IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0683

STATE OF MONTANA,

Plaintiff and Appellee,

v.

LINDSEY MAE LALICKER,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

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

APPEARANCES:

CHAD WRIGHT
Appellate Defender
DEBORAH S. SMITH
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
debbiesmith@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
ROY BROWN
Assistant Attorney General
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

MARTIN B. LAMBERT
Gallatin County Attorney
BJORN BOYER
Deputy County Attorney
1709 W. College
Bozeman, MT 59715

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The State fails to demonstrate the prosecution proved beyond a reasonable doubt that Lyndsey knew she had no legal right to parent LL during the weekend at issue. 1

A. Viewing the evidence and testimony in the light most favorable to the State, a rational juror could not have found Lyndsey guilty under applicable law. 1

B. The State improperly dismisses legislative history as irrelevant upon which this Court has relied when deciding previous parenting and custodial interference cases. 13

C. The State inveighs against arguments Lyndsey did not make. 17

II. The fine and costs imposed at sentencing are illegal, not objectionable, because the payment plan approved by the District Court does not allow Lyndsey to pay the financial obligation in full during her deferred sentence and facially precludes a request for early termination of the sentence. 19

CONCLUSION 25

CERTIFICATE OF COMPLIANCE 26

TABLE OF AUTHORITIES

Cases

City of Kalispell v. Salsgiver,
2019 MT 126, 396 Mont. 57, 443 P.3d 504 (*en banc*) 23

Contway v. Camp,
236 Mont. 169, 768 P.2d 1377 (1989) 16

In re Winship,
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 18

Lalicker v. Hartkopf,
2021 MT 265N 9, 10

Parenting of L.G.L. (*L.G.L. I*),
2018 MT 283N 3, 9

Parenting of L.G.L. (*L.G.L. II*),
2021 MT 313N 9, 10

State v. Heafner,
2010 MT 87, 356 Mont. 128, 231 P.3d 1087 21

State v. Kotwicki,
2007 MT 17, 335 Mont. 344, 151 P.3d 892 ..... 20, 23

State v. Lance,
201 Mont. 30, 651 P.2d 1003 (1982) 4, 16, 18

State v. Lenihan,
184 Mont. 338, 602 P.2d 997 (1979) 20, 23

State v. MacDonald,
2013 MT 105, 370 Mont. 1, 299 P.3d 839 12

State v. Polak,
2018 MT 174, 392 Mont. 90, 422 P.3d 112 12

State v. Price,
2002 MT 229, 311 Mont. 439, 57 P.3d 42 ..... passim

State v. Reynolds,
2017 MT 317, 390 Mont. 58, 408 P.3d 503 22

State v. Robertson,
2014 MT 279, 376 Mont. 471, 336 P.3d 367 6

State v. Spottedbear,
2016 MT 243, 385 Mont. 68, 380 P.3d 810 ..... 6, 7

State v. Young,
2007 MT 323, 340 Mont. 153, 174 P.3d 460 (*en banc*) ..... passim

Statutes

Montana Code Annotated
§ 40-4-205 ..... 10, 11
§ 45-5-304 ..... 13, 14, 16, 17
§ 45-5-304(1) 15
§ 45-5-304(3) 15
§ 45-5-631 2
§ 45-5-634 ..... passim
§ 45-5-634(1) 15
§ 45-5-634(3) 15, 17
§ 46-18-201(1)(a)(ii) 20
§ 46-18-208 24
§ 46-18-208(1)(a) 20
§ 46-18-208(6)(c) 20
§ 46-18-231 23
§ 46-18-231(3) 21
§ 46-18-232 23
§ 46-18-232(2) 22
§ 46-18-234 22

Rules

Internal Operating Rule 3(I)(3)(c)(ii) 9

Other Authorities

2/28/1979 Hearing on H.B. 224, S. Judiciary Comm.....5, 6

Lyndsey Mae Lalicker maintains the arguments in her opening brief and respectfully replies to the State's argument:

ARGUMENT

I. The State fails to demonstrate the prosecution proved beyond a reasonable doubt that Lyndsey knew she had no legal right to parent LL during the weekend at issue.

A. Viewing the evidence and testimony in the light most favorable to the State, a rational juror could not have found Lyndsey guilty under applicable law.

The State contends "the alleged failure to pursue contempt proceedings does [not] make[] the State's evidence insufficient for the crime of parenting interference." (Appellee's Br. at 31.) According to the State, Lyndsey's "claim is merely that the State should have pursued alternative means of sanctioning her." (Appellee's Br. at 31.) The State misses the mark.

Lyndsey's opening brief did not argue or imply the State should have pursued alternative means of sanctioning Lyndsey. There was no reason for the State to pursue any criminal sanctions against Lyndsey. Indeed, the State is not a party to Lyndsey and Luke's parenting plan case, in which Luke had moved for contempt twice against Lyndsey in the parenting plan matter, first on January 5, 2018, and again on April

16, 2018. (App. F at 7, 9.) Those requests remained unadjudicated after the State stepped in to prosecute Lyndsey for parenting interference in this case and two misdemeanor charges of interference with parent-child contact under Mont. Code Ann. § 45-5-631, at issue in *State v. Lalicker*, DA 19-0717. The parenting case, not criminal court, was the proper forum for determining Lyndsey's potential culpability, if any, for the alleged parenting plan violations.

Given the prospective remedy of contempt available to Luke in the parenting plan case, the State's decision to prosecute a hard-working, single mom with no criminal history, possessed of an unwavering conviction that she was following the parenting plan while McLaughlin was making up her own rules that violated the parenting plan, the State's decision to gin up any criminal case, let alone three of them, against Lyndsey is baffling.[1]

---

[1] The State asserts, "Currently before this Court are *two of* [Ms.] Lalicker's criminal appeals[,]" vaguely implying Lyndsey has other pending criminal cases or perhaps past appeals. (Appellee Br. at 1 (emphasis added).) Lyndsey has no other past or present criminal cases or appeals. Her two present appeals of convictions arising solely out of parenting disputes with Luke Oyler, who indisputably suffers from mental illness, tried to relinquish his parenting rights, and filed a parenting plan action concerning LL only after Lyndsey petitioned for

Everyone knew where Lyndsey was on the weekend at issue in this case – working at the horse sale in Salmon, Idaho. (Exh. 9 at attachments 1, 1A, 10 – 12, 15.) Everyone knew Lyndsey had taken LL with her; Lyndsey told them so in advance of leaving with LL for the weekend. Everyone knew LL would return home with Lyndsey to Gallatin County at the end of the weekend when the horse sale ended. Everyone knew Lyndsey disagreed with McLaughlin's edicts about the parenting phases and her decision mandating parenting of LL on weekends opposite to when Lyndsey parented her minor-age son.

Lyndsey was acting *pro se* in her parenting plan case after the final parenting plan was issued by the District Court. *L.G.L. I*, ¶ 6. Her counsel withdrew in August 2017; she was arrested on the parenting interference charge in April 2018. (D.C. Doc. 4; App. F at 5 – 6 (## 94, 96).) Before her arrest, Lyndsey did everything she could think of to get judicial attention to her complaints about McLaughlin's directives. (App. F at 6 – 9 (document numbers 97 – 178).) Instead, what Lyndsey got was a slew of criminal charges that have required

---

child support, are Lyndsey's *only* criminal cases. (*Parenting of L.G.L.*, 2018 MT 283N, ¶¶ 3 – 5 (*L.G.L. I*).)

substantially more court time than would have been necessary to clarify McLaughlin's role to determine the parenting phases described in the parenting plan.

Parenting plan cases, even contentious ones like Lyndsey's and Luke's, were not intended by the Criminal Law Commission, the Legislature, or this Court to land a parent in criminal proceedings except in narrowly specified circumstances. *State v. Lance*, 201 Mont. 30, 33, 651 P.2d 1003, 1004 (1982) (*en banc*), *State v. Price*, 2002 MT 229, ¶¶ 39 – 44, 311 Mont. 439, 57 P.3d 42. This Court, the Legislature, and the Commission agree that context matters. Mont. Code Ann. § 45-5-634 should not be used to punish parents who are in the midst of a heated parenting proceeding, often without the assistance of counsel, and who may not understand the extent or limits of their legal rights under vague, confusing court orders that cede judicial authority to unelected contractors like a "parenting coordinator" retained by the other parent.

Lyndsey is a mother who was trying to address the uncertainty regarding McLaughlin's authority to decide if Luke successfully completed a parenting phase and could move to the next phase. She is

not a trained lawyer. Here, the State prosecuted Lyndsey as a criminal for her *pro se* actions in a parenting case. It is impossible to understand how this prosecution was undertaken with LL's best interest in mind, given the lack of proof of McLaughlin's authority to declare the parenting phases.

The Prosecutor improperly weaponized a parenting plan to attack Lyndsey – exactly what then-Senator, later-Chief Justice Jean Turnage cautioned against more than 40 years ago during debates on amendments to the earlier custodial interference statute. H.B. 224, Hearing, Minutes at 6 and 8, Senate Judiciary Comm. (02/28/1979) ("Senator Turnage said that the parents will often use the child as a club or a weapon to get even" and "the typical thing you are going to be contending with is the hysterical wife calling up when her husband is two hours late in returning the child, and he said that you do not want to prosecute a case like that.")

As the proverb goes, what is sauce for the goose is sauce for the gander. The admonition against prosecuting a former husband due to calls from "the hysterical wife" applies equally to police reports from a mentally ill father because the mother of his daughter left town for the

weekend with the child and had colored the child's hair to look like an easter egg a few weekends prior. (Exhs. 13, 14.) As Chief Justice Turnage stated, "you do not want to prosecute a case like that[,] because "all you want to do is get the kid back and teach the fellow [or gal] a lesson". H.B. 224, Hearing, Minutes at 6.

In *State v. Robertson*, 2014 MT 279, ¶¶ 24-25, 376 Mont. 471, 336 P.3d 367, the Court held the prosecution failed to prove criminal trespass in a town fire hall beyond a reasonable doubt where the defendants were members of the fire hall at the time of the alleged trespass and possessed a right to enter. None of the State's evidence in Robertson refuted the fact that the Robertsons could not trespass on property they had a lawful right to enter. Similarly, in *State v. Spottedbear*, 2016 MT 243, ¶ 39, 385 Mont. 68, 380 P.3d 810, another trespass case, the Court ruled no rational trier of fact could have found beyond a reasonable doubt that Spottedbear remained unlawfully in a Wal-Mart store after a police officer directed him to leave at the request of a store employee, because once the officer asked him to leave, Spottedbear walked toward the exit to leave but was arrested when he paused to turn around and yell at the employee on his way out the door.

Here, the Prosecutor could not, and did not, prove beyond a reasonable doubt that Lyndsey knew she had no right to parent LL on the weekend of April 14 or that she withheld LL from Luke that weekend to substantially deprive him of parenting rights. The record on appeal, as well as the parenting plan case record of which this Court can take judicial notice, unequivocally establishes Lyndsey firmly believed McLaughlin's actions were violating the parenting plan and that McLaughlin lacked authority to set the parenting phases in the first place. Nothing in the plan provided direction for determining Luke's success in the parenting phases or ability to progress to the next phase. It is inconceivable the District Court would decline to make a straightforward clarification of the parenting coordinator's authority to implement the parenting plan while presiding over a felony criminal prosecution grounded upon an alleged violation of a parenting plan.

Lyndsey pledged to return LL to Luke that night during her conversation with Deputy Clark, but her arrest achieved by law enforcement's trickery prevented her from doing so. Just like in *Spottedbear*, where the defendant was prevented from leaving the store following his arrest at the time he was actually trying to leave the store,

Lyndsey was prevented from returning LL following her arrest, which defeated her ability to rely on the first offense exception. *Price*, ¶ 48.

But unlike *Price* or *State v. Young*, 2007 MT 323, ¶ 20, 340 Mont. 153, 174 P.3d 460 (*en banc*), Lyndsey did not intend to kidnap LL or substantially deprive Luke of parenting time with LL. The record shows Lyndsey's repeated attempts to work out a schedule so Luke could have weekends with LL in spring 2017, while Lyndsey's appeals in the parenting plan case worked their way to conclusion. All the District Court had to do was set a hearing on Luke's contempt motions or simply issue an order addressing the real problