
STATE OF MONTANA,

Plaintiff and Appellee,

v.

BENJAMIN ELMER ASBY,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Leslie Halligan, Presiding

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STATEMENT OF THE ISSUES

A 911-caller reported seeing a vacant car in the middle of the road. Roughly a mile away, on a different street, he saw a pedestrian. Two law enforcement officers independently searched for—and failed to locate—the vehicle. When they found Benjamin Asby, he was walking lawfully a mile-and-a-half away from the vehicle’s presumed location. Asby admitted he was intoxicated but denied driving and denied leaving his car in the middle of the road. Twelve minutes after Asby was detained and investigated for DUI, a third officer discovered the vehicle.

1. Was Asby’s initial seizure a valid community caretaker stop?
2. Was the informant’s uncorroborated tip regarding the vehicle sufficiently reliable to supply the officers with particularized suspicion of DUI?
3. Was the State’s evidence sufficient to prove beyond a reasonable doubt that Asby was in actual physical control of a vehicle?
4. In the opening moments of voir dire, the prosecutor told the venire that Asby had three prior DUI convictions, disregarding the court’s warning and the parties’ stipulation. He then argued with prospective jurors about the facts of the case, including facts not in evidence, and published previously denied exhibits showing Asby’s DUI history. Did the State commit prosecutorial misconduct that prejudiced Asby’s right to a fair trial?

STATEMENT OF THE CASE

Sheriff’s Deputy Baker testified that he initiated a welfare check on Asby because he thought that Asby might get “smoked by a car” while walking along a 55mph road at the following distance:



(State’s Ex. 14, Baker Car Camera at 0:22 (Baker 1), *admitted* Jury Trial Tr., Day 1 at 128:16 (Aug. 5, 2024); Suppr. Hrg. Tr. at 35:7–20 (Mar. 15, 2024).)

Asby’s vehicle was parked on a different street, a mile-and-a-half away, although Baker did not know where it was—or whether Asby even owned a car. (Suppr. Hrg. at 22:1–3, 34:2–11; Trial, Day 1 at 133:2–19, 173:15–174:8.) After asking Asby “how he was,” Baker started a driving under the influence (DUI) investigation. (Suppr. Hrg. at 44:1–4; State’s Ex. 12, Baker Body Camera at 0:00–2:10 (Baker 2), *admitted* Trial, Day 1 at 149:2.)

Within a minute-and-a-half, a second officer, Montana Highway Patrol Trooper Munoz, accompanied Baker. (Baker 2 at 1:21–2:05.)

Munoz eventually led the investigation and arrested Asby for DUI. (*Id.* at 12:40–59, 33:26.) The State charged Asby with DUI, fourth offense, under Mont. Code Ann. § 61-8-1002(1)(a). (Doc. 3.)

Asby moved to suppress all evidence because Baker lacked particularized suspicion both to initiate a *Terry* stop and to convert it into a DUI investigation. (Doc. 19.) Following a suppression hearing on March 15, 2024, the court ruled that the community caretaker doctrine (CCD) justified Baker’s temporary seizure of Asby and that Baker gathered enough particularized suspicion during his welfare check to prolong the stop. (Docs. 26–27.)

Asby moved to exclude his prior DUI convictions, which the State had included in discovery. (Doc. 8.) The State withdrew its notice to introduce prior bad acts, agreeing that Asby’s prior convictions were inadmissible. (Doc. 10.) In a minute order, the court “noted the State ha[d] filed a response indicating there are no prior bad acts.” (Doc. 11.)

At the August 1, 2024 final pretrial conference, just four days before trial, the Judge reminded the prosecutor that no evidence of Asby’s prior DUIs would come in. (Final Pretrial Conf. Tr. at 4:2–10, 10:13–11:4 (Aug. 1, 2024) (PTC).) The prosecutor agreed. (*Id.*) The

Judge also instructed the prosecutor to provide the State’s proposed exhibit list to defense counsel because he had not yet done so. (*Id.* at 14:8–15, 20:6–11.)

A jury trial was held on August 5–6, 2024. (Docs. 38, 41.)

At the start of voir dire, the prosecutor told the venire that Asby was on trial for a “fourth offense” DUI. (Trial, Day 1 at 24:25–25:1.) The court admonished the prosecutor outside of the jury’s presence. (*Id.* at 66:6–9.) During a break in voir dire, defense counsel notified the court that the prosecutor included certified copies of Asby’s three prior DUI convictions in his belatedly disclosed trial exhibits. (*Id.* at 65:12–15.) The court admonished the prosecutor again, and the prosecutor agreed that those exhibits were inadmissible. (*Id.* at 66:6–21.)

During the State’s case-in-chief, the prosecutor published the inadmissible exhibits and the list of exhibits showing Asby’s DUI history to the jury. (*Id.* at 162:2–163:1.)

At the close of the State’s case, Asby moved for a directed verdict on grounds that the State failed to prove he was in actual physical control of a vehicle. (Jury Trial Tr., Day 2 at 2:23–24 (Aug. 6, 2024).)

The court denied the motion. (*Id.* at 6:12–13.) The jury returned a guilty verdict. (Doc. 42.) Asby timely appealed. (Doc. 50.)

STATEMENT OF THE FACTS

Once an austere rural truck stop, the unincorporated community of “Wye” in Missoula County is home to over 1,000 people, a dog-park, coffee shops, restaurants, bars and casinos, and a partially paved walking path along a 55mph-stretch of Highway 10. Long-time Wye resident Benjamin Asby was walking lawfully on that path just after midnight on March 14, 2023, when two law enforcement officers detained and arrested him for DUI.

Asby’s Detention and Arrest

It all began when Douglas Ford called 911 while driving to work at 12:55 a.m. (Trial, Day 1 at 122:1–15, 123:14–16; State’s Ex. 1, Dispatch Log, *admitted* Suppr. Hrg. at 38:10.) “There is a random, like, Ford Explorer . . . parked sideways in the middle of the road, just like it rolled out of the driveway at the house . . . right by the intersection of Mocassin and Meadow Drive,” Douglas said. (State’s Ex. 11, 911 Call at 0:14–34, *admitted* Trial, Day 1 at 128:3.) He did not see any occupants. (*Id.* at 0:40–45.)

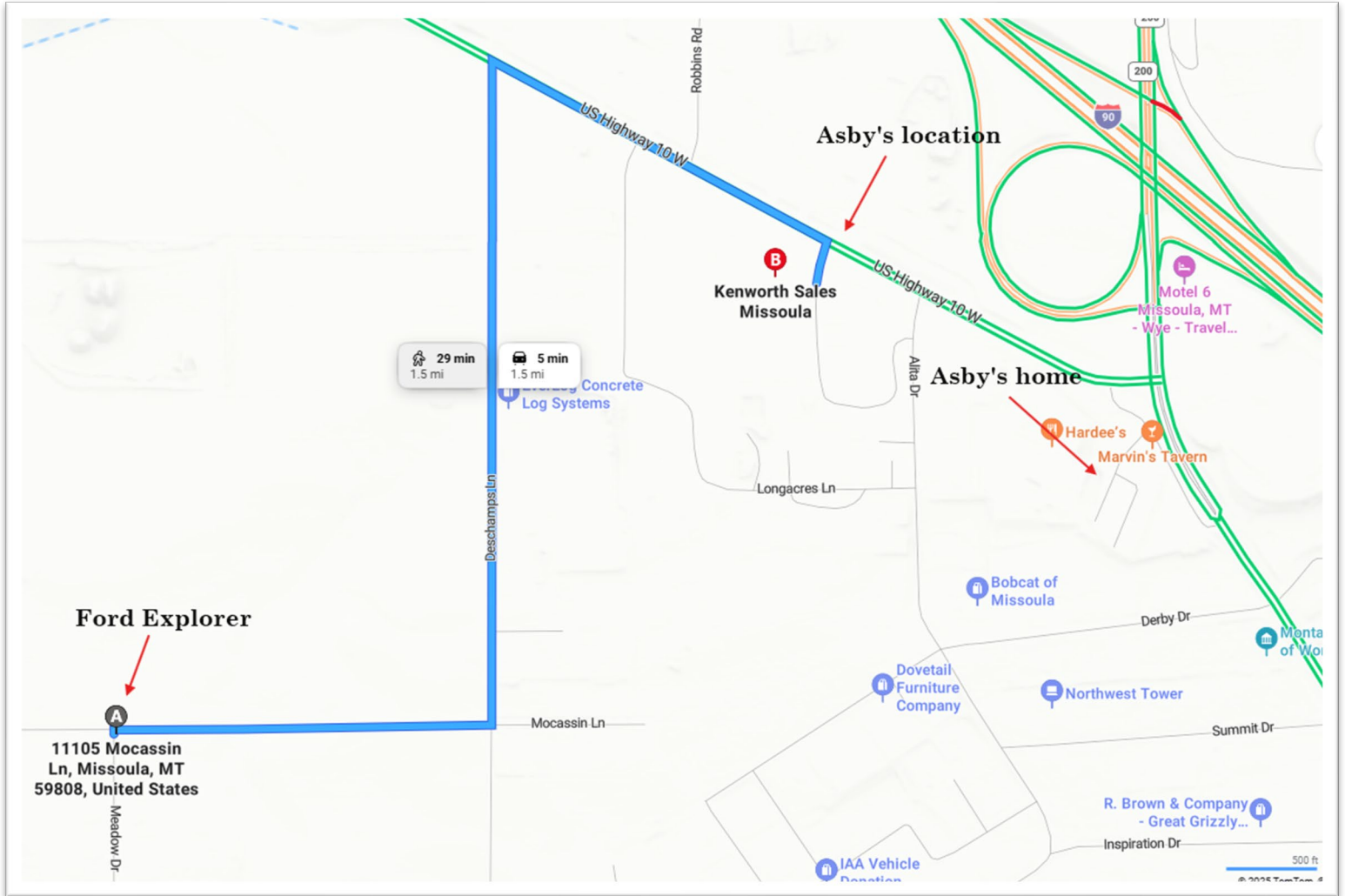
At 12:58 a.m., Douglas called back from a different road. (Dispatch Log.) “They may want to look for the owner of the vehicle,” he said, “there was someone walking/staggering in the ditch back toward Deschamps.” (911 Call at 1:52–2:22.) The dispatcher asked whether Douglas thought the pedestrian was “possibly related to the vehicle”; Douglas responded, “Eh—it could be. There’s not—it’s pretty quiet out here.” (*Id.* at 2:08–16.) Douglas clarified that the pedestrian was “toward the end” of “Deschamps,” not on Mocassin. (*Id.* at 2:02–30.)

Baker and Munoz separately responded to the call but were unable to locate the Explorer. (Dispatch Log; Suppr. Hrg. at 17:20–18:20, 22:1–3, 44:12–21, 50:24–51:7; Trial, Day 1 at 173:15–174:8.) Around 1:10 a.m., Baker saw Asby walking on Highway 10, where the speed limit is 55mph.¹ (Dispatch Log; Suppr. Hrg. at 18:15–20.) Asby was walking in front of Kenworth Sales, a truck dealership, on the Wye’s walking path—which is separated from the street by a wide ditch. (Baker 1 at 0:22.) The area was bright, the road mostly dry, and it

¹ Mont. Dep’t of Transp., *Mapped Speed Studies* (2023), available at <https://experience.arcgis.com/experience/8995b56fcac04914a171c3f63b85b85f> (last visited Nov. 13, 2025). The Court may take judicial notice of the speed limit. Mont. R. Evid. 201.

was not snowing yet. (*Id.*) Asby was appropriately dressed, wearing a jacket, jeans, and a hat. (*Id.* at 0:44.)

The distance between Kenworth Sales and the Mocassin–Meadow intersection is 1.5 miles:



Screenshot, Microsoft Bing: Maps;² (*See also* Suppr. Hrg. at 34:2–11; Trial, Day 1 at 133:2–19, 172:5–173:14, 243:13–25.)

Baker pulled over because Asby “matched the description” that Douglas provided. (Suppr. Hrg. at 18:13–19:1.) Baker drove into the Kenworth parking lot and stopped roughly ten feet in front of Asby, almost directly in his path:



(Baker 1 at 0:43.) As multiple witnesses testified, there were no other people around. (Suppr. Hrg. at 9:20–21, 65:14–16; Trial, Day 1 at 132:14–19, 209:18–20.) Baker left the car and headlights on and walked toward Asby. (Baker 1 at 0:43–47.) Asby also walked a few steps

² A map of the area was admitted as a demonstrative exhibit at Asby’s trial, and witnesses identified all the relevant landmarks above. (Trial, Day 1 at 92:11–13, 132:5–13, 170:9–21, 172:5–173:14; Trial, Day 2 at 6:21–25.) *See also* Mont. R. Evid. 201.

toward Baker. (*Id.*)

The first three seconds of Baker's and Asby's conversation are missing because Baker's body camera has a slight delay when initiating. (Suppr. Hrg. at 41:21–42:3.) According to Baker, in those first three seconds, he “said hi and asked [Asby] how he was.” (*Id.* at 44:1–4.)

When Baker's body camera started recording three seconds later, Baker was in the middle of interrogating Asby about a vehicle: “What's going on? Is it broke down, or what's happening?” (Baker 2 at 0:00–03.) “The battery quit; it just died,” Asby explained. (*Id.* at 0:02–07.) When Baker informed him that it might be in the middle of the road, Asby responded, “It shouldn't [be] in the middle of the road.” (*Id.* at 0:11–14.) Baker replied, “Well, that's what they said; I didn't go look at it.” (*Id.* at 0:12–15.)

At that time, there was no evidence that Baker and Asby were talking about the same vehicle. (*See generally id.* at 0:00–15; Suppr. Hrg. at 20:19–23:4.) Baker asked Asby what his plan was for getting *his* car, and Asby replied, “I got to go to work in the morning.” (Baker 2 at 0:19–26.) Asked where he was headed, Asby said he was walking home—roughly half a mile away, in the trailer park “behind the bar.”

(*Id.* at 0:26–34, 11:37–41; Suppr. Hrg. at 42:17–23.)

Approximately 35 seconds after stopping Asby, Baker asked to see his identification. (Baker 2 at 0:35.) While Asby was looking through his wallet, Trooper Munoz pulled into the parking lot. (*Id.* at 1:21–27.)

Around that time, Baker, who had grown impatient with Asby’s inability to locate his identification, grabbed Asby’s wallet out of his hand, saying, “I’m happy to do it for you, if you’re ok with that.” (*Id.* at 1:24–27.) Asby consented, and Baker removed Asby’s driver’s license. (*Id.* at 1:27–55.)

After checking his identification, Baker asked Asby if he had anything to drink. (*Id.* at 2:05–12.) “Of course I did,” Asby replied, “but I wasn’t driving when that happened.” (*Id.* at 2:13–23.)

Moments later, Asby took a few steps forward, but Baker grabbed his shoulder and said, “Hold on, hold on, hold on, Ben.” (*Id.* at 2:50–57.) Baker asked Asby again if he had driven after drinking, and Asby said he had not. (*Id.* at 3:20–26.) Three-and-a-half minutes into the stop, Baker asked Asby for the first time where his vehicle was. (*Id.* at 3:37–4:02.) Asby said it was at a friend’s house on Mocassin but reiterated that it was not in the middle of the road. (*Id.*)

Baker and Munoz continued grilling Asby but were unable to piece together a timeline of when Asby drank and when his car died. (*Id.* at 4:04–15:28.) They also never confirmed or asked for the make and model of Asby’s car. (*Id.*)

Over eleven minutes into the stop, Baker asked Asby if anyone sober could help him get his inoperable vehicle from his friend’s house; “I’ll go find somebody,” Asby replied, “I got friends that live close by. We can go get the car.” (*Id.* at 11:03–25.)

Roughly twelve minutes into Asby’s detention, Trooper Paulson located the Explorer at 11105 Mocassin Ln., which is at the Mocassin–Meadow intersection. (*Id.* at 11:45–50; Trial, Day 1 at 133:2–19; Suppr. Hrg. at 63:5–10; Dispatch Log.) Although it was in the middle of the road, there was nothing, such as a warm hood, indicating that it had been driven recently. (Suppr. Hrg. at 69:9–11.) Paulson ran the plate and learned that the Explorer belonged to Asby. (*Id.* at 68:4–16; Dispatch Log.)

Munoz informed Baker that Paulson found the Explorer. (Baker 2 at 11:40–47.) Baker and Munoz then had a sidebar. (*Id.* at 11:53–57.)

“I know he’s full of shit, but I also can’t prove he’s full of shit,” said

Baker to Munoz. (*Id.* at 12:10–15.) “I think we were five minutes too late on this one,” he complained. (*Id.* at 12:29–34.) Munoz said, “I can take this,” and offered to lead the remainder of the investigation. (*Id.* at 12:40–49.)

Asby denied driving impaired a total of ten times and denied leaving his vehicle in the middle of the road a total of six times. (*See id.* at 0:00–19:27.) Although Asby admitted that he was intoxicated, Munoz forced him to perform sobriety tests. (Trial, Day 1 at 187:8–20.) At that time, it started snowing, and after standing in the cold for nearly 30 minutes, Asby was physically unable to perform the tests. (Baker 2 at 26:13–58.)

Motion to Suppress

Asby argued that Baker lacked particularized suspicion (a) to initially detain him and (b) to start a DUI investigation. (Doc. 19.)

In briefing, the State did not contend that Baker had particularized suspicion to detain Asby when he was walking on Highway 10; rather, it argued that Asby was not “seized” until after Baker developed particularized suspicion of DUI. (Doc. 20 at 5, 11.) The State also argued, alternatively, that if Asby was seized, the community

caretaker doctrine (CCD) justified his detention. (*Id.* at 8.)

At the suppression hearing, the State abandoned the theory that Asby was not seized. (Doc. 27 at 9:13–17.) It also explicitly conceded that Baker lacked particularized suspicion when he first encountered Asby. (Suppr. Hrg. at 72:6–14.) Instead, it argued that Baker was conducting a welfare check, during which he developed particularized suspicion. (*Id.* at 70:1–3, 72:6–14.)

Baker testified that he stopped Asby because he “recognized [he] matched the description” he “received on [his] computer.” (Suppr. Hrg. at 18:13–19:1.) Later, with guidance from the prosecutor, Baker changed his tune, slightly, saying that a “factor[]” for stopping Asby was his concern that Asby might “stumble into the road” and “get smoked by a car.” (*Id.* at 35:7–24.)

The District Court acknowledged the State’s about-face regarding the seizure question and therefore treated the CCD issue as the “threshold question.” (Doc. 27 at 9:13–17.) It found that Baker “had reasons to be concerned about Asby’s wellbeing”—namely, the “cold temperature; frozen, uneven ground; Asby’s location near a primary highway in the dark; [and] Asby’s appearance and difficulty walking.”

(*Id.* at 11.) Although the court acknowledged that “[t]he circumstances here are not the best example of the community caretaker doctrine,” it nonetheless ruled that the doctrine applied to Asby’s detention. (*Id.* at 12.)

The Prosecutor Introduced Evidence of Asby’s Prior DUIs

Despite the parties’ stipulation and the court’s instructions that the prior DUIs were inadmissible, the prosecutor began voir dire by telling the venire that “Asby is charged with . . . driving under the influence, *fourth offense*.” (Trial, Day 1 at 24:25–25:1 (emphasis added).) The prospective jurors went on to have a discussion about “repeat offenders,” how they are “killing people on the road,” and how the laws aren’t “tough enough on these DUI drivers.” (*Id.* at 59:23–61:14.)

During a break in voir dire, defense counsel informed the court that the State snuck in certified copies of Asby’s prior DUI convictions as trial exhibits. (*Id.* at 65:12–16.) The Judge admonished the prosecutor again:

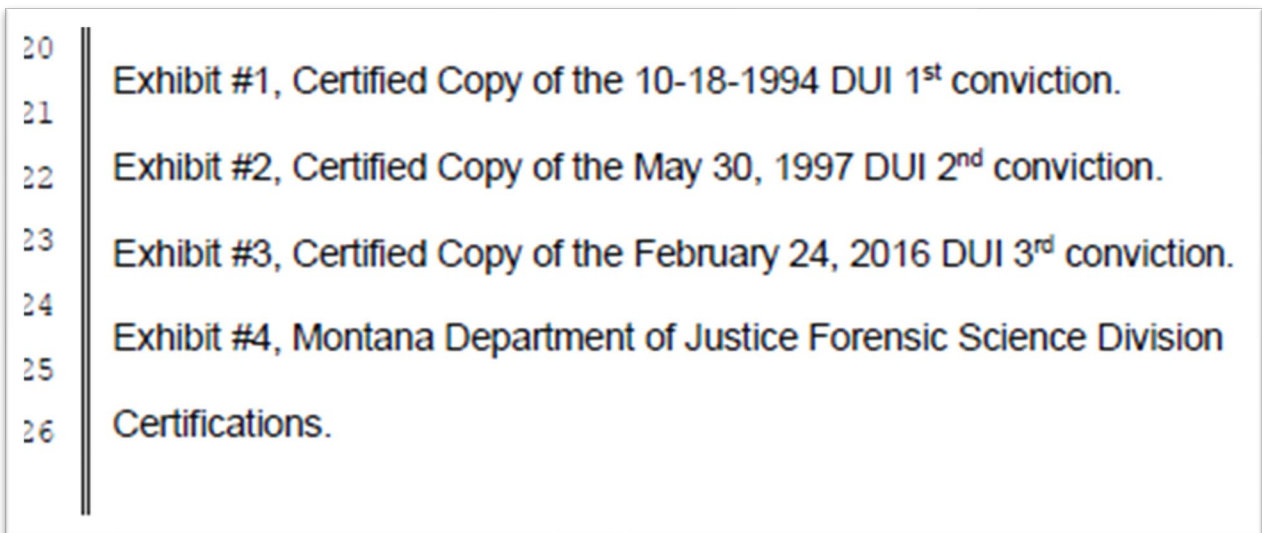
[Judge]: Mr. Dean, . . . although you may have provided all of those exhibits, I think we discussed on Thursday that none of that would be coming in.

[Prosecutor]: 1, 2, and 3? No. That’s correct.

[Judge]: And no mention by any of the officers as well.

(*Id.* at 66:6–14.)

But that wasn't the last of it. During Munoz's testimony, the prosecutor scrolled past the three inadmissible exhibits on the big screen and published the list of Asby's previous DUI offenses. (Trial, Day 1 at 162:2–163:1.) The jury was exposed to the following:



20 Exhibit #1, Certified Copy of the 10-18-1994 DUI 1st conviction.
21
22 Exhibit #2, Certified Copy of the May 30, 1997 DUI 2nd conviction.
23
24 Exhibit #3, Certified Copy of the February 24, 2016 DUI 3rd conviction.
25
26 Exhibit #4, Montana Department of Justice Forensic Science Division
Certifications.

(*Id.*; Doc. 37.) When defense counsel realized this was happening, he unplugged the monitor and requested a recess. (Trial, Day 1 at 162:10–163:1.) The Judge warned the prosecutor that she would declare a mistrial “if it happens again.” (*Id.* at 164:4–5.) The prosecutor acknowledged what he had done and said, “I’m not going to put it up again.” (*Id.* at 164:6–7.)

The Prosecutor Argued the State’s Case During Voir Dire

The prosecutor described Asby’s case in excessive detail during voir dire, often exaggerating or fully misrepresenting facts—including that Asby “abandoned” his vehicle in the middle of the night, failed to call a “tow service,” and answered “yes” when asked if he drove intoxicated. (*Id.* at 32:10–20, 37:7–21, 41:14–19, 45:12–46:22.) Consequently, prospective jurors began discussing the facts of Asby’s case spontaneously, and the prosecutor started arguing with them. (*Id.* at 34:5–23, 45:12–46:22, 48:13–49:1.)

Asby objected to the State’s improper voir dire, and the Judge admonished the prosecutor. (*Id.* at 49:2–6.) Despite that warning, the prosecutor continued arguing with prospective jurors using specific facts from the case: *e.g.*, “What if he tells you that the battery went out?” (*Id.* at 49:19–50:9.) Asby again objected, and the Judge had to admonish the prosecutor two more times. (*Id.* at 50:10–12, 51:8–12.) Although the prosecutor finally complied after the third warning, the jurors continued spontaneously mentioning case-specific facts. (*Id.* at 51:16–23.)

