

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-23-0568

STATE OF MONTANA

Plaintiff and Appellee,

v.

JORY JERAE SONGER

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Mike Menahan, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ISSUES PRESENTED 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 5

STANDARDS OF REVIEW 13

ARGUMENT 13

 I. The district court erred when it granted the State’s motion for a material witness deposition 13

 II. The district court abused its discretion when it failed to grant a mistrial after Davis referred to Songer’s prior prison term 18

 III. The district court erred when it denied the motion to suppress. 20

 IV. The district court erred when it refused to appoint new counsel after a clear breakdown in attorney client communication 23

 V. These combined errors require reversal. 26

CONCLUSION 27

CERTIFICATE OF COMPLIANCE 27

TABLE OF AUTHORITIES

Cases

<i>State v. Cunningham</i> , 2018 MT 56, 390 Mont. 408, 414 P.3d 289.....	27
<i>State v. Derbyshire</i> , 2009 MT 27, 349 Mont. 114, 201 P.3d 811.....	20, 21
<i>State v. Dunn</i> , 155 Mont. 319, 472 P.2d 288 (1970).....	16, 18
<i>State v. Erickson</i> , 2021 MT 320, 406 Mont. 524, 500 P.3d 1243.	19, 20
<i>State v. Gallagher</i> , 1998 MT 70, 288 Mont. 180, 955 P.2d 1371	24, 26
<i>State v. Gill</i> , 2012 MT 36, 364 Mont. 182, 272 P.3d 60	21
<i>State v. Hart</i> , 2009 MT 268, 352 Mont. 92, 214 P.3d 1273	14, 15, 16
<i>State v. Hendershot</i> , 2007 MT 49, 336 Mont. 164, 153 P.3d 619.....	26
<i>State v. Johnson</i> , 2019 MT 34, 394 Mont. 245, 435 P.3d 64	25
<i>State v. Laster</i> , 2021 MT 269, 406 Mont. 60, 497 P.3d 224.	23
<i>State v. Loberg</i> , 2024 MT 188, ___ Mont. ___, ___ P.3d ___.	23
<i>State v. Maile</i> , 2017 MT 154, 388 Mont. 33, 396 P.3d 1270.	21
<i>State v. Mizenko</i> , 2006 MT 11, 330 Mont. 299, 127 P.3d 458.....	14
<i>State v. Noli</i> , 2023 MT 84, 412 Mont. 170, 529 P.3d 813.....	23
<i>State v. Norquay</i> , 2011 MT 34, 359 Mont. 257, 248 P.3d 817.....	15, 17
<i>State v. Partin</i> , 287 Mont. 12, 951 P.2d 1002 (1997).....	19
<i>State v. Pecora</i> , 190 Mont. 115, 619 P.2d 173 (1980)	16
<i>State v. Pierce</i> , 2016 MT 308, 385 Mont. 439, 384 P.3d 1042	19
<i>State v. Rogers</i> , 2013 MT 221, 371 Mont. 239, 306 P.3d 348.	20
<i>State v. Widenhofer</i> , 286 Mont. 381, 950 P.2d 1383 (1997)	15
<i>State v. Zimmerman</i> , 2018 MT 94, 391 Mont. 210, 417 P.3d 289	19

Statutes

Mont. Code Ann. § 46-15-201.....	14, 15
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ISSUES PRESENTED

Whether the district court violated Songer’s right to Confrontation when it allowed the video deposition of a key witness to be played at trial.

Whether the district court should have granted a mistrial based on a reference to Songer’s prior prison term.

Whether the district court erred when it denied Songer’s motion to suppress the stop and search of his backpack.

Whether the district court’s refusal of new appointed counsel violated Songer’s Sixth Amendment right to effective assistance of counsel.

STATEMENT OF THE CASE

This appeal concerns three separate but interrelated district court causes: ADC-2022-476, ADC-2022-464, and ADC-2018-88. The appeals of these causes began respectively as DA-2023-0568, DA-2023-0567, and DA-2023-0566. The Appellant moved to consolidate the three direct appeals under the -0568 cause number and this Court granted the motion.

For ease of reading, citations to the record for the -476 case will be cited as “Homicide Doc. X,” citations for the -464 case will be cited as “Drug Doc. X,” and citations for the -88 case will be cited as “Revo Doc. X.”

In ADC-2022-476, Songer was charged with Count I: Attempted Deliberate Homicide - in violation of §§ 45-4-103/45-5-102(1)(a), MCA; Count II: Attempted Deliberate Homicide - in violation of §§ 45-4-103/45-5-102(1)(a), MCA; Count III: Assault with a Weapon - in violation of § 45-5-213(1)(b), MCA; Count IV: Assault with a Weapon - in violation of § 45-5-213(1)(b), MCA. Homicide Doc. 1.

In ADC-2022-464, Songer was charged with Count I: Criminal Possession of Dangerous Drugs with Intent to Distribute - in violation of § 45-9-103, MCA; Count II: Criminal Possession of Drug Paraphernalia - in violation of § 45-10-103, MCA; Count III: Obstructing a Peace Officer or Other Public Servant - in violation of § 45-7-302, MCA. Drug Doc. 1.

In ADC-2018-88 the State filed for revocation of Songer's 2018 sentence for accountability for burglary. The petition to revoke initially alleged the same conduct and charges of the drug case. Revo Doc. 29.

A two day jury trial was held on the drugs and obstruction counts in March, 2023 wherein Songer was convicted on all three counts. Songer proceeded to jury trial on the attempted homicide and assault with a weapon counts in May, 2023 and was convicted on all counts.

The district court held sentencing on all three cases together.

On Count I: Attempted Deliberate Homicide, the district court imposed a sentence of 100 years; on Count II: Attempted Deliberate Homicide, the district

court imposed a sentence of 100 years; on Count III: Assault with a Weapon, the district court imposed a sentence of 20 years; on Count IV: Assault with a Weapon the district court imposed a sentence of 20 years. The district court ran all four counts concurrently with each other, and concurrently with the sentences in the other cases. Homicide Doc. 93.

In the drug case, Songer was sentenced on Count I: Criminal Possession with Intent to Distribute to 20 years in the Montana State Prison; on Count II: Criminal Possession of Drug Paraphernalia to six months County Jail; on Count III: Obstructing a Peace Officer to six months County Jail. Drug Doc. 55. The district court ran all three counts concurrently with each other, and concurrently with the sentences in the other cases.

In the revocation, the district court took judicial notice of Songer's conviction in the other two cases and revoked Songer's suspended sentence, imposing a sentence of three years with the Department of Corrections. Judgment at Revo Doc. 48. The district court ran that revocation concurrently with the sentences in the other two cases.

Songer now appeals.

STATEMENT OF FACTS

At 1:00 a.m. on August 18, 2022, four people were socializing around the stoop of a home in a large housing complex in Helena, Montana. An unknown person approached them “wearing a mask all black or dark clothing and wearing a mask and a hoodie.” Homicide Doc. 2, p. 4. After a brief verbal exchange, the stranger shot at the group, hitting one person in the leg and another in the forearm. The shooter then fled into the night. The State’s interview of witnesses led them to believe the shooter had fled to a getaway car and left the area.

Three weeks later, an officer stopped three men on suspicion of drug use in a parked car. One of them was Jory Songer. After discovering he was on probation, law enforcement searched Songer’s backpack and found methamphetamine, a scale, and “a white half-face mask with a depiction of a skull on it.” Homicide Doc. 2, p. 5. The methamphetamine and scale resulted in Songer’s arrest and charges for criminal possession of dangerous drugs, drug paraphernalia, and obstruction of justice. Drug Doc. 2.

In a separate investigation regarding a stolen Hyundai Sonata, law enforcement arrested Patience Davis on outstanding warrants and questioned her. Davis admitted to stealing the Sonata. Eventually, investigators asked whether she was near the area of the shooting on August 18th. Patience at first denied it, but then admitted that she had used the Sonata to drop Songer off at the housing

complex “to visit friends.” She then drove down the block and turned around towards a gas station, but Songer caught up to her and got back into the car, saying he had not found his friends. Patience denied knowing about the shooting.

Homicide Doc. 2, p. 6.

The State interviewed Songer about the shooting. Songer gave vague and contradictory answers to questions, eventually telling police that the shooting “wasn’t a planned hit, I wasn’t there though.” Homicide Doc. 2, p. 7.

The State eventually charged Songer with two counts of attempted deliberate homicide and two counts of assault with a weapon for the August 18th shooting.

Suppression Hearing

Songer moved to suppress the evidence found in his backpack during the September 9, 2022 stop and arrest.

