IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0735

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ZACHARY ELLIS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable Rienne McElyea, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
THAD TUDOR
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
thad.tudor@mt.gov

AUDREY CROMWELL
Gallatin County Attorney
HENRY WESTESEN
Deputy County Attorney
1709 West College, Suite 200
Bozeman, MT 59715

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

JAMI L. REBSOM
Jami Rebsom Law Firm PLLC
P.O. Box 670
Livingston, MT 59047-0670

ATTORNEY FOR DEFENDANT
AND APPELLANT

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STATEMENT OF THE ISSUES

1. Whether officers had had particularized suspicion to investigate Appellant for DUI after he fled the scene of an unexplained single car accident and volunteered that he had inhaled some Dust Off while he was driving, which caused him to pass out.

2. Whether the district court erred when it affirmed the justice court's denial of Appellant's motion to suppress evidence and concluded that no unlawful search had occurred.

3. Whether the officers' conversations with Appellant leading up to and including administration of standardized field sobriety tests (SFSTs) constituted custodial interrogation for the purpose of requiring *Miranda* warnings.

4. Whether Appellant waived his claim of insufficient foundation to admit the results of his blood test by not appealing the justice court's evidentiary ruling to the district court and not asking this Court to invoke plain error review.

5. Whether there was sufficient evidence to support the justice court's verdict.

STATEMENT OF THE CASE

On March 2, 2023, the State cited Zachary Ellis, (Ellis), with driving under the influence of alcohol or drugs, third offense, in violation of Mont. Code Ann. § 61-8-1002(1)(a). (Doc. 2.) The State alleged that on that date, at about 5 p.m.,

Gallatin County dispatch received reports that a black Jeep, with Montana license plates DFA 165, had crashed into a street sign and fled the scene. (Doc. 1 at 1.)

Montana Highway Patrol (MHP) Trooper Alex Becken (Trooper Becken) and Captain Brian Taylor (Captain Taylor) of the Gallatin County Sheriff's Department (GCSD) arrived at the residence of the Jeep's owner and observed Ellis in his driveway. (*Id.*) They observed the Jeep with fresh damage to the bumper, and a broken window. (*Id.*) Trooper Becken noticed that Ellis had a "dazed expression on his face, snot all over his coat, and watery/bloodshot eyes." (*Id.* at 2.)

Ellis informed the officers that he had just "passed out," and that he had fled the scene of the crash because he "panicked." (*Id.*) Ellis admitted that he had purchased some Dust Off from Ace Hardware, and he had been "huffing" it while driving home. (*Id.*)

After Ellis agreed to perform SFSTs, and blew a .000 on a preliminary breath test, he agreed to provide a blood sample pursuant to the implied consent advisory.[1] (*Id.*) Law enforcement determined that Ellis had two prior DUI convictions from 2009 and 2019. (*Id.*)

On May 19, 2023, Ellis filed a motion to suppress "all evidence," based on a lack of particularized suspicion to initiate a DUI investigation (Doc. 18), a motion

[1] The sample would later test positive for 1-diflouroethane, or "DFE," which is a commonly used inhalant found in Dust Off and other computer cleaning sprays. ("Transcript of Judge Trial," Doc. 78 at 14.)

to suppress all evidence pursuant to an illegal search (Doc. 19), and also a motion to suppress Ellis' statements to the officers, claiming "[a]t no time was Mr. Ellis advised of the *Miranda* warnings." (Doc. 20 at 1.)

After an evidentiary hearing on July 31, 2023, the justice court denied Ellis' motions. (Doc. 39.) On August 15, 2023, Ellis waived a jury trial. (Doc. 40.) At the judge trial on December 11, 2023, the justice court found Ellis guilty of DUI, third offense. (Doc. 58.) Ellis' attorney filed a notice of appeal to the district court. (Doc. 66.)

Ellis' appeal to the district court asserted that the justice court erred when it denied his motions to suppress evidence obtained pursuant to an illegal search and denied his motion to suppress his statements because he had not been read his *Miranda* rights. (Doc. 76 at 4.) Ellis also alleged, "THE STATE DID NOT PROVE PROBABLE CAUSE AT TRIAL TO FIND MR. ELLIS GUILTY OF THE DUI, AS THE OFFICER DID NOT HAVE PARTICULARIZED SUSPICION TO PROLONG THE STOP OF MR. ELLIS WHO HAD NO SIGNS OF IMPAIRMENT FOR A DUI INVESTIGATION." (*Id.* at 11.) Ellis did not appeal the justice court's evidentiary ruling regarding insufficient foundation for his blood test to the district court.

On October 3, 2024, the district court affirmed the justice court's denial of Ellis' motions to suppress evidence and statements. (Doc. 83.) This appeal follows.