Having been thoroughly exposed to Asby’s criminal history and

the State’s interpretation of the facts before any evidence was introduced, the jury found Asby guilty of DUI. (Doc. 42.)

STANDARD OF REVIEW

Challenges for lack of particularized suspicion present mixed questions of fact and law. *State v. Zeimer*, 2022 MT 96, ¶ 32, 408 Mont. 433, 510 P.3d 100.

The Court reviews de novo whether sufficient evidence supports a conviction. *State v. Davis*, 2012 MT 129, ¶ 8, 365 Mont. 259, 279 P.3d 162.

Reversal is necessary when “a prosecutor’s improper comments prejudice a defendant’s right to a fair trial.” *State v. Byrne*, 2021 MT 238, ¶ 18, 405 Mont. 352, 495 P.3d 440.

The Court has an “inherent duty” to “protect individual rights set forth in the constitution.” *State v. Lawrence*, 2016 MT 346, ¶ 6, 386 Mont. 86, 385 P.3d 968.

SUMMARY OF THE ARGUMENT

The threshold conditions for a community caretaker (CCD) stop were not met. First, a CCD stop requires objective, specific, and articulable facts that a person is in peril or in need of assistance.

Walking home at night is not a sign of peril or distress. Baker's concern that Asby might have been "smoked by a car" was both pretextual and unsupported by the record—regardless, it cannot justify a warrantless intrusion. Second, the stop must actually involve a welfare check. But Baker did nothing to check on Asby's welfare, except ask him "how he was." Third, an officer must either render aid, if necessary, or discontinue the CCD stop, if not; Baker did neither. If Asby needed any assistance, it was related to his inoperable vehicle, with which Baker did not offer to assist.

Even if the initial stop was reasonable, Baker lacked particularized suspicion to convert it into a DUI investigation because (1) nobody corroborated Douglas's tip regarding the Explorer until twelve minutes into Asby's detention, and (2) Douglas did not personally observe Asby anywhere near the Explorer. Douglas's tip was therefore not a reliable source of particularized suspicion. *See State v. Pratt*, 286 Mont. 156, 165, 951 P.2d 37, 42–43 (1997).

Notwithstanding the jury's exposure to Asby's DUI history or the prosecutor's rogue voir dire arguments, the State's evidence was

insufficient to prove beyond a reasonable doubt that Asby was in actual physical control of a vehicle.

Perhaps seeking to compensate for its lack of evidence, the State (1) knowingly introduced prior bad acts and (2) improperly commented on the facts of the case—some of which were completely false—during voir dire. The prosecutor’s misconduct, drawing repeated objections and court admonitions, violated Asby’s constitutional right to a fair trial and left unsettled the fundamental fairness of the proceedings. Under either the harmless or plain error standard, a new trial is necessary.

ARGUMENT

I. The community caretaker doctrine (CCD) did not justify Asby’s initial seizure but was used as a pretext for an investigatory stop.

“The Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution” protect Asby “against unreasonable searches and seizures.” *State v. Spaulding*, 2011 MT 204, ¶ 15, 361 Mont. 445, 259 P.3d 793. A “carefully drawn exception[]” to warrantless seizures, *id.*, the CCD, “applies only to certain police–citizen encounters where police become involved, unrelated to the enforcement or prosecution of the criminal law, to

check-on or aid persons who may be in peril or otherwise in need of some form of assistance.” *State v. Laster*, 2021 MT 269, ¶ 15, 406 Mont. 60, 497 P.3d 224 (citations omitted).

The CCD does not apply here because (1) Baker did not have objective, specific, and articulable facts to suspect that Asby was in peril; (2) Baker did not actually conduct a welfare check; and (3) once Baker realized that Asby was fine and only needed assistance with his inoperable vehicle, he prolonged the interaction without ever offering or intending to help.

As a threshold matter, the District Court correctly treated Asby’s detention as a “seizure.” (Doc. 27 at 9:13–17.) Although Baker never activated his emergency lights, he drove up to Asby—the only person in the area—shined his headlights on him, and walked toward him. *Cf. State v. Storm*, 2014 MT 234, ¶ 13, 376 Mont. 277, 333 P.3d 218. Within three seconds, Baker began interrogating Asby about his vehicle and whereabouts. Within 35 seconds, Baker asked for Asby’s driver’s license, then temporarily seized his wallet and ultimately his identification. Within a minute-and-a-half, Munoz joined the detention. Within three minutes, Baker grabbed Asby by the shoulder and

physically restrained him. The State sensibly gave up the argument that Asby was not seized.

A. Deputy Baker lacked “objective, specific, and articulable facts” that Asby was in peril.

A CCD stop cannot lawfully occur unless the officer has “objective, specific, and articulable facts” to “suspect that a citizen is in need of help or is in peril.” *Spaulding*, ¶ 21. Although the officer’s subjective purpose need not be “solely and exclusively to conduct a welfare check,” *id.* ¶ 24, “the community caretaker doctrine cannot be used as a pretext for an illegal search and seizure,” *State v. Schlichenmayer*, 2023 MT 79, ¶ 20, 412 Mont. 119, 529 P.3d 789.

As the District Court admitted, “the circumstances here are not the best example of the community caretaker doctrine.” (Doc. 27 at 11:19–20.) The court’s candid remark makes sense, considering most CCD stops start with a report of an unconscious or erratic driver—*i.e.*, someone in obvious danger—not someone walking home in a safe and lawful manner. *See, e.g., State v. McClellan*, 2024 MT 276, ¶ 3, 419 Mont. 132, 559 P.3d 816 (defendant was slumped over and unresponsive in driver’s seat of running car); *Zeimer*, ¶ 2 (driver was slumped over the steering wheel of “irregularly” parked vehicle); *City of Missoula v.*

Metz, 2019 MT 264, ¶ 3, 397 Mont. 467, 451 P.3d 530 (defendant appeared unresponsive in driver’s seat); *State v. Updegraff*, 2011 MT 321, ¶ 1, 363 Mont. 123, 267 P.3d 28 (defendant was in the driver’s seat “motionless and unresponsive”); *Spaulding*, ¶ 6 (driver jerked car abruptly to the side of a gravel road roughly 200 yards in front of officer); *State v. Burns*, 2011 MT 167, ¶ 7, 361 Mont. 191, 256 P.3d 944 (driver was slumped over the steering wheel with the engine running); *State v. Wheeler*, 2006 MT 38, ¶ 5, 331 Mont. 179, 134 P.3d 38 (driver was flailing her arms excitedly while parked adjacent to a steep drop-off in a dangerous intersection); *State v. Litschauer*, 2005 MT 331, ¶ 3, 330 Mont. 22, 126 P.3d 456 (driver was banging her head into the steering wheel and headrest before driving off); *State v. Seaman*, 2005 MT 307, ¶ 3, 329 Mont. 429, 124 P.3d 1137 (defendant was sitting in driver’s seat, parked on shoulder of the off-ramp, in sub-zero degree temperature); *State v. Nelson*, 2004 MT 13, ¶ 4, 319 Mont. 250, 84 P.3d 25 (driver appeared unconscious in near-zero degree temperature).

In *Laster*, a 911-caller reported that a car was “stuck in the snow” and that its occupants might be “casing out vehicles and houses.” *Laster*, ¶ 2. An officer independently confirmed the vehicle’s location,

make, model, and color, and saw the owner attempting to remove it from the snow. *Id.* ¶ 3. Because the location of the vehicle was hazardous, the officer initiated an alleged welfare check and later discovered illegal drugs. *Id.* ¶¶ 3–6. The officer testified that he stopped “to dispense with the traffic hazard, identify the driver, and thereby assess the accuracy of the 911-caller’s suspicion.” *Id.* ¶ 24. This Court held that the CCD did not justify Laster’s seizure because the officer did not have “any reason to think that [Laster] was in fact in peril or otherwise in need of assistance.” *Id.* Nor did he actually “inquire[] as to Laster’s welfare or need for assistance.” *Id.*

In *State v. Graham*, an officer saw a vehicle parked on a dirt pullout. 2007 MT 358, ¶ 2, 340 Mont. 366, 175 P.3d 885. Concerned that the car might be stuck, she pulled up behind the vehicle and noticed the occupants kissing. *Id.* ¶ 3. The officer detained the driver and discovered signs of impairment. *Id.* ¶ 4. The district court erroneously reasoned that the stop was proper because “checking on a truck out in the middle of nowhere could save a life someday.” *Id.* ¶ 27. This Court reversed because the officer lacked “objective, specific, and articulable facts” to suspect that Graham was “in peril.” *Id.* ¶ 30. An officer

“equipped with nothing more than personal dissatisfaction with a person’s otherwise lawful conduct” cannot effectuate a CCD stop “without any intention of providing community care or assistance.” *Id.* ¶ 31 (citations omitted).