On that date, Helena Police Officer Guerrero was patrolling the area and driving through the parking lots of area businesses. Supp. Hrg 14:8-10. He went to a hotel parking lot known for criminal activity and saw a silver BMW. Supp. Hrg 15:1-3. The BMW vaguely matched a description of a silver BMW reported stolen, but did not match in other ways. Supp. Hrg 29:5-30:2.

As he drove by the BMW, Guerrero saw three individuals hunched over something, but could not see what they were doing because of the car’s window tinting. Supp. Hrg 15:11-18. When the individuals exited the car, he identified

Shay McPhee, who was a suspect in the investigation of the August shooting. Supp. Hrg 16:6-13. Guerrero approached and saw two other individuals exit the car. Supp. Hrg 16:17-18.

Guerrero told Songer he was not free to leave and took his backpack. Supp. Hrg 34:4-19. Guerrero then discovered that Songer was on probation and searched the backpack at the request of his probation officer. Supp. Hrg 36:14-15. Inside the backpack was meth, a scale, and a mask.

The district court found that Guerrero had particularized suspicion to stop and detain Songer because of suspected drug use. Drug Doc. 25.

Representation of Steve Scott

Steven Scott was appointed through the Office of the Public Defender.

At the final pretrial conference for the homicide case, Scott requested a change of plea hearing be set because the parties had resolved all pending cases in a plea agreement. Homicide Doc. 12. When a change of plea hearing was held, Songer refused to plead and new trial dates were set for the homicide case.

Less than two months after that failed change of plea hearing, Songer sought new counsel on the grounds that there had been a breakdown in the attorney client relationship. At a hearing on the matter, Scott detailed the breakdown in his relationship with Songer. Scott told the Court that Songer did not trust him, had

filed a complaint against him through OPD, and was unwilling to talk with him or his investigator about the case. *Gallagher* Hearing, 4:7-7:18.

The Court then inquired of Songer:

THE DEFENDANT: I just feel like I won't get a fair trial, and I want new Counsel that I feel comfortable with. And there's been stuff that's already happened that I don't agree with.

THE COURT: Like what?

THE DEFENDANT: Like the whole speedy trial, me waiving my speedy trial. I'm pretty sure I spoke up in court and I did not want to change my plea, but I'm still waiving my speedy trial. I wasn't informed that that would have happened.

3/15/23 Hearing, 8:7-17.

The court denied Songer's request for new counsel. 3/15/23 Hearing, 10:17-11:19.

Deposition of Patience Davis

The State sought a deposition of Patience Davis to preserve her testimony for trial. The motion was based on two concerns: Davis received threatening notes from other inmates because of her statements against Songer, and Davis was scheduled to enter an outpatient addiction program the week before trial. The State's motion provided no supporting documentation or exhibits. Homicide Doc. 18.

The defense argued that the State provided no specific evidence or documentation of the alleged threats to Davis. The defense emphasized that Davis'

testimony was crucial to the case and that Songer had a constitutional right to confront her in person at trial. Homicide Doc. 32.

The district court granted the State's motion in a one-sentence order. Homicide Doc. 34.

A deposition was held. Davis testified that Songer was angry at one of the shooting victims because he "used to be his friend and was with [Songer's] kids's mom now." Homicide Doc. 67, 15:4-11. Davis dropped Songer off near the housing complex on the night of the shooting, thinking he was going to "have a conversation" or fight with his former friend. Homicide Doc. 67, 16:14-24. When Davis picked Songer up a couple streets down, Songer was out of breath, and he told her he "got them niggas and he motioned like this (illustrating). And that's when I kind of pieced together that it was more than just a fight." Homicide Doc. 67, 27:1-3.

Deposition Edits

Before playing the deposition, Songer objected that the reference to his previous stint in prison should be removed, specifically the portions found at Homicide Doc. 67, 6:13-17; 7:15. Before playing the deposition at trial, the State assured the district court that those references had been edited out of the deposition video. Homicide Trial Day 3 & 4, 6:3-7.

But when the deposition was played for the jury, the State accidentally played Davis' statement about Songer's prior prison stint. Davis was asked how she knew Songer, and part of her answer was, "Before he went to prison . . ."

Homicide Doc. 67, 6:13. Counsel was heard outside of the presence of the jury:

[SCOTT]: Judge, it had been discussed several times with the State that any references to prison by Ms. Davis would be edited out, would not be played for the jury. That bell cannot be unrung at this time. It's very, very clear she said 'when he went to prison.'

