion over Frank's entire encounter with police. Deputy Bruursema testified that, as he "first approached" the campsite, he detected the "[o]dor of marijuana," recognizable from prior investigations and law enforcement training. (Tr. 180-81.) He related his role in seizing the "suspected marijuana cigarettes"—which the prosecution referred to as "evidence"—and in facilitating the chain of custody for the "investigation." (Tr. 180-82, 184-85.) The State presented multiple photographs of what Officer

Vance testified were "numerous rolled marijuana cigarettes" and testimony regarding a "large bag of marijuana" found in Frank's vehicle and weighed on a digital police narcotics scale. (Tr. 141, 144, 149, 154-55; State Ex. 3.3 & 3.4, 4.14-4.15, 4.22.) One photograph showed the marijuana prominently displayed alongside the suspected methamphetamine and heroin. (Tr.144-45; State Ex. 3.5.) The State then described some of these same photographs a second time through Deputy Bruursema's testimony. (Tr. 184-85; State Ex. 3.3-3.4.)

No other uncharged items in the vehicle—say, smores—were smelled, suspected, seized, counted, weighed, repeatedly photographed, or otherwise described as "evidence" at trial. The State gave no reason for its obsession with Frank's weed. Yet, it would have been all too easy for the jury to infer from this special treatment that the prosecution and law enforcement viewed it as incriminating evidence worthy of investigation, inflaming pre-existing associations of marijuana with criminality and inviting improper inferences that Frank was a person of questionable character, had a propensity for substance use or, worse yet, engaged in illegal distribution. *See Lake*, ¶ 32; M. R. Evid. 403 &

404. No limiting instruction was given. *See* § 46-16-401(1), MCA; M. R. Evid. 105; *McGhee*, ¶ 16; *Lake*, ¶ 43.

After the State's presentation of evidence, Frank did briefly testify to his therapeutic marijuana use. (Tr. 266-67.) However, whatever marginal benefits Frank's defense may have extracted from his marijuana use was lost in the cloud of unfair prejudice and improper propensity inferences cast about him by the State's gratuitous use of it. *See Lake*, ¶¶ 31-32, 44 (affirming district court's decision not to bar all reference to objectionable material, but "manner and frequency" of State's subsequent use of it during trial posed unacceptable risk of unfair prejudice). And the defense gained nothing by trading admission of the marijuana evidence for the State's concession to exclude the pill bottles, rather than awaiting a ruling: the District Court ultimately ruled the bottles and their contents inadmissible as irrelevant anyway. (Tr. 149-50.) The State cannot bear its burden to demonstrate "no reasonable possibility" of a different outcome had Frank's right to be present been vindicated. *Zitnik*, ¶¶ 15, 28.

B. Alternatively, Defense Counsel's failure to object to Frank's absence constituted ineffective assistance of counsel.

In the event that this Court declines to review Frank's presence claim as unpreserved, Frank alternatively argues that Defense Counsel was ineffective in failing to object to his client's absence. Frank hereby incorporates his arguments made above in Part IV.A.2 and maintains that an objection to his absence would have been meritorious and Defense Counsel's failure to make one, in the absence of any legitimate reason for the oversight is reviewable on direct appeal and rendered his performance deficient. *Miller*, ¶ 40.

With regard to prejudice, *Whitlow*, ¶¶ 10-11; *Miller*, ¶ 40, the purpose of the right to be present is to ensure that the defendant can participate in the "preservation of his rights" and "observe[] whether his attorney [i]s advocating for him zealously and professionally." *Matt*, ¶ 21; *Zitnik*, ¶ 14. Defense Counsel deemed the marijuana sufficiently prejudicial to merit multiple pretrial briefings seeking to exclude it, yet inexplicably withdrew the objection in his client's absence. (D.C. Doc. 79, D.C. Doc. 88.) Frank incorporates his arguments made above in the context of harmless error, *supra* IV.A.3, as affirmatively demonstrating

a "reasonable probability" of a different outcome, had Defense Counsel objected. *Kimmelman,* 477 U.S. at 374-75.

V. The District Court erred in imposing costs Frank lacked the ability to pay.

At sentencing, over Frank's objection that he did not have the ability to pay, the court orally imposed a $50 PSI fee and a $250 public defender fee. (11/23/2022 Tr. at 7, 33-34, attached as Appendix D, Oral Pronouncement of Sentence.) Frank was homeless and "couch surfing" at the time of the PSI's writing, apparently having moved into his recently-deceased mother's camper by the time of the hearing. (11/23/2022 Tr. at 6; D.C. Doc. 103, PSI[7], at 10.) The vehicle he drove was not in his name. (D.C. Doc. 103, at 10.) At age 57, Frank needed a knee replacement, suffered from Bell's Palsy, and had had a stint put in following a heart attack. (*Id*. at 11.) Frank was in arrears for child support payments. (*Id*. at 10.) Aside from "handyman and odd jobs for cash," Frank was unemployed and a part-time caretaker for R.R. (*Id*. at 2, 10; 11/23/2022 Tr. at 6.)