In *Zeimer*, a 911-caller reported that someone was parked “irregularly” and “slumped over the steering wheel” at a gas station. *Zeimer*, ¶ 2. When the officers arrived, they saw Zeimer “perk up” and drive slowly “to the frontside of the store, where he properly parked.” *Id.* ¶ 3 (cleaned up). The State conceded, and this Court agreed, that although the initial report suggested that Zeimer was in peril, that concern “evaporated” and was “dispelled” when the officers “saw Zeimer perk up . . . and lawfully drive away.” *Id.* ¶¶ 19, 33–34.

1. Deputy Baker testified that he stopped Asby because he matched the informant’s description.

As in *Laster*, ¶ 24, where the officer testified that he stopped to identify the driver and assess the accuracy of the 911-caller’s report, Baker used the CCD as a pretext for an investigatory stop. Baker testified, three times, that he stopped Asby only after he recognized that he matched Douglas’s description. (Suppr. Hrg. at 18:15–19:1, 40:5–8 (“Once I recognized it matched the description, I performed a U-

turn in my vehicle and pulled into the parking lot”).) Although Baker later asserted that Asby could have been “smoked by a car,” he did so only with guidance from the prosecutor. (*Id.* at 35:7–24.) And Baker said he had a hunch of criminal activity before he even found Asby because Douglas’s report was “very common with stolen vehicles” and “DUIs.” (*Id.* at 52:2–9.) Baker’s stop was even more pretextual than the officer’s in *Laster* because Baker had not corroborated any information regarding the Explorer.

2. The informant did not suggest that Asby was in peril.

Douglas never expressed any concern for Asby’s wellbeing. He called because he thought Asby “could be” connected to the Explorer. (911 Call at 1:48–2:36.) He told the 911 dispatcher, “It’s pretty quiet out here,” indicating the unlikelihood of Asby getting “smoked by a car.” (*Id.* at 2:08–16.) Douglas never said that Asby was inappropriately dressed or that he appeared stranded or lost. (*Id.*) Unlike the 911 reports in *McLellan*, ¶ 3, and *Zeimer*, ¶ 2, where the callers saw the drivers asleep in their cars, or *Litschauer*, ¶ 3, where the caller saw the driver banging her head against the steering wheel, Douglas communicated no

“specific” facts to suggest that Asby was having a medical emergency or was in peril.

3. The only specific concern that Deputy Baker articulated was that Asby could have been “smoked by a car.”

Other than vaguely testifying that Asby’s welfare was a “factor” for detaining him, (Suppr. Hrg. at 35:21–24, 40:4), Baker’s only half-baked example of “peril” was that Asby could have been “smoked by a car,” (*Id.* at 35:11–20). But Baker did not express that concern to Asby on the night of the stop until well over seven minutes into his investigation—after he had already interrogated Asby about driving while intoxicated. (Baker 2 at 7:19–22 (“I don’t want you getting smoked by a car as you’re walking down the road”).) Regardless, the vague notion that checking on someone “could save a life someday” does not justify a CCD stop, absent objective, specific, and articulable concerns for their welfare. *See Graham*, ¶ 27.

Asby was nowhere near the road when Baker located him; he was on the other side of a wide ditch separating the walking path from the street. (Baker 1 at 0:22.) And although that street name is *Highway 10*, the speed limit is only 55mph. *See* p. 8, *supra*. Baker testified that Asby

was “off the shoulder,” “not even in the road” when he saw him. (Suppr. Hrg. at 50:21–23.) And several State’s witnesses all testified that the area was not busy. (*Id.* at 9:20–21, 65:14–16; Trial, Day 1 at 132:14–19, 209:18–20.) Baker also saw “no indication that [Asby’s] walk was abnormal.” (Suppr. Hrg. at 41:4–7.) It had not started snowing, and the road was mostly dry—regardless, Asby was appropriately dressed. (Baker 1 at 0:22–43.)

As in *Graham*, ¶ 31, Baker’s “personal dissatisfaction” with Asby’s “otherwise lawful conduct” of walking safely down the road was not an “objective, specific, and articulable fact[]” that Asby was in peril or in need of assistance. As in *Zeimer*, ¶ 33, where the driver perked up and drove around the parking lot, Asby’s behavior at the time that Baker encountered him did not indicate that he was in peril or need of assistance.

Baker lacked an objective, specific, and articulable basis to detain Asby, and the CCD stop was used as a pretext to investigate a potential crime.

B. Deputy Baker never checked on Asby’s welfare, other than saying, “hi, how are you,” when he greeted him.

A valid CCD stop requires “that the stop actually involve a welfare check.” *Metz*, ¶ 22.

In *Metz*, a 911-caller requested a welfare check on an unconscious motorist sitting in the driver’s seat of a running car. *Id.* ¶ 3. Three officers, an ambulance, and a fire truck were dispatched. *Id.* ¶ 4. An officer asked Metz to “step out of the car so that the medical personnel [could] talk to him and see if he [was] alright.” *Id.* Instead of asking whether Metz needed aid, the officers requested his identification and interrogated him about his whereabouts. *Id.* The officers ultimately arrested Metz for DUI. *Id.* ¶ 5. This Court reversed because Metz’s detention did not “actually involve a welfare check.” *Id.* ¶ 24. The officers’ “purpose upon making contact with Metz was simply to identify him,” and they “appeared wholly unconcerned with Metz’s welfare as it [was] apparent that Metz [was] fine.” *Id.* ¶ 21. Once the officers began interrogating Metz and asking for his identification, “this matter [] moved beyond a welfare check to an investigation.” *Id.* ¶ 23.

In *State v. Reiner*, an informant reported a “possible intoxicated driver” in a “green Ford pickup” and provided a partial license plate

number. 2003 MT 243, ¶ 3, 317 Mont. 304, 77 P.3d 210. An officer located a parked vehicle matching that description, with Reiner asleep behind the wheel. *Id.* ¶ 5. The officer asked for Reiner’s identification and began interrogating him. *Id.* This Court held that the stop was unlawful because the officer failed to corroborate any indicia of impaired driving *and* failed to actually conduct a welfare check—making the CCD inapplicable. *Id.* ¶¶ 17–20. The officer testified that he approached Reiner because he matched the informant’s description. *Id.* “This was an attempt to locate a vehicle matching the [caller’s] description.” *Id.* ¶ 21. The officer’s stop “was not undertaken as a lawful [CCD] welfare check.” *Id.* ¶ 22 (cleaned up).

Asking Asby “how he was” before interrogating him was not a welfare check. (Suppr. Hrg. at 44:1–4 (“[I] said ‘hi’ and asked him how he was”).) When the audio turned on three seconds later, Baker was in the middle of interrogating Asby about the Explorer, and Baker asked for Asby’s identification within 35 seconds. (Baker 2 at 0:35.) As in *Metz*, ¶ 4, and *Reiner*, ¶ 6, Baker immediately began interrogating Asby about his vehicle, his whereabouts, and whether he was driving while intoxicated. There was even less pretense of a welfare check here

because in *Metz*, medical personnel actually arrived, and the officers at least asked Metz if he needed to talk to them. *Id.* Here, other than a casual greeting—“hi, how are you”—which is not even recorded on Baker’s body camera, Baker immediately started investigating.

(Baker 2 at 0:00–35.)