I've consulted with my client. We are asking for a mistrial at this point in time. I don't believe that a curative instruction of any type that can be given in this matter where the jury would then be able to disregard this and move on.

This was not supposed to happen. I would ask for a mistrial at this point in time.

[VANDER WEY]: Your Honor, for the record, this is Rune Vander Wey. I'm Deputy County Attorney. Your Honor, we did make that. I cannot explain why that is in there, but I watched it jump ahead, so that the next objection will be—(inaudible).

I would just argue, Judge, the case law on this is pretty specific. One mention of prison is not enough to be prejudicial in this case. This is a case where the Defendant—there's an interview where he's in orange. This is a case where he has been arrested. There is no question about his custody, and I don't think that that—

The State does not believe that that's enough to color whether or not he is guilty of the crimes that he has been charged in this case. One mention is not sufficient. . . .

[THE COURT]: Anything else, Mr. Scott?

[SCOTT]: Yes. That he's in orange during the interview in this particular case has been mentioned by the defense several times, and my client was arrested on September 9th with a backpack. And I have

demonstrated through several witnesses, “Here's what was located in his backpack.”

It is highly prejudicial. There is also—I anticipate the State is going to put in photographs, all from my client's cell phone, with him holding a pistol in two different photographs that was shown to Travis Spinder. It wasn't shown to the jury yet, but it's going to be shown to them. Now we are going to hear that he went to prison, and now he's sitting there as a felon holding a firearm.

It's highly prejudicial to my client. It's exceptionally prejudicial. I don't think the bell can be unrung, and I'm asking for a mistrial.

[THE COURT]: Although this is problematic, I will just say that for many people who have no contact with the criminal justice system, the use of the words ‘prison’ and ‘jail’ are interchangeable. They don't know the difference between the Lewis & Clark County Detention Center as a place that people are detained pretrial, or the Montana State Prison which is a post-disposition facility.

And so while that is prejudicial, I'm not sure that it warrants a mistrial, because I think jurors could assume here that by ‘prison,’ Ms. Davis may be referring to the fact that Mr. Songer got arrested for this offense, because of the time that this deposition was taken. And so I think for that reason, I'm not going to grant a mistrial.

Homicide Trial Day 3 & 4, 23:9-26:10.

The remainder of the deposition was then played for the jury without further reference to Songer’s prison term.

SUMMARY OF THE ARGUMENT

The State sought and obtained a material witness deposition of the most important witness in their case: Patience Davis. The grounds for that motion were

that she had been threatened in jail and had a possible bed date at Rimrock Recovery Center.

The use of criminal depositions is meant to be limited. The district court ordered a deposition based on little cause and no proof. If criminal depositions can be ordered on such flimsy and unsupported grounds, trials will easily be conducted without a single witness present in the courtroom.

And, the State made a crucial error when playing the deposition. Although the district court was assured that no such statement would be played, Patience Davis told that jury that she knew Songer “before he went to prison . . .” The district court brushed aside the statement on the grounds that many people equivocate prison and jail, and the jurors will probably do the same. The district court’s wishful thinking cannot save a defendant from the obvious prejudice attached to a prior prison term. A mistrial should have been granted.

Songer also filed a motion to suppress the search of his backpack. The arresting officer detained Songer based on speculation rather than clear, objective signs of drug use. The officer testified that he could see someone hunched over in the car, but not what they were doing. That, combined with his knowledge of the area as a high crime area, caused him to detain Songer. A search followed and the resulting evidence was used to convict Songer in both the drug and homicide cases.

Finally, a major breakdown in the attorney client relationship occurred between Songer and his attorney, Steven Scott. A plea deal fell apart because Songer refused to change his plea, leading to continuance of trial dates. Songer and Scott agreed that Songer's distrust of Scott had caused an unworkable relationship. The broken relationship deprived Songer of effective counsel and violated his Sixth Amendment right to effective assistance.

These errors standing alone require reversal. Together, they constitute cumulative error that certainly prejudiced Songer's right to a fair trial. Reversal of all three cases is required.

STANDARDS OF REVIEW

For ease of reading, standards of review will be identified in each argument subsection.

ARGUMENT

I. The district court erred when it granted the State's motion for a material witness deposition.

A. Standard of Review

This Court reviews a district court's evidentiary decision to determine whether it abused its discretion. *State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont. 299, 302, 127 P.3d 458, 460. "There is no discretion, however, in properly interpreting

the Sixth Amendment.” *Id.* Accordingly, a district courts interpretations of the Constitution or the rules of evidence are reviewed *de novo*. *Id.*

B. Criminal depositions are limited exceptions to the Confrontation right, requiring a showing of unavailability.

The Confrontation Clause normally requires that a witness testify in court and in front of a jury. *State v. Hart*, 2009 MT 268, ¶ 23, 352 Mont. 92, 214 P.3d 1273. The Legislature codified a limited exception to in court testimony in Mont. Code Ann. §§ 46-15-201 and -202.

Mont. Code Ann. § 46-15-201 provides:

- (1) In district or municipal court cases, a deposition may be taken if it appears that a prospective witness:
- (a) is likely to be either unable to attend or otherwise prevented from attending a trial or hearing;
 - (b) is likely to be absent from the state at the time of the trial or hearing; or
 - (c) is unwilling to provide relevant information to a requesting party and the witness’s testimony is material and necessary in order to prevent a failure of justice. . . .

The purpose of the statute “is to set forth the limited use of depositions in criminal cases. They are only to be used when the state or defendant needs a deposition to avoid the loss of a witness material to the case.” Mont. Code Ann. § 46-15-201, MCA, Annotations, Comm'rs Comments (1991).

Accordingly, when a party seeks a criminal deposition on the grounds of witness unavailability, the court must make a finding that the witness unavailable

for trial. *Hart*, ¶ 23 (citing *Crawford v. Wash.*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004)). The proponent of the testimony of an unavailable witness in a criminal case bears the burden of demonstrating unavailability, and that it made a “good faith effort” to secure the witness's attendance at trial. *State v. Norquay*, 2011 MT 34, ¶ 21, 359 Mont. 257, 262, 248 P.3d 817, 821 (citing *Hart*, ¶ 21). The lengths to which a party must go to present a witness during trial is a question of reasonableness, based on the totality of the circumstances. *State v. Widenhofer*, 286 Mont. 381, 351-54, 950 P.2d 1383, 1389-90 (1997).

The State proposed two reasons to depose Davis: that she was scared to testify because of jailhouse threats, and that she had a bed date for addiction treatment at Rimrock Foundation in Billings.

Unwillingness to testify is grounds for a deposition if a witness *refuses* to testify. The witness in *Hart* fled Montana, eluded police, and refused to testify. *Hart*, ¶ 26. Unwillingness becomes unavailability when a witness is uncooperative or otherwise refuses to provide important information to a party. *State v. Pecora*, 190 Mont. 115, 120, 619 P.2d 173, 176 (1980); *see also State v. Dunn*, 155 Mont. 319, 330, 472 P.2d 288, 295 (1970) (witness unwillingness not demonstrated simply by failure to respond to request for interview).

The State never claimed that Davis would refuse to testify, and indeed she *did testify* against Songer via video deposition only a week before trial. Davis was

still incarcerated during the deposition, so her fear of retaliation would not have been lessened. And in her deposition, Davis did not describe being threatened, but being shamed by other inmates:

[STATE]: So let's talk a little bit about your time at the jail here. Has anything happened in the jail that would change your testimony today?

[DAVIS]: I mean, it's not changing my testimony, but definitely I feel like has tried to persuade me to change my testimony. You know, like. . . . P you're a rat and you wouldn't be here if you had kept your mouth shut, you dumb bitch. . . . They're writing it on the rec wall. . . . It also said, like, Jory got 60 years, thanks P, bye-bye Jory, or something along those lines. And then it also said . . . have fun at Rimrock, all your time got suspended, something along those lines.

Homicide Doc. 67, 36:15-37:9. None of the language towards Davis was an actual threat, as the State claimed in its motion.

Turning next to the State's assertion that a bed date at Rimrock made Davis "unable to attend or otherwise prevented from attending trial." This Court addressed unavailability due to health issues in *Norquay*. The witness there was in late term pregnancy with a due date relatively near the trial date. The witness provided statements from her physician regarding the dangers of traveling close to her due date and the trial date. *Id.* ¶ 26. This Court found that the unavailability requirement of the statute was satisfied based on this showing. *Id.*

Compare those identifiable health issues to the outpatient addiction treatment Davis required. A bed date at a treatment center is an important step for

an incarcerated person trying to recover from addiction. But as argued in Songer's answer brief, "bed dates can be moved." Homicide Doc. 32 at 2. Indeed, there are numerous prerelease programs, inpatient and outpatient addiction centers, and other treatment programs inside and outside Montana. Availability for these programs is limited and fluctuates constantly, so nearly any witness will become unavailable based on possible admission to one of these many programs. This is especially true of incarcerated witnesses, who often apply to numerous programs in the hopes of getting out of secure custody. Finally, the State's motion asserted that Davis would be in *outpatient treatment*, Homicide Doc. 18 at 1, meaning she would not be confined and could travel from Billings to Helena for trial.

The State made no showing of Davis' unavailability either at the motions stage or before playing the deposition at trial. "The proponent of the testimony of an unavailable witness must demonstrate unavailability and a good faith effort to secure the witness's attendance at trial." *Norquay*, ¶ 21; *see also Dunn*, 155 Mont. at 330, 472 P.2d at 295 (party's affidavit about failed attempts to interview witness insufficient to warrant deposition). The State attached no letters, no emails, no evidence or exhibits for either assertion about Davis' unavailability. The State's vague assertion about threats was disproven when Davis testified at the deposition. At trial, the State made no attempt to show that Davis actually went to Rimrock and could not attend trial.

This violation of Songer’s Confrontation right was not harmless. Davis was an essential witness for the State, testifying that Songer was at the scene on the night of the shooting and essentially admitted that he shot the victims. Without that testimony, the State had only circumstantial evidence and testimony that a masked man had shot the victims in the middle of the night.

True confrontation consists of more than simply cross-examination. Davis was allowed to testify in front of a camera, without the drama of trial or the anxiety of a watchful jury. Songer’s counsel was not able to ask Davis about the testimony of other witnesses at trial. If important witnesses can avoid in court testimony on these flimsy grounds, criminal trials will quickly resemble the civil deposition process. Criminal trials may then proceed without a single witness present in court.

II. The district court abused its discretion when it failed to grant a mistrial after Davis referred to Songer’s prior prison term.

A. Standard of Review

This Court reviews a district court’s denial of a motion for a mistrial for abuse of discretion. *State v. Pierce*, 2016 MT 308, ¶ 17, 385 Mont. 439, 384 P.3d 1042. A district court abuses its discretion when it “acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *State v. Zimmerman*, 2018 MT 94, ¶ 13, 391 Mont. 210, 417 P.3d 289.

B. Mention of Songer's prior prison term had a prejudicial effect.

Testimony about prior crimes “is inherently prejudicial.” *State v. Erickson*, 2021 MT 320, ¶ 27, 406 Mont. 524, 534, 500 P.3d 1243, 1249. Recognizing this, the State agreed to edit out references to Songer’s prior prison term. *See State v. Partin*, 287 Mont. 12, 20, 951 P.2d 1002, 1007 (1997) (mention of prior arrest prejudicial when party “elicited the very testimony it agreed was inadmissible”). It is clear trial error to admit evidence of the Defendant’s past wrongs, and it was clearly an error here. *See State v. Rogers*, 2013 MT 221, ¶ 40, 371 Mont. 239, 251, 306 P.3d 348, 358.

The only remaining question is whether the reference to Songer’s prison sentence had a prejudicial effect on his trial. *Erickson*, ¶ 27. If tainted evidence was not admitted to prove an element of the offense, it is harmless if the State can show that there was no reasonable possibility it might have contributed to a conviction. *State v. Derbyshire*, 2009 MT 27, ¶ 48, 349 Mont. 114, 131, 201 P.3d 811, 823

The State can make no such showing here. The district court recognized that the prison slip was “problematic” but concluded that many people equivocate prison and jail, so the jury likely believed the reference was to Songer’s pretrial detention on his current charge. Trial Day 3 & 4, 25:17-25. This reasoning was speculative wishful thinking. The remaining context of the deposition betrayed that interpretation. The following question from the State highlighted that Davis’

reference was not related to the current case: “[W]e’re trying to keep this to just the facts surrounding a couple of these court cases that are open, and so I’m going to ask a couple questions to kind of follow up on how you know Mr. Songer. How long have you known him? A. A couple years.” Homicide Doc. 67, 6:19-24.

This Court has held that reference to “probation officers” and the defendant being “on probation” was highly prejudicial and warranted reversal. *Derbyshire*, ¶ 54. The reference to Songer’s prior prison sentence is far more prejudicial than a reference to probation: it shows that Songer had not only criminal history but serious criminal convictions that led to incarceration. The mention should have resulted in a mistrial, but was dismissed by the district court on the hopes that the jury misunderstood Davis’ testimony.