STATEMENT OF THE FACTS

Brittany Fitte was a 34 year old gas station manager at Casey's Corner in Gallatin County. (Trial Transcript [Tr.] at 2-3.)[2] On March 2, 2023, at about 5 p.m., Fitte was stopped at a traffic light by Love Lane and Huffine. (*Id.* at 4.) Fitte observed Ellis' vehicle moving "really slow." (*Id.*) Ellis drove into her lane, then veered back into his own lane, and Fitte observed "numerous people . . . pulling off onto the shoulder" due to Ellis' erratic driving. (*Id.*)

Fitte saw Ellis drive into the ditch, so she pulled over, exited her vehicle, and approached him. (*Id.*) Fitte described Ellis' vehicle as a "black Jeep Liberty." (*Id.*) When she approached, Fitte was "literally" at Ellis' window telling him to stop. (*Id.*) Ellis told her, "I'm fine, I just passed out, I fell asleep for a second." (*Id.*) Then, Ellis "looked forward and floored it and then went to the next people that were trying to stop him." (*Id.* at 5.)

Fitte called 911, and was "a little bit frantic." (*Id.*) Asked why she was worried, Fitte explained:

> I was worried because he not only almost hit me and put me in a bad situation where I had to go into a different lane to have him avoid hitting me, and when he went back, he almost hit numerous people before he went into the ditch and hit the sign of the veh—or, the sign of the Flying TJ Ranch. Literally watched him plow through

[2] The trial transcript is divided into two parts: pages 1-44 of the judge trial [Doc. 77], and pages 45-69 of the judge trial [Doc. 78]. Further, a transcript of the July 31, 2023 evidentiary hearing is attached to Ellis' opening brief in his appeal to the district court [Doc. 76].

> it and there's pieces of his car kinda going everywhere through the ditch. And I watched it hit and break out the back window and everything like that of [sic] it, it was just bad. And then when I spoke to him, he floored it and almost side swiped those two cars that were trying to stop him that were pulled over because he had almost hit them as well.

(*Id.* at 6.)

When asked what the road conditions were like that day, Fitte responded that, "[t]he roads were dry." (*Id.* at 8.)

Captain Taylor was a patrol captain who had worked for GCSO since 2009. (*Id.* at 14.) Captain Taylor had completed DUI training at the Law Enforcement Academy and also, "ARIDE."[3] (*Id.* at 15.) On March 2, 2023, when he arrived at Ellis' residence, Ellis "appeared to be exiting, a vehicle that was parked in the road." (*Id.* at 16-17.) By the time Captain Taylor had exited his squad vehicle, Ellis was "walking up his driveway." (*Id.* at 17.)

A video recording from Captain Taylor's body worn camera (BWC), which captured his interactions with Ellis, was submitted as State's Exhibit 1. (*Id.* at 1718-.) This showed that as Captain Taylor was getting out of his squad vehicle, Ellis was shutting the driver's door to a dark colored Volkswagen sedan, which was backed into his driveway. (State's Ex. 1 at 00:18.)

[3] Trooper Becken later testified that "ARIDE" stands for "Advanced Roadside Impaired Driving Enforcement." (Doc. 77 at 27.) Additionally, he clarified that Captain Taylor was "Sergeant" Taylor at the time of this incident. (*Id.* at 34.)

Captain Taylor first asked, "How's it going, man?" (*Id.*) Ellis responded, "Ah, not bad, how are you?" (*Id.* at 00:18-20.) Without any prompting, Ellis walked directly up to Captain Taylor, who was standing at the end of Ellis' driveway near the sidewalk, and their conversation continued.

Ellis told Captain Taylor that he had been at Ace and admitted that he "had just pulled in." (*Id.* at 00:28-35.) Ellis volunteered that he had driven home via Huffine. (*Id.* at 00:37-40.) He explained that he was in the process of moving one of the vehicles in his driveway so that he could put another vehicle into his garage. (*Id.* at 00:46-53.)

Trooper Becken had arrived shortly after Captain Taylor and asked, "So, what happened to the front of your car, man?" (*Id.* at 00:56-57.) Ellis responded, "Yeah, I passed out." (*Id.* at 00:58-01:00.)

As Captain Taylor began inspecting the damage to Ellis' Jeep, which was parked on the street, Trooper Becken asked Ellis for his driver's license, and they had the following conversation:

> BECKEN: There's some pretty significant damage to the front of your car, what did you hit?
>
> ELLIS: I don't even know, like a f—uh, a street sign?
>
> BECKEN: Okay. You said you just passed out? Fell asleep?
>
> ELLIS: I have no idea, I was just like cruising along, and then all of a sudden it was like "boom," and I woke up, and I was on the side

> of the road, and this lady was just like, "are you okay?" and I was like, "yeah, I think so," and I just . . . split.

(*Id.* at 01:09-33.)

Ellis' wife came out of their house, and as Captain Taylor and another officer spoke with her, Trooper Becken could be heard telling Ellis that he was concerned that he didn't remain at the crash scene and that his "bigger concern" was how Ellis could "just pass out." (*Id.* at 01:50-56.)

Captain Taylor then reapproached Ellis, who was casually leaning on a truck in his driveway, and asked what was wrong with his car.[4] (*Id.* at 03:46-48.) Ellis described the mechanical problems with his car. (*Id.* at 03:48-04:12.) Ellis described the route he had used to return home from Ace, while Trooper Becken was inspecting the damage to the Jeep. (*Id.* at 04:16-37.)

When Captain Taylor asked what he got at Ace, Ellis replied that he had purchased some "duster." (*Id.* at 04:47-52.) This prompted the following exchange:

> TAYLOR: What are you—what are you doing with the duster [in] the car?
>
> ELLIS: Nothing.
>
> TAYLOR: Nothing?
>
> ELLIS: Yeah.
>
> TAYLOR: I see a bunch of snot on your shirt, were ya, sniffin' the—

[4] This segment of their discussion was about a vehicle that was not the Jeep Ellis was driving during the crash.

ELLIS: [Looking at front of his jacket] This is—this is probably not snot—um,

TAYLOR: Looks like snot.

ELLIS: Could be.

TAYLOR: Were you sniffing the, the duster?

ELLIS: I did um, try that, yeah, and that's not what—that is not good.

TAYLOR: Did you try that while you were driving?

ELLIS: Apparently.

TAYLOR: Okay. Did you tell [that to the] trooper?

ELLIS: I did not.

BECKEN: [Approaching] What did you not tell me?

ELLIS: Um, that when I was at Ace I bought a can of that keyboard duster and then I tried—um, apparently I tried it, and that's probably what made me pass out.

(*Id.* at 05:03-41.)

At this point, Trooper Becken explained:

BECKEN: Okay, so, you got some pretty significant damage to the back side of your car, you got significant damage to the front of your car, while talking with you, your eyes are watery and bloodshot, and you had a crash, that you really can't explain, you just passed out on bare, dry roads, when you tell me that you were huffing Dust Off that makes a lot more sense.

ELLIS: Right.

BECKEN: Okay. You didn't remain on scene, didn't report the crash to law enforcement, you have no real outside explanation for how the crash occurred, okay?

ELLIS: Yeah, that's it.

BECKEN: My job is to investigate crashes, and what could have caused them.

ELLIS: Right.

BECKEN: And my belief is that impairment, such as from Dust Off, which contains difluoroethane, which is an intoxicant, could have been a role for this, okay? So what [inaudible] some standardized field sobriety tests to investigate that crash, are you okay with that?

ELLIS: Sure.

(*Id*. at 05:42-06:23.)

Captain Taylor clarified a portion of the conversation, testifying that:

> Ok. He told me that he just stopped off at Ace to get some stuff to fix his vehicle. That's why I prompted the question, "what's wrong with your vehicle?" Um, after he described what was wrong with his vehicle, it didn't make a whole lot of sense to me on what you'd be getting in a hardware store to fix a vehicle, which prompted me to ask what he got at Ace. Um, when he told me he got [D]ust [O]ff, I could see the, the snot on his, an obvious amount of snot on his sleeve. Um, which is a side effect from huffing is excess snot.

(Doc. 77 at 19.)

Captain Taylor opined that the route that Ellis described to return home from Ace was consistent with an attempt "to avoid detection from law enforcement." (*Id.* at 20.) Captain Taylor's BWC recorded Trooper Becken's administration of

the SFSTs on Ellis. (*Id.* at 21.) This recording was admitted into evidence as State's Exhibit 2. (*Id.*)

Trooper Becken had been with the MHP for four years, and he described the training he received at the Montana Law Enforcement Academy. (*Id.* at 26-27.) Trooper Becken had completed ARIDE, was a certified drug recognition expert (DRE), and trained other officers on how to conduct SFSTs. (*Id.* at 27-28.) Trooper Becken had training and experience with respect to difluoroethane, "commonly referred to as DFE." (*Id.* at 28.) Further, he had conducted "well over 200" DUI investigations. (*Id.* at 28-29.)

On March 2, 2023, at about 5 p.m., Trooper Becken received a dispatch to a single vehicle accident and was given the license plate of the vehicle involved. (*Id.* at 29-30.) He arrived at the scene of the crash and observed some street signs that had been knocked over. (*Id.* at 30.) He subsequently took photographs of the scene, which were admitted into evidence as State's Exhibits Three, Four, and Five. (*Id.* at 31-33.)

After running the reported license plate number, Trooper Becken drove to the address of the registered owner, which was in the Belgrade area. (*Id.* at 34.) There, he observed a black Jeep that had sustained what appeared to be fresh damage. (*Id.* at 35.) Photographs of the damage were introduced as State's Exhibits Six, Seven, and Eight. (*Id.*)

Trooper Becken explained why it was significant that Ellis had purchased computer duster:

> *Based on my training and experience, people who consume, uh, dust-off which contains DFE, difluoroethane, it produces a short high and based on my training and experience people typically pass out.* It provided more, a better explanation for the crash, because upon initial contact he didn't have a real explanation for the crash, [or] how it occurred, why it occurred. He just told me that he passed out or fell asleep. When I first spoke with him, I asked if he had any sort of medical conditions or if this had ever happened before, which he denied. So, at the time I was very confused as to how this crash could have occurred. When he told me he consumed dust-off, it made a lot more sense.

(*Id.* at 38-39 (emphasis added).)

Trooper Becken had noticed that Ellis' eyes were watery and bloodshot, that he had a "dazed confused expression on his face," and also that "he had snot running down his nose and across the front of his black jacket." (*Id.* at 39.) When asked why he initiated a DUI investigation, Trooper Becken testified:

> Based on the totality of the circumstances. We had a crash on a bare dry road with no outside real explanation to it, um, one of the, the second reporting party said that they observed that the male was passed out, uh, he didn't remain on scene of the crash, didn't report the crash, fled home [from] the crash, and the personal observations that I had from him, his watery bloodshot eyes, dazed and confused expression on his face, the snot running down his nose, and then his admittance to consuming the dust-off while driving.

(*Id.* at 39.)

When asked how a DUI investigation for DFE impairment would be different than a DUI investigation involving alcohol, Trooper Becken explained that DFE is metabolized "a lot quicker in the bloodstream than alcohol is." (*Id.* at 40.) He elaborated, "[s]o, 30-40 minutes later you might not see near as many signs of impairment, whereas somebody who's under the influence of alcohol at a high BAC, 30-40 minutes later you're still gonna see, typically speaking, indicators of impairment. (*Id.*)

The State published a portion of State's Exhibit 2, from 10:25 to 15:21. (*Id.* at 40.) This segment of video showed that after the SFSTs, Trooper Becken attempted to clarify Ellis' use of the duster. Ellis denied huffing duster in the recent past. (State's Ex. 2 at 10:45-11:00.) Their conversation continued:

> BECKEN: How much of the Dust Off did you use?
>
> ELLIS: I have no idea how to judge that—
>
> BECKEN: Okay. Do you still have the can?
>
> ELLIS: Like, a lungful or two. Um, yeah, I th—I think I put in that car right there, actually [pointing to Volkswagen].
>
> BECKEN: Okay. Any reason you took it out of that car and put it in that car?
>
> ELLIS: Um, I was going to take it in the garage.

BECKEN: Okay. Do you wanna grab that can out of there and show me?

ELLIS: Yeah.

(*Id.* at 11:10-31.)

Ellis then opened the rear passenger's side door of the Volkswagen sedan in his driveway and obtained the can of Dust Off.[5] (*Id.* at 11:50-12:04.) Ellis confirmed that he had not consumed any additional duster since the crash and handed the can to Trooper Becken, who noted that the can was "probably nine-tenths empty." (*Id.* at 12:04-07.)

Ellis agreed to take a preliminary breath test, which did not detect the presence of alcohol. (*Id.* at 13:42-51.) Trooper Becken observed the results and stated, "So, triple zeros, as I suspected, I don't suspect impairment from alcohol, however I do inspect—suspect impairment from inhalants is what caused our crash today, okay?" (*Id.* at 13:54-14:04.)

Ellis responded "yeah," and Trooper Brecken continued, "[s]o based on the totality of the circumstances, my observations, and my conversations with you, I

[5] Citing to "Exhibit A," Ellis contends "[o]ne officer gets inside the second vehicle and seizes the dust off." (Appellant's Br. at 6.) Consistent with the lower courts' findings, Captain Taylor's BWC shows that it was Ellis who entered the vehicle and grabbed the can of duster, without any assistance or involvement of the officers. (*See* State's Ex. 2 at 11:50-12:07.)

am placing you under arrest for driving under the influence of al—drugs, okay?" (*Id.* at 14:04-11.)

After the State called a forensic toxicologist, the State rested. (Doc. 78 at 64.) The defense presented no witnesses or evidence. (*Id.* at 64-65.) The justice court found Ellis guilty of DUI. (*Id*. at 68.) Additional relevant facts will be included in the arguments section below.

SUMMARY OF THE ARGUMENT

The district court correctly affirmed the justice court's determination that officers had a particularized suspicion to investigate Ellis for DUI, and his claim that he was unlawfully seized within the curtilage of his home was without merit. Officers tracked Ellis' Jeep from the scene of a crash, saw the Jeep parked on the street, and observed that it had sustained significant damage. When Captain Taylor exited his squad vehicle, he was standing on or near the sidewalk when Ellis approached him, and within one minute of their conversation, Ellis admitted that he had just "passed out" while driving.

Officers observed that Ellis had bloodshot, watery eyes, a dazed expression on his face, and an "overabundance" of "snot" on his jacket. This, combined with his erratic driving behavior and immediate admission that he had just "passed out," provided the officers particularized suspicion to initiate a DUI investigation. Six

minutes into their investigation, Ellis admitted to huffing duster while he was driving home from Ace, and that the duster caused him to pass out and crash into the road signs. All of the police interactions with Ellis were in his driveway and within two or three steps of the sidewalk in front of his house, completely open to view by the general public.

The officers' initial conversations with Ellis, during which he admitted to having passed out from huffing duster while he was driving, did not amount to custodial interrogation, which would have required officers to give him *Miranda* warnings.

Ellis waived his right to object to any foundational error in allowing the results of his blood test into evidence because he did not preserve this issue with the district court, and he has not asked this Court to invoke plain error review.

There was more than sufficient evidence to support the justice court's verdict of guilty for DUI.

ARGUMENT

I. Standards of review

This Court reviews a trial court's denial of a motion to suppress evidence to determine whether the trial court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *State v. Bailey*, 2021 MT 157, ¶ 18,

404 Mont. 384, 489 P.3d 889 (citing *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 8, 391 Mont. 457, 419 P.3d 1208). A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the lower court misapprehended the effect of the evidence, or if this Court's review of the record leaves it with a definite and firm conviction that a mistake has been made. *City of Helena v. Brown*, 2017 MT 248, ¶ 7, 389 Mont. 63, 403 P.3d 341.

Whether sufficient evidence exists to convict a defendant is reviewed de novo. *State v. Boyd*, 2021 MT 323, ¶ 12, 407 Mont. 1, 501 P.3d 409. This Court views the evidence in the light most favorable to the prosecution, and determines whether any rational trier of fact could find the elements of the crime beyond a reasonable doubt. *State v. Hren*, 2021 MT 264, ¶ 16, 406 Mont. 15, 496 P.3d 949.

II. Officers had a particularized suspicion to seize Ellis when they arrived at his residence and obtained additional evidence while they spoke with him in his driveway and he voluntarily retrieved the can of duster he had been inhaling.

A. Applicable law

The Fourth Amendment to the United States Constitution and article II, section 11, of the Montana Constitution prohibit unreasonable searches and seizures. The purpose of these provisions is '"not to eliminate all contact between the police and citizenry,' but rather 'to prevent arbitrary and oppressive'

government interference with individual privacy and security." *Bailey*, ¶ 20 (citing *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980)).

Because of these protections, "government searches and seizures must generally occur pursuant to a judicial warrant issued on probable cause." *Kroschel*, ¶ 10. A temporary investigative stop is a recognized exception to the warrant requirement. Under this exception:

> [A] law enforcement officer may briefly stop and detain a person for investigative purposes without a warrant or probable cause for an arrest if, based on *specific and articulable facts known to the officer*, including rational inferences therefrom based on the officer's training and experience, the officer has an objectively reasonable, particularized suspicion that the person is engaged, or about to engage, in criminal activity.

Kroschel, ¶ 11 (emphasis in original) (citing Mont. Code Ann. §§ 46-5-401, -403). "Particularized suspicion does not require certainty; it depends on the totality of the circumstances in which the officer is making the determination." *Brown*, ¶ 10 (citations omitted). This analysis considers factors such as "the time of day, the location of the stop, and the petitioner's driving behavior." *Weer v. State*, 2010 MT 232, ¶ 10, 358 Mont. 130, 244 P.3d 311.

While the scope and duration of an investigative stop is generally limited to what is "reasonably necessary to confirm or dispel the particularized suspicion of criminal activity that justified the initial stop or its continuation," that scope or duration may be expanded or prolonged beyond that limitation "upon development

of a new or expanded particularized suspicion of criminal activity based on additional specific and articulable facts observed or discovered during the lawful scope and duration of the initial stop." *State v. Zeimer*, 2022 MT 96, ¶¶ 29, 30, 408 Mont. 433, 510 P.3d 100.

B. Officers had a particularized suspicion to seize Ellis to investigate his erratic driving.

Prior to arriving at Ellis' residence, officers knew that a male driving a black Jeep that was registered to his wife had inexplicably crashed into a ditch, damaged road signs, told a witness he had just passed out or fallen asleep, then fled the scene. The district court applied this Court's precedent in *State v. Pratt*, 286 Mont. 156, 951 P.2d 37 (1987), to determine that this information was reliable, because the 911 callers were reporting personal observations and the officers were able to corroborate their information, which included Ellis' admission that he had just "passed out."[6] (Doc. 83 at 7-8.)

This Court has held that abnormal or erratic driving behavior can be sufficient to establish the existence of particularized suspicion warranting an investigatory stop. *See State v. Van Kirk*, 2001 MT 184, ¶ 16, 306 Mont. 215, 32 P.3d 735 (concluding that particularized suspicion existed to stop the defendant

[6] The district court mistakenly indicated that the record did not reveal whether the 911 callers identified themselves, (Doc. 83 at 7), but they both testified. (*See* Doc. 77 at 4, 12.)

based upon his erratic driving and slow speed); *State v. Brander*, 2004 MT 150, ¶ 6, 321 Mont. 484, 92 P.3d 1173 (finding particularized suspicion based on abnormally slow speeds and swerving); *State v. Wagner*, 2013 MT 159, ¶¶ 15, 16, 370 Mont. 381, 303 P.3d 285 (weaving back and forth between lanes at 2:40 a.m. sufficient for particularized suspicion to initiate stop).

Further, this Court has stated:

> we note that particularized suspicion for the initial stop may also serve as the necessary particularized suspicion for the administration of field sobriety tests, providing the basis for the initial stop was of the nature that would lead an officer to believe that the driver was intoxicated. In other words, if an individual is driving erratically—e.g., if he is driving all over the road, crossing the center line and the fog line, weaving in and out of traffic, or braking for green lights—such evidence would serve as particularized suspicion both of the officer to initially stop the driver and to administer field sobriety tests.

Hulse v. DOJ, Motor Vehicle Div., 1998 MT 108, ¶ 39, 289 Mont. 1, 961 P.2d 75.