After those first three seconds, Baker did not inquire into Asby’s wellbeing. (*See generally id.*) Baker testified that he “didn’t feel the need to ask for medical assistance”; that there was “no indication of a crash”; and that he never “ask[ed] []Asby if he needed to be in [his] vehicle for warmth.” (Suppr. Hrg. at 42:8–11, 44:5–11.) And despite Baker’s alleged concern that Asby might get “smoked by a car,” he never offered to drive him home. (*See generally Baker 2.*)

Baker did not conduct an actual welfare check.

C. The CCD requires officers to either render aid if the citizen is in peril or end the welfare check if they are not; Deputy Baker did neither.

If, after a brief seizure, an officer confirms that a “citizen is in need of aid,” he “may take appropriate action to render assistance or mitigate the peril.” *Spaulding*, ¶ 21. Otherwise, if the officer “is assured that the citizen is not in peril or is no longer in need of assistance,” the

investigation must cease unless it is “justified by something” else, “such as particularized suspicion.” *Id.* A CCD stop “may not last longer than is necessary to effectuate the purpose of the stop.” *Schlichenmayer*, ¶ 16 (citing Mont. Code Ann. § 46-5-403).

- 1. Even if Asby appeared to be in peril, Deputy Baker’s concern was quickly dispelled upon learning that he was fine and that he lived half a mile away.**

Even if Asby legitimately appeared to be in peril, Baker quickly learned that (a) Asby was “fine,” (*See Suppr. Hrg.* at 44:5–8); and (b) Asby lived “within half a mile,” (*Id.* at 42:17–19; *Baker 2* at 0:26–34). There was no need for Baker to prolong his interaction with Asby once the initial justification for the stop—making sure he wasn’t “smoked by a car”—evaporated. Once Baker confirmed that Asby was fine and that he lived nearby, the “brief seizure” needed to come to an end because Baker was “assured that [Asby was] not in peril or [was] no longer in need of assistance.” *See Spaulding*, ¶ 21.

- 2. If Asby needed any assistance, it was related to his inoperable vehicle, and Deputy Baker never offered to help him with that.**

Assuming that Asby needed any assistance, it was unrelated to getting “smoked by a car”; rather, it had to do with Asby’s inoperable

vehicle. If Baker thought that Asby needed help with his vehicle, he could have “take[n] appropriate action to render assistance or mitigate the peril.” *Id.* Baker failed to do so. Although he asked Asby—once—what *his* plan for the vehicle was, he never offered to assist him.

(Baker 2 at 0:25–35.) Eleven minutes later, Baker asked Asby whether Asby could find someone sober to move his car. (*Id.* at 11:03–25.) Asby replied, “I’ll go find somebody . . . I got friends that live close by.” (*Id.*) But Baker never responded to that statement, as he was not genuinely interested in assisting with the car. (*Id.*)

Baker’s alleged CCD stop was pretextual and violated Asby’s right to be free from unreasonable seizures.

II. Even if the CCD stop was valid, the officers lacked particularized suspicion to investigate a DUI without confirming any information about the Explorer or Asby’s driving.

An officer relying on an informant’s tip to form particularized suspicion of DUI must either personally “observe[] the illegal activity or find[] the person, the vehicle, and the vehicle’s location substantially as described by the informant,” *and* “the information” must be “based on the informant’s personal observations.” *Pratt*, 286 Mont. at 165, 951 P.2d at 43. Neither factor was met here: (1) Baker and Munoz had not

confirmed any information about the Explorer when they launched a DUI investigation; and (2) Douglas never personally observed Asby in or near the Explorer.

A. The officers did not corroborate the informant’s tip regarding the Explorer when they started a DUI investigation.

“Corroboration of the tip occurs when the officer either observes illegal activity or finds the person, the vehicle, *and* the vehicle’s location substantially as described by the informant.” *Pratt*, 286 Mont. at 165, 951 P.2d at 43 (emphasis added). But Baker and Munoz neither saw Asby engaged in illegal activity nor corroborated Douglas’s information about the Explorer. First, the Explorer was not discovered until twelve minutes into Asby’s detention—well after the DUI investigation began. And second, Baker and Munoz did not confirm that the vehicle Asby left at his friend’s house was the same vehicle that Douglas allegedly saw in the middle of Mocassin.

1. Law enforcement did not locate the Explorer until twelve minutes into Asby’s detention.

The DUI investigation started within three seconds of Asby’s detention because that is when Baker moved on from allegedly inquiring into Asby’s “welfare.” (See Baker 2 at 0:00–03; Suppr. Hrg.

at 22:8–15, 44:1–8.) Alternatively, it began after 35 seconds, when Baker asked for Asby’s identification, which had no relevance to Asby’s welfare. (Baker 2 at 0:35.) At the very latest, it started when Baker asked Asby if he had “anything to drink” two minutes after stopping him. (*Id.* at 2:05–12.) By that time, although the officers had searched for the Explorer, they had been unable to find it on Mocassin. (Dispatch Log; Suppr. Hrg. at 50:24–51:7; Trial, Day 1 at 147:1–16, 173:15–174:8.) Therefore, Baker and Munoz tried—and failed—to corroborate Douglas’s tip, as Baker admitted. (Baker 2 at 0:12–15 (“that’s what they said; I didn’t go look at it”).)

Trooper Paulson located the Explorer twelve minutes into Asby’s detention and ten minutes after Baker asked Asby whether he had been drinking. (*Id.* at 11:45–50.) By then, Baker and Munoz had both vigorously questioned Asby. (*Id.* at 2:05–12:00.) Because they failed to corroborate Douglas’s tip by finding “the vehicle[] and the vehicle’s location substantially as described by [him]” prior to the interrogation, they did not have particularized suspicion of DUI. *See Reiner*, ¶ 16.

2. The officers never confirmed that Asby’s car was the same vehicle the informant saw in the middle of Mocassin until after they investigated Asby for DUI.

When Baker extended the stop into a DUI investigation, he did not know (a) the make or model of Asby’s car; (b) the location of Asby’s car; or (c) whether Asby’s car was in the middle of Mocassin.

First, Asby never said that his car was a Ford Explorer. (*See* Baker 2 at 0:00–40:46.) Although Asby was talking about *his* vehicle breaking down, Baker and Munoz had no idea what its make or model was—nor did they ask—until Paulson found it and ran the plates twelve minutes later. (*Id.*) The only statement Asby made about his car when Baker first stopped him was, “The battery quit; it just died.” (*Id.* at 0:00–14.) And Baker never testified that he asked Asby to identify his car in the unrecorded first three seconds. (Suppr. Hrg. at 20:19–23:4, 44:1–8.)

Second, Asby never admitted that his car was on Mocassin until *after* Baker started a DUI investigation. (Baker 2 at 0:00–3:36.) When Baker asked Asby where his car was, he had already interrogated him about his drinking. (*Id.*)

Third, Asby never admitted that his car was in the middle of the road, and Baker failed to confirm that he and Asby were discussing the same vehicle. When asked about it, Asby said, “It shouldn’t [be] in the middle of the road.” (*See id.* at 0:11–14.)

Because Baker and Munoz never witnessed Asby violating the law, they needed to confirm the information that Douglas provided regarding the Explorer. *See Reiner*, ¶ 16. They did not. Therefore, they failed to corroborate Douglas’s tip when they began their DUI investigation.

B. The informant’s report that Asby “could be” related to the Explorer was not based on his personal observations.

A third party’s report “must be based upon the informant’s personal observations” to be a sufficiently reliable source of particularized suspicion. *Reiner*, ¶ 16. But when Baker stopped Asby, his hunch that Asby might be connected to the Explorer stemmed entirely from Douglas’s report. And Douglas never personally observed Asby in or near the Explorer; he saw him a mile away, near the intersection of Deschamps and Highway 10. (911 Call at 1:57–2:03 (“on Deschamps, toward the end by the trap club”)) Douglas himself was not

even sure that Asby was connected to the Explorer. When the dispatcher asked Douglas whether Asby and the car were “possibly related,” Douglas hesitated: “Eh—it could be.” (*Id.* at 2:08–16.)

Douglas’s 911 tip was not sufficiently reliable to supply Baker and Munoz with particularized suspicion because Baker and Munoz did not corroborate any information about the Explorer, and Douglas had no personal knowledge that Asby was connected to it. *See Pratt*, 286 Mont. at 165, 951 P.2d at 43. Baker and Munoz therefore lacked particularized suspicion when they extended the pretextual welfare check into a DUI investigation. *See Laster*, ¶ 18 (when the “original constitutional justification for a CCD stop ends,” an officer must have “some other constitutional justification” to “prolong[] the stop, such as particularized suspicion of criminal activity”).

III. There was insufficient evidence that Asby was in actual physical control of a vehicle.

Due process demands proof beyond a reasonable doubt of “every fact necessary to constitute [a] crime.” *Davis*, ¶ 11. To convict Asby, the State needed to prove beyond a reasonable doubt that he was “in actual physical control of” a vehicle while “under the influence of alcohol.” § 61-8-1002(1)(a). It presented *no* evidence of that element. The State’s

conjectural argument that “there were no drinking establishments” between Mocassin and Asby’s location does not supply the missing temporal link between the Explorer’s mechanical failure, Asby’s drinking, and Asby’s midnight stroll. (*See* Trial, Day 2 at 23:16–20.) The court erred by denying Asby’s motion for a directed verdict.

The “actual physical control” language of § 61-8-1002 is “intended to discourage intoxicated persons from entering motor vehicles except as passengers.” *State v. Sommers*, 2014 MT 315, ¶ 20, 377 Mont. 203, 339 P.3d 65. Whether a person exercises actual physical control depends on a balancing of factors:

- (1) where *in the vehicle* the defendant was located;
- (2) whether the ignition key was in the vehicle, and *where the key was located*;
- (3) whether *the engine was running*;
- (4) where the vehicle was parked and *how it got there*;
- (5) whether the vehicle was *disabled* (broken down, mechanically inoperable, stuck, or otherwise immovable); and
- (6) how easily the defendant could have *cured the vehicle’s disability*.

Id. ¶ 35 (emphasis added).

In *North Carolina v. Eldred*, officers discovered a damaged, vacant vehicle on the highway. 815 S.E.2d 742, 743 (N.C. Ct. App. 2018). They later found Eldred walking two-to-three miles away on the

same highway. *Id.* Eldred admitted that he was “on meth” but could not remember much else. *Id.* When he was interrogated again at the hospital, he said he “ran out of gas” and was “involved in a wreck a couple hours ago.” *Id.* The court of appeals reversed Eldred’s DUI conviction for insufficient evidence because the State “presented no evidence, direct or circumstantial,” to establish that Eldred had driven while impaired. *Id.* at 746. Although “[m]ost anyone would surmise what happened,” “the law prohibits imposing criminal liability based on conjecture [and] gaps in the evidence.” *Id.* at 742. *Accord, e.g., Ohio v. Williams*, 968 N.E.2d 1038, 1040 (Ohio Ct. App. 2011); *Giron v. City of Alexander*, 693 F. Supp. 2d 904, 951 (E.D. Ark. 2010); *Krull v. Georgia*, 438 S.E.2d 152, 154 (Ga. Ct. App. 1993).

When Baker spotted him, Asby was on foot—one-and-a-half miles away from the Explorer. Not a single witness could place Asby in or near the Explorer—much less in the driver’s seat. (Trial, Day 1 at 139:7–8.) The State offered no evidence regarding the location of Asby’s keys or the operability of his car. *Cf. Sommers*, ¶ 35.

As in *Eldred*, 815 S.E.2d at 745, the State “presented no evidence of how much time elapsed between” Asby driving to his friend’s house

on Mocassin, the Explorer’s battery failing, and Asby wandering down Highway 10. The hood of Asby’s car was not warm, and there was no indication that it had been driven on or around March 14, 2023. (Trial, Day 1 at 214:3–5.) Asby’s statement that he was at his friend’s house when his battery died notably lacked any temporal element. (Baker 2 at 5:25–34.) When asked directly if he drove *before he drank*, Asby said, “Oh, way before.” (*Id.* at 4:14–20.) Further, Douglas admitted that he did not know whether the Explorer was on the road the day before, how or when it got there, or whether anyone had operated it. (Trial, Day 1 at 134:17–135:6.) He specifically testified that he was not “watching the road” and did not drive by earlier. (*Id.* at 131:25–132:1; 134:17–135:6.)

Finally, the Explorer was “mechanically inoperable.” *See Sommers*, ¶ 35. The State offered no evidence of when the battery died. Douglas never saw the vehicle running—he believed that it “rolled out of the driveway.” (Trial, Day 1 at 133:20–23.) And Asby could not have “easily” cured the mechanical issue because he was a mile-and-a-half away at 1:10 a.m., ostensibly without a car key. *See Sommers*, ¶ 35. Nor did he intend to cure the mechanical issue that night: Asby said he was

headed home, and he planned to find someone who could help him before work the next morning. (Baker 2 at 0:26–34, 11:03–41.)

The State’s evidence was insufficient to prove that Asby was in actual physical control of a vehicle. As Baker admitted on the night of Asby’s arrest, “I [] can’t prove he’s full of shit.” (*Id.* at 12:10–15.) At trial, the State needed something more than that—it needed proof *beyond a reasonable doubt*. It came nowhere near meeting that standard.

IV. Prosecutorial misconduct substantially impaired the fundamental fairness of Asby’s trial and necessitates reversal.

With no proof of an essential DUI element, the State resorted to cheating. Asby had a constitutional right to a fair trial. *See* U.S. Const. amend. VI; Mont. Const. art. II, § 24. The State violated that right by (i) knowingly defying the court’s instruction and the parties’ stipulation to exclude Asby’s prior DUIs, and (ii) engaging in improper argument during voir dire.

Prosecutors have a “duty to refrain from improper methods calculated to produce a wrongful conviction.” *Lawrence*, ¶ 17. “[T]he duty of the prosecutor is to seek justice, not merely to convict.” *Colorado*

v. Tenth Judicial Dist. Ct., 632 P.2d 1022, 1023 (Col. 1981) (citing *Singer v. United States*, 380 U.S. 24, 85 (1965)). “The purpose of voir dire in a criminal case is to determine the existence of a prospective juror’s partiality.” *State v. Michaud*, 2008 MT 88, ¶ 26, 342 Mont. 244, 180 P.3d 636. It “is to discover bias, not to *create* bias.” *Missouri v. Ousley*, 419 S.W.3d 65, 74 (Mo. 2013) (emphasis added).

A. Over Asby’s objections and the court’s admonitions, the prosecutor repeatedly informed the jury that Asby had three prior DUI convictions.

“Evidence of other crimes” is “not admissible to prove the character of a person.” Mont. R. Evid. 404(b). Impermissibly introducing evidence of a “defendant’s prior convictions” is “a classic example of the prosecutor’s zeal exceeding his judgment.” *Iowa v. Knupp*, 310 N.W.2d 179, 184 (Iowa 1981); *see also Gaddie v. North Dakota*, 11 N.W.3d 21, 29 (N.D. 2024) (“knowing introduction of prior bad acts” constituted “prosecutorial misconduct”). *Accord Simmons v. Wyoming*, 72 P.3d 803, 810 (Wyo. 2003); *McGuire v. Nevada*, 677 P.2d 1060, 1065 (Nev. 1984).

From the opening moments of voir dire, the jury knew that Asby was on trial for a fourth DUI because the prosecutor told them. *See*

p. 14, *supra*. This was clearly impactful, as the venire then had a discussion about repeat offenders:

I have a problem with the law because I personally have—my brother, I don't know how many DUIs he has received . . . and none of this works. The law isn't strong enough.

. . . .

[T]hey just get free, and they just keep doing it over and over.

. . . .

Kind of like what she was saying, the guy that killed my niece, he had, like, previous DUIs, so it's like these repeat offenders are the ones that are out there killing people on the road.

. . . .

[M]y brother has . . . been released time after time after time and has been out there driving. I don't think—guilty or innocent, I don't think it makes any difference.

(*Id.* at 59:23–60:20, 61:10–14.)

The prosecutor then capitalized on the jurors' hostility by publishing exhibits of Asby's DUI convictions during Munoz's testimony. *See* p. 15, *supra*. The prosecutor acted knowingly because he had previously agreed to exclude Asby's criminal history, (PTC at 4:2–10; Doc. 10); the court admonished the prosecutor four days before trial, (PTC at 10:24–11:4), and again during voir dire, (Trial, Day 1 at 66:6–

14); the court had already rejected the proposed exhibits, (*Id.* at 65:12–16); and the prosecutor admitted what he had done on the record, (*Id.* at 164:6–7).

Given the obvious fragility of the State’s case—that Asby was a mile-and-a-half away from his inoperable vehicle—it is reasonably likely that the jury would not have convicted him but for its knowledge of Asby’s DUI history. The purpose of Rule 404(b) “is to prevent convictions that are merely based on a jury finding that someone has a propensity to do certain things.” *State v. Aakre*, 2002 MT 101, ¶ 12, 309 Mont. 403, 46 P.3d 648. Here, the State obtained a conviction by publishing Asby’s DUI history to the jury—which had already expressed hostility toward “repeat [DUI] offenders.”

Because Asby objected in a pretrial motion, and “the State stipulated to the motion and reassured the court” that it would not bring in Asby’s DUI history, the prosecutor’s misconduct is subject to harmless error review. *See Byrne*, ¶ 21. But even if unpreserved, Asby’s claim warrants plain error review because the prosecutor’s repeated introduction of Asby’s prior DUIs violated his right to a fair trial and

“raise[d] a question as to the fundamental fairness of the proceedings.”

See Lawrence, ¶ 11.

B. Despite three warnings, the prosecutor used voir dire to argue his case, commit jurors on factual issues, and misrepresent evidence.

The American Bar Association’s criminal justice standards on voir dire prohibit prosecutors from using voir dire “to argue the prosecutor’s case,” “commit jurors on factual issues,” and “intentionally present [inadmissible] arguments, facts, or evidence.” ABA *Crim. J. Section, Crim. J. Standards for the Prosecution Function* 3-6.3 (4th ed. 2017). A court “may limit the examination” of prospective jurors “if the examination is improper.” Mont. Code Ann. § 46-16-114.

The State “was not permitted to argue the merits of its case during voir dire.” *See Columbus v. Hamilton*, 605 N.E.2d 1004, 1007 (Ohio Ct. App. 1992) (prosecutor’s arguments during voir dire interfered with defendant’s right to fair trial). But that is exactly what the prosecutor did here. He went into excruciating, impermissible detail regarding the circumstances of Asby’s arrest, drawing two objections from Asby and three warnings from the Judge. (Trial, Day 1 at 49:2–6, 50:10–12, 51:8–12.)

Specifically, the prosecutor made the following statements during voir dire:

[Y]ou're going to hear some testimony here relative to . . . the abandonment of a vehicle. If anybody—does anybody here think that if you are in a vehicle and it stalls out, and you park it in the middle of the road on a rural road, that you have a duty to contact law enforcement or a tow service to get it out of the road? . . . Does anybody think that that's what should have been done?

. . . .

Now, in this case, . . . there was an abandoned vehicle, and . . . the abandoned vehicle belonged to the defendant . . . We expect the evidence will show . . . this case began with a 911 call . . . from Douglas Ford, who was on his way to work . . . [a] Good Samaritan citizen.

. . . .

[W]e expect the evidence will show that the . . . Breathalyzer machine has to be calibrated and has to be known to be operational . . . [a]nd we anticipate you'll hear evidence of that fact.

(Trial, Day 1 at 32:10–20, 37:7–21, 41:14–19.)

Consequently, when the prosecutor asked the venire to explain “circumstantial evidence,” a prospective juror gave the following example: “Car is parked in the road that belongs to you, but you're not in it.” (*Id.* at 34:3–4.) The prosecutor followed up with that juror:

[Prosecutor]: Right. And what if . . . it's found in the

middle of the road, in the middle of the night, and you're the only one on the road, walking down that road? What would circumstantial evidence tell you about that, sir?

[Juror]: The other person isn't walking with you anymore, or . . . there could be other people walking.

[Prosecutor]: Right. But you're speculating about that.

[Juror]: Speculating. Sure.

(Id. at 34:5–23.)

When one of the prospective jurors expressed skepticism about finding a DUI without physical control of a vehicle, the prosecutor offered the following:

[Prosecutor]: [W]hen he encountered the law enforcement officers, and they asked him, "Were you drinking and driving, were you driving that vehicle," and he tells them, "Yes, well, the car breaks down—my car broke down, and I left it down there," that indicates what to you?

. . . .

[Juror]: That does make a difference. Yes.

[Prosecutor]: Alright. When directly asked by the officer when they first encounter him, "Where are you coming from, what are you doing, have you been drinking," and then . . . later saying, "Well, my car broke down," and he left it there.

[Juror]: Yes.

[Prosecutor]: And does anybody have a problem with the hazard of leaving your vehicle, not contacting 911, or not contacting a tow service, on a rural road, middle of the night? Anybody think that's a problem?

[Juror]: Was it in the middle of the road?

[Prosecutor]: Middle of the road. Perpendicular. . . .

[Juror]: I'm [Juror Number] 41. If it is in the middle of the road, then that's a problem.

(*Id.* at 45:12–46:22 (emphasis added).) Five other prospective jurors—including two selected for trial—said it was a problem that Asby left his car in the middle of the road. (*Id.* at 46:24–48:4, 86:13–17.) When another juror expressed some skepticism, the prosecutor responded with additional details: “If it’s in the middle of the road on Mocassin and Deschamps at 1:00 in the morning, where there’s no streetlights?” (*Id.* at 48:13–49:1.)

Many of those facts were never even in evidence, including that Asby “abandoned” his vehicle in “the middle of the night,” on “Mocassin and Deschamps,” where there are “no streetlights”; that he answered “yes” when asked if he was drinking and driving; and that he failed to

contact a “tow service.” Not only were those facts not in evidence, but the whole crux of Asby’s defense was that he never admitted to drinking and driving and that the State did not know *what time* his vehicle failed. (Trial, Day 2 at 29:6–13, 30:11–22.)

The prosecutor’s comments during voir dire violated Asby’s substantial right to a fair trial because “the jury’s purpose and duty” is to “decide if the State has proved the defendant’s guilt,” “based on the facts presented.” *See State v. Ritesman*, 2018 MT 55, ¶ 27, 390 Mont. 399, 414 P.3d 261. The State deprived Asby of that opportunity by “argu[ing] [its] case to the jury,” “commit[ting] jurors on factual issues,” and “intentionally present[ing] [inadmissible] facts or evidence” during voir dire. *See Crim. J. Standards for the Prosecution Function* 3-6.3.

Although Asby preserved this issue by objecting when the prosecutor’s voir dire went off the rails, *Byrne*, ¶ 21, the misconduct also warrants plain error review. The prosecutor’s inappropriate voir dire violated Asby’s right to a fair trial and “raise[d] a question as to the fundamental fairness of the proceedings.” *See Lawrence*, ¶ 11. Whether viewed in isolation or cumulatively, the prosecutor’s instances of misconduct violated Asby’s right to a fair trial and demand reversal.

CONCLUSION

At every stage in these proceedings, the State was as far, metaphorically, from securing justice as Asby was, physically, from his inoperable vehicle: a mile-and-a-half away.

Baker had no reason to stop Asby. Walking home at night, even in March in Montana, is not a sign of peril. Nor is asking someone “how they are” a welfare check.

Baker had even less reason to extend his pretextual welfare check into a DUI investigation because the *Pratt* factors were not satisfied: nobody had corroborated any information about the Explorer, its location, or Asby’s connection to it at the time that Baker started a DUI investigation, and nobody witnessed Asby near the Explorer.

But even if the State can overcome the issues with Asby’s arrest, it presented no evidence that Asby was in actual physical control of his vehicle—or *any* vehicle—in his intoxicated state.

Perhaps acknowledging the abject weakness of its case, the State sought to secure a conviction by cutting ethical corners: knowingly disregarding the parties’ stipulations and the court’s orders by introducing Asby’s prior DUIs to the jury, and infecting the venire with

a prejudicial and factually erroneous version of events during jury selection.

The Court should reverse Asby's conviction.

Respectfully submitted this 4th day of December, 2025.

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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 9,990, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Dimitrios Tsolakidis
Dimitrios Tsolakidis

APPENDIX

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CERTIFICATE OF SERVICE

I, Dimitrios Tsolakidis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-04-2025:

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