[7] This document contains the PSI, a report that is marked and seen as confidential under the law. Section 46-18-113(1), MCA. Frank's waiver of confidentiality in the PSI is limited to information from those reports cited in this brief. Frank reserves the right to object to additional disclosures.

Section 46-8-113(4), MCA, provides the sentencing court "*shall take into account* the financial resources of the defendant and the nature of the burden that payment of costs will impose" and "*may not* sentence a defendant to pay the costs for assigned counsel *unless* the defendant" is able to pay. The inquiry must be "scrupulous[] and meticulous[,]" mindful of the defendant's right to a jury trial. *Gable*, ¶ 22. Section 46-18-111(3), MCA, similarly forbids imposition of a PSI fee if "the court determines that the defendant is not able to pay the fee within a reasonable time." The court "must question and determine the defendant's ability to pay" fees and costs and make a "serious inquiry and separate determination" on the matter. *State v. Reynolds*, 2017 MT 317, ¶¶ 22, 24-26, 390 Mont. 58, 408 P.3d 503.

The District Court did not question Frank regarding his ability to pay. *See State v. Moore*, 2012 MT 95, ¶ 14, 365 Mont. 13, 277 P.3d 1212 (sentencing court erred in failing to directly question defendant regarding ability to pay cost of counsel). The extent of the court's discussion of financial ability was as follows: "given the financial situation that we have here, *I totally recognize the State's point, a lot of resources were given by the public defender's office* in this case. I'm not

going to waive the PSI fee. I'll reduce cost of counsel to $250.00." (11/23/2022 Tr. at 33-34 (emphasis added).) Far from the required "scrupulous[] and meticulous[] examin[ation]" *Gable*, ¶ 22, or "serious inquiry" and "separate determination" regarding Frank's ability to pay, *Reynolds*, ¶¶ 24-26, the court's reference to State funding of Frank's trial counsel implies the court was improperly penalizing Frank's exercise of his rights to a trial and assistance of counsel. *See Gable*, ¶ 22; *State v. McLeod*, 2002 MT 348, ¶¶ 33-35, 313 Mont. 358, 61 P.3d 126 (though court apparently read the PSI report, failure to discuss on the record defendant's ability to pay or financial hardship was error); *Moore*, ¶ 16.

The court's ultimate conclusion regarding Frank's ability to pay was clearly erroneous in light of Frank's financial limitations. *See Dowd*, ¶¶ 7, 16 (determination of ability to pay is factual finding reviewed for clear error). The court's addition of a PSI fee and cost-of-counsel to the existing surcharges constituted illegal sentencing conditions improperly impinging on the "basic needs" of the housing-insecure, underemployed, and ailing Frank and his children. *Dowd*, ¶¶ 14, 16 (sentence was illegal where defendant likely could not pay

without endangering access to housing and transportation; "not reasonable for the court to impose *any* discretionary fees" in light of financial situation (emphasis added)). This Court should remand with instructions to strike those fees from the judgment.

CONCLUSION

Frank asks this Court to:

- vacate Frank's conviction and sentence and dismiss Counts I-III (felony possession) with prejudice and remand Count IV (paraphernalia) for retrial because the evidence obtained via illegal warrantless searches and seizures of the contents of Frank' pockets (entire evidentiary basis for Counts I-III) and tent (partial evidentiary basis for Count IV) would have been suppressed if counsel had not ineffectively failed to move to suppress and dismiss on that basis; or,
- alternatively, reverse the District Court's Order denying Frank's motion for a suppression hearing and remand for a suppression hearing to determine whether Frank's arrest was unlawful and evidence derived thereof should be suppressed, in which case the District Court must vacate

the convictions and sentence and dismiss all charges with prejudice.

Moreover, if the charges are not dismissed, the case should be remanded for a new trial upon reversal of:

- the District Court's admission of the assault allegation; or,
- alternatively, the violation of Frank's fundamental right to be present through plain error or IAC.

Finally, in the event Frank's conviction is not vacated, this Court should instruct the District Court upon remand to strike the charges for the PSI and cost of counsel.

Respectfully submitted this 7th day of March, 2024.

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

By: /s/ Anders K. Newbury
ANDERS K. NEWBURY
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,844, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Anders K. Newbury
ANDERS K. NEWBURY

APPENDIX

CERTIFICATE OF SERVICE

I, Anders K. Newbury, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-07-2024:

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

Nancy L. Rohde (Govt Attorney)
PO Box 179
Columbus MT 59019
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of Anders K. Newbury
Dated: 03-07-2024