Based upon Ellis' erratic driving, which caused other traffic to pull off of the road and resulted in an unexplained crash, and based on Ellis' admission that he passed out prior to fleeing the scene, officers had a particularized suspicion to temporarily detain Ellis to investigate his erratic driving. As the justice court observed:

> Here, law enforcement had multiple reporting parties state that they saw erratic and dangerous driving behavior, with a vehicle driving in the ditch. Reports said the vehicle hit a street sign, that the driver was passed out, then woke up and left the scene in the vehicle. With this alone, it would be reasonable for law enforcement to make

> an inference that the driver of that car was driving while under the influence of a substance, a violation of the law.

(Doc. 39 at 6.)

Trooper Becken's first question to Ellis was "So, what happened to the front of your car, man?"[7] (*Id.* at 00:56-57.) Ellis responded, "Yeah, I passed out." (*Id.* at 00:58-01:00.) Trooper Becken asked if he had "passed out or fell asleep," and Ellis replied:

> I have no idea, I was just like cruising along, and then all of a sudden it was like "boom," and I woke up, and I was on the side of the road, and this lady was just like, "are you okay?" and I was like, "yeah, I think so," and I just…split.

(*Id.* at 01:09-33.)

As Trooper Becken briefly inspected the Jeep, Ellis casually leaned against the hood of a truck that was backed into his driveway and spoke with Captain Taylor.[8] Ellis informed Captain Taylor that he had purchased Dust Off at Ace. (Doc. 77 at 19.) Captain Taylor had observed an "obvious amount of snot on [Ellis'] sleeve," and was aware that "a side effect from huffing is excess snot."

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[7] Trooper Becken arrived at Ellis' home seconds after Captain Taylor. (State's Ex. 1 at 00:29-31.)

[8] Ellis contends that "the search and the photographing of the vehicle takes Becken over ten minutes." (Appellant's Br. at 4.) However, Trooper Becken can first be observed approaching the Jeep at about 4 minutes and 19 seconds into their initial contact. (State's Ex. 1 at 04:19.) Trooper Becken appeared to have completed his examination of the Jeep and reengaged with Ellis a little over one minute later. (*Id.* at 05:24-30.)

(*Id.*) Ellis admitted that he had "apparently" sniffed it, and that is "probably" what caused him to pass out. (State's Ex. 1 at 05:03-41.)

In other words, within one minute of their arrival at Ellis' residence, the officers corroborated information from the 911 callers, including that Ellis had passed out prior to the crash. (*Id.* at 00:58-01:00.) Within six minutes, officers learned that Ellis thought he had "probably" passed out because he was huffing an inhalant.[9] (*Id.* at 05:03-41.) The officers would have been derelict not to proceed with a DUI investigation at that point.

C. Officers did not encroach upon Ellis' curtilage

Inextricably linked to the traditional protection of the privacy of the home is the curtilage doctrine, which extends Fourth Amendment protections to "the area around the home to which the activity of home life extends." *Oliver v. United States*, 466 U.S. 170, 182 n.112 (1984). However, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 350 (1967).

"If this Court finds that there is no reasonable expectation of privacy, 'there is no constitutional intrusion, search, or seizure under Article II, Sections 10-11 [of the Montana Constitution].'" *City of Whitefish v. Zumwalt*, 2024 MT 153, ¶ 25,

[9] Ellis denied having any medical conditions that would have caused him to pass out or having this happen on prior occasions. (Doc. 77 at 39.)

417 Mont. 237, 553 P.3d 1 (quoting *State v. Staker*, 2021 MT 151, ¶ 11, 404 Mont. 307, 489 P.3d 489).

In *Zumwalt*, officers responded to a motor vehicle accident in an apartment parking lot, where the defendant had caused "significant damage" to another vehicle prior to retreating to his apartment. *Zumwalt*, ¶ 5. The officers knocked on Zumwalt's door, and he did not answer. *Id.* ¶ 7. Officers peered inside his windows and observed someone moving inside. *Id.*

Officers continued knocking on the door, and informed Zumwalt they had seen him. *Id.* ¶ 8. When Zumwalt opened his door and denied knowing anything about the vehicle damage, officers initiated a DUI investigation. *Id.* Zumwalt appealed his eventual conviction, asserting that officers engaged in an unlawful search when they had "peered into his apartment from a few feet away." *Zumwalt*, ¶ 26.

This Court observed that "there were no signs, gates, or other indicators that restricted the officers or other persons from entry to the apartment building complex or to the common areas surrounding Zumwalt's apartment complex." *Id.* ¶ 28. This Court concluded:

> Standing in a space that was not segmented or otherwise designated as private, or restricted to Zumwalt's personal use, the officers observed an individual through a partially uncovered window. On these facts, we cannot conclude the surrounding common area came within

> Zumwalt's apartment's "curtilage"—the area outside a dwelling that one "reasonably may expect . . . should be treated as the home itself."

(*Id.* (citing *United States v. Dunn*, 480 U.S. 294, 300 (1987)).)