III. The district court erred when it denied the motion to suppress.

A. Standard of Review

A district court’s finding that particularized suspicion exists is a question of fact, which this Court reviews for clear error. *State v. Gill*, 2012 MT 36, ¶ 10, 364 Mont. 182, 272 P.3d 60. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if this Court has a firm or definite conviction that the trial court committed a mistake. *State v. Maile*, 2017 MT 154, ¶ 8, 388 Mont. 33, 396 P.3d 1270.

B. Songer was stopped based on generalized suspicion of drug activity.

The district court found Officer Guerrero legally stopped Songer because he had particularized suspicion that the occupants of the vehicle were in possession of dangerous drugs. Drug Doc. 25, at 6. The district court specifically found that the parking lot was known for drug activity, and observing three men hunched over something, “it appeared they were smoking drugs.” *Id.*

But at the hearing, Guerrero repeatedly emphasized that he could *not* see anything drug related and was even unsure if they were smoking because of the window tint:

A. To me it looked like they were kind of hunched over, see the person directly in the back, saw that the windows up, and I kind of just decided to keep driving to see what their action would be afterwards.

Q. Were they doing anything in the vehicle? Could you tell?

A. It was hard to tell with the windows pretty tinted.

Q. The front wind screen was tinted?

A. The side ones.

Q. So what did you see when you drove by the front -- (inaudible) --

A. When I drove through the front, I saw them hunched over. It was hard to see when I drove along on the side

[. . . .]

Q. So is it now your testimony that you actually saw my client smoking drugs in the vehicle as you drove by it?

A. No. I believed they were smoking drugs.

Supp. Hrg 15:10-25; 30:25-31:3.

Guerrero then seized Songer as soon as he exited the car, when McPhee fled and Guerrero gave chase: “I got out, and noticed that Shay was walking away at

that time. I thought he was a potential suspect of a shooting still. It was either I stayed with these two individuals here, or go after Shay, so I decided to go arrest, apprehend Shay. . . .” Supp. Hrg. 24:5-11. When he began chasing McPhee, Guerrero told Songer he was not free to leave. Supp. Hrg 32:21-24. At that time, the only evidence Guerrero had about drug use was the “hunched over” people in a car, and the general reputation of the hotel.

A *Terry* stop allows a law enforcement officer to stop and detain a person if they observe specific and articulable objective facts leading to particularized suspicion the person is engaged in criminal activity. *State v. Loberg*, 2024 MT 188, ¶ 10, ___ Mont. ___, ___ P.3d ___. An officer's asserted justification may be based on common sense probabilities from the perspective of those versed in law enforcement, but law enforcement-specific inferences must still be objectively reasonable under the totality of the circumstances. *State v. Noli*, 2023 MT 84, ¶ 31, 412 Mont. 170, 198, 529 P.3d 813, 831.

“[A] person's unexplained presence at night in a high crime area, or even in the vicinity of a recent crime, under generally suspicious or unclear circumstances is generally insufficient alone to support a reasonable particularized suspicion of criminal activity.” *State v. Laster*, 2021 MT 269, ¶ 25, 406 Mont. 60, 88, 497 P.3d 224, 243. If an officer's only bases for suspecting criminal activity could be drawn

from the conduct of virtually any law-abiding person, the suspicion is not particularized. *Loberg*, ¶ 12 (citing *Noli*, ¶ 32).

Guerrero did not see drugs or drug use before seizing Songer. His only objective evidence was three people doing something in a car, what it was he could not see. Guerrero's belief that drug use was occurring was based entirely on his experience that the hotel parking lot was a high crime area. Individuals may legally sit in a car, may be hunched over, and may even smoke in a car. The district court gave substantial weight to the high crime nature of the area, and found that Songer appeared to be doing drugs based on innocent and innocuous conduct.

The meth and scale were the main exhibits in the drug case. Without those items, the State would have had only Guerrero's tinted view of men hunched over in a car. The search also found a mask, which became strong evidence in the homicide case as the State alleged that Songer wore it on the night of the shooting.

IV. The district court erred when it refused to appoint new counsel after a clear breakdown in attorney client communication

A. Standard of Review

This Court reviews a district court's decision to deny new appointed counsel for an abuse of discretion. *State v. Gallagher*, 1998 MT 70, ¶ 10, 288 Mont. 180, 955 P.2d 1371 (citations omitted).

B. Songer and Scott had a complete breakdown in communication.

A defendant “is entitled to substitute counsel if he presents material facts showing good cause for the substitution as demonstrated by: (1) an actual conflict of interest; (2) an irreconcilable conflict between counsel and the defendant; or (3) a complete breakdown in communication between counsel and the defendant.” *State v. Johnson*, 2019 MT 34, ¶ 19, 394 Mont. 245, 435 P.3d 64. A district court must inquire to determine whether a defendant’s complaints are substantial. *Johnson*, ¶ 21. Such an inquiry should weigh the defendant’s factual complaints together with counsel’s specific explanations for the complaints. *Johnson*, ¶ 22 (citations omitted). A defendant “must present material facts showing that the attorney-client relationship has deteriorated to prevent the mounting of an adequate defense.” *Johnson*, ¶ 23.

A breakdown in communication first became apparent two months before the hearing to appoint new counsel. Scott represented to the district court that a global plea agreement would resolve all of Songer’s criminal cases. Homicide Doc. 12. But no plea agreement was filed, and Songer protested the loss of his current trial date as a result of the anticipated change of plea. 3/1/23 Hearing at 4:21-25. At the *Gallagher* hearing, Songer cited the failed change of plea and loss of the original trial date as a reason he distrusted his attorney. *Gallagher* Hrg, 8:12-17. This Court considered a failed change of plea as evidence of an obvious

breakdown in communication in *State v. Hendershot*, 2007 MT 49, ¶ 25, 336 Mont. 164, 171, 153 P.3d 619, 624. Certainly, a disagreement or misunderstanding on the crucial issue of whether to plead guilty cannot bode well for the future of an attorney-client relationship.

Songer's complaints and the communication breakdown mirrored those in *Gallagher*. The defendant there described a breakdown in the working relationship leading to a "total lack of communication." *Gallagher*, ¶ 23. That, in turn, made them unable to actually "work together" on his defense. *Id.* After the failed change of plea, Songer refused to work with Scott's investigator, and Scott acknowledged that the relationship was irreparable: "I don't believe that it can be salvaged. His refusal to engage with me basically goes to the very essence of a breakdown in the attorney-client relationship." *Gallagher* Hrg 7:6-9.

"[W]hen the error alleged is the denial of a timely request for substitution of counsel, the issue is not whether defendant received effective assistance of counsel at a subsequent trial, but whether his conflict with counsel was sufficient that it required substitution of counsel at the time the request was made." *Hendershot*, ¶ 27. A presumption of ineffectiveness can arise upon the establishment of an "irreconcilable conflict" and once the presumption is established the defendant need not satisfy the second prong of the *Strickland* test. *Id.*

The communication breakdown occurred early in the case and never showed signs of repair. After the failed change of plea and a hearing to obtain new counsel, Songer sought a continuance of the trial date to seek private counsel. Homicide Doc. 55. The district court denied the motion to continue the trial date. Songer and Scott agreed that their relationship was irreparable, and Songer requested to relieve Scott multiple times. This breakdown cast a shadow over the entire defense and creates a presumption of prejudice.

V. These combined errors require reversal.

These errors all warrant reversal individually. However, cumulative error arises “where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial.” *State v. Cunningham*, 2018 MT 56, ¶ 32, 390 Mont. 408, 421, 414 P.3d 289, 298.

The errors here concerned vital parts of the State and Defense case. The inclusion of Davis’ video deposition put Songer not only at the crime scene, but in prison for prior crimes. The illegal stop and subsequent search of Songer provided drugs and a scale in the drug case, and an incriminating mask in the homicide case. Overshadowing all of these problems, Songer and Scott were unable to communicate from early on in the case and both agreed that they could not work together. If one of these errors was not sufficiently prejudicial to warrant reversal, taken together they cast grave doubts about the fairness of Songer’s trial.

CONCLUSION

This Court should reverse the homicide and drug case for new trial. This Court should reverse the revocation as unsupported by the evidence, as it was based solely on judicial notice of the convictions in the other two cases.

Respectfully submitted this 3rd day of September, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact words count is 6916 words as calculated by my Microsoft Word software excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

Dated this 3rd day of September, 2024.

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CERTIFICATE OF SERVICE

I, Nicholas Kirby Brooke, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-03-2024:

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