Additionally, this Court observed that the nature of the officers' purported intrusion was "minimal," and distinguished the search in *Zumwalt* from the "overly intrusive" search conducted by officers in *State v. Bullock*, 272 Mont. 361, 384, 901 P.2d 61, 76 (1995). *Zumwalt*, ¶ 29.

Here, the district court correctly applied the holding of *Zumwalt* when it determined that Ellis "did not have an 'actual expectation of privacy [at the bottom of his driveway next to the sidewalk] that society is willing to recognize as objectively reasonable." (Doc. 83 at 11.) The officers simply parked on a public street, and Ellis, who was visible in his driveway, approached Captain Taylor as he stood on or near the sidewalk. There were no signs, gates, bushes, or anything intended to screen the driveway from the officers' view of Ellis. As demonstrated by the video on State's Exhibits 1 and 2, the officers' investigation of Ellis took place within an open area that was completely viewable to the public. Thus, the officers here did not at any point encroach upon "curtilage" for purposes of a Fourth Amendment analysis.

D. Officers did not conduct an unlawful search

"The plain view doctrine holds that an officer who is in a place where she has a right to be need not divert her gaze from incriminating evidence." *State v.*

Urziceanu, 2015 MT 58, ¶ 13, 378 Mont. 313, 344 P.3d 399. As the district court found, Ellis' Jeep was parked on the street "where any member of the public is lawfully permitted to see into the vehicle." (Doc. 83 at 12.) Further, even if peering into the windows of the Volkswagen sedan that was backed into Ellis' driveway was an unlawful search, the officers did not see anything relevant or incriminating.

The justice court observed:

> Here, the Defendant willingly offered the information that he had used duster while driving, willingly told Trooper Becken where the can currently was, and willingly retrieved the can and gave it to Trooper Becken. Before this time, no officers had opened the doors to the sedan where the can was to conduct a search. [Captain] Taylor had taken a moment to look through the windows, but then moved on. Indeed, the officers did not ask to enter the vehicle and never did enter the vehicle.

(Doc. 39 at 9-10:¶ 8.)

In affirming the justice court, the district court applied this Court's precedent in *State v. Larson*, 2010 MT 236, 358 Mont. 156, 243 P.3d 1130. (Doc. 89 at 1314.)- In *Larson*, after the defendant had exhibited erratic driving and other indicia of impairment, he blew a .023 on his preliminary breath test. *Larson*, ¶¶ 9-10. The officer asked for consent to search his vehicle and explained that he believed that Larson might be under the influence of drugs. *Id.* ¶ 11. In response, "Larson turned, proceeded to his vehicle, and retrieved a bag of marijuana and a pipe." *Id.*

This Court affirmed Larson's conviction, holding that "the [d]istrict [c]ourt correctly concluded that no search was at issue, because Larson personally

retrieved the marijuana and pipe after being asked for consent to search." *Larson*, ¶ 35 (citing *State v. Graves*, 191 Mont. 81, 90, 622 P.2d 203, 208 (1981)).

Officers in this case were aware that Ellis had inhaled difluoroethane from a can of Dust Off prior to his otherwise unexplained crash. Their relevant discussion went as follows:

> BECKEN: How much of the Dust Off did you use?
>
> ELLIS: I have no idea how to judge that—
>
> BECKEN: Okay. Do you still have the can?
>
> ELLIS: Like, a lungful or two. Um, yeah, I th—I think I put in that car right there, actually [pointing to Volkswagen].
>
> BECKEN: Okay. Any reason you took it out of that car and put it in that car?
>
> ELLIS: Um, I was going to take it in the garage
> .
> BECKEN: Okay. Do you wanna grab that can out of there and show me?
>
> ELLIS: Yeah.

(*Id.* at 11:10-31.)

Ellis then opened the rear, passenger's side door of the Volkswagen, obtained the can of duster, and handed it to Trooper Becken. (State's Ex. 2 at 11:50-12:04.)

The district court concluded that, "[l]ike *Graves* and *Larson*, no search occurred because [Ellis] personally handed the computer duster to Trooper Becken." (Doc. 83 at 14.) This finding is supported by irrefutable evidence, and the district court should be affirmed.

E. Ellis' admissions to officers were voluntary

This Court recognizes that "law enforcement officers need not administer *Miranda* warnings to suspects during brief investigative encounters even if those encounters are somewhat coercive." *State v. Hurlbert*, 2009 MT 221, ¶ 34, 351 Mont. 316, 211 P.3d 869 (quoting *State v. Elison*, 2000 MT 288, ¶ 27, 302 Mont. 228, 14 P.3d 456).

In *Larson*, *supra*, this Court affirmed that "roadside investigations are not custodial interrogations so long as officers keep the scope of an inquiry reasonably related to the purpose for which the investigation was initiated." *Larson*, ¶ 31 (citing *Elison*, ¶¶ 31-33). Affirming the lower court, this Court reasoned that "Larson's roadside detainment remained public, routine and temporary in nature, never exceeding the scope of a DUI investigation." *Id.* ¶ 32.

In this case, the district court's relevant findings stated:

> Here, Defendant was not subject to a custodial interrogation, requiring Miranda warnings. Defendant was questioned on his property just outside of his home, in the late afternoon. There were two officers present and Defendant's wife was in the vicinity. While Miranda warnings were not gratuitously given and Defendant was eventually arrested, the initial questioning was casual. Defendant felt comfortable

> enough to lean against his truck, one foot crossed over the other, with one hand in his pocket. Law enforcement acquired the most relevant information within six minutes of approaching Defendant. The encounter was more inquisitive than coercive and did not require Miranda warnings.

(Doc. 83 at 15.)

III. Ellis has waived his right to contest whether sufficient foundation had been established to admit his blood test by not raising the issue with the district court.

A. Additional facts

At trial, the State's final witness was Scott Larson (Larson), a forensic toxicologist at the Montana Forensic Science Division. (Doc. 78 at 49.) During his testimony, Ellis' attorney objected to the State offering Larson's report into evidence as State's Exhibit 9. (*Id.* at 54-55.) Specifically, the objection was to a lack of foundation, due to the State not calling the phlebotomist who drew Ellis' blood sample. (*Id.* at 56.)

Based on Trooper Becken's testimony that he "observ[ed] the blood draw and didn't indicate issues with the blood draw," and also that he was the individual who sent it to the crime lab, where it arrived in sealed condition, the district court overruled the objection. (*Id.* at 56-57.)

Ellis did not raise this issue in his appeal to the district court. (Doc. 76.)

B. Ellis has waived the issue

This Court will not consider an issue on appeal where a defendant had an appeal to the district court and did not raise the issue in the appeal. *City of Missoula v. Asbury*, 265 Mont. 14, 20, 873 P.2d 936 (1994). In *Asbury*, this Court declined to review an issue regarding a treaty that defendants had raised in the municipal court, but failed to mention the issue in their appeal to the district court in their "Defendants' Opening Brief." *Asbury*, 265 Mont. at 20, 873 P.3d at 939.

This Court explained:

> The principle that this Court will not address an issue not presented to the trial court is well-established. The rationale underlying the principle—while seldom stated—is that both fairness and judicial economy necessitate bringing alleged errors to the attention of each court involved, so that actual error can be prevented or corrected at the first opportunity. Here, of course, the "treaty" issue was presented to the trial court, which in this instance, was the [m]unicipal [c]ourt. However, the treaty issue was not presented to the first level appellate court—here, the [d]istrict [c]ourt.

Id. (citation omitted).

This Court has since reaffirmed *Asbury*, stating that "failure to raise an appealable issue, whether preserved in the trial court or not, on intermediate appeal from a lower court of record generally constitutes an implied waiver of the issue for ultimate appeal to this Court." *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 32, 397 Mont. 134, 447 P.3d 1048.

Further, Ellis has not asked this Court to invoke plain error review. "We will not invoke plain error review where a party has requested it for the first time in the reply brief." *State v. Beaudet*, 2014 MT 152, ¶ 18, 375 Mont. 295, 326 P.3d 1101 (citing *State v. Raugast*, 2000 MT 146, ¶ 19, 300 Mont. 54, 3 P.3d 115); *see also State v. Strizich*, 2021 MT 306, ¶ 33, 406 Mont. 391, 499 P.3d 575.

IV. More than sufficient evidence supports the justice court's verdict.

Ellis' sole contention on sufficiency of the evidence is that "no officer testified that Ellis showed any signs of impairment on the field sobriety manuevers." (Appellant's Br. at 34.) He further concludes, "Ellis showed no signs of impairment." (*Id.* at 35.) These assertions disregard the compelling evidence that Ellis had huffed difluoroethane from a can of duster while he was driving, which caused him to pass out.

Additionally, Trooper Becken, a DRE who had experience with difuoroethane, testified that in his experience, individuals who inhale this drug "typically pass out." (Doc. 77 at 38-39.) Trooper Becken also clarified that because difluoroethane metabolizes "a lot quicker" than alcohol in the bloodstream, "you might not see near as many signs of impairment," as would typically be present with alcohol. (*Id.* at 40.)

Regardless, the issue that the justice court had to determine was whether the drug impaired Ellis' ability to drive a vehicle, not whether it impaired his ability to perform SFSTs. The fact that the drug caused him to pass out would qualify as impairment under any standard. Viewing the evidence in the light most favorable to the prosecution, the justice court found Trooper Becken credible, and there was more than sufficient evidence to support the guilty verdict.

CONCLUSION

The justice court's and the district court's findings were supported by substantial evidence, and should be affirmed.

Respectfully submitted this 12th day of June, 2025.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Thad Tudor*
THAD TUDOR
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,067 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Thad Tudor
THAD TUDOR

CERTIFICATE OF SERVICE

I, Thad Nathan Tudor, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-12-2025:

Jami L. Rebsom (Attorney)
Jami Rebsom Law Firm
PO Box 670
Livingston MT 59047
Representing: Zachary Ellis
Service Method: eService

Audrey S. Cromwell (Govt Attorney)
502 S 19th Ave
Ste 102
Bozeman MT 59715
Representing: State of Montana
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Thad Nathan Tudor
Dated: 06-12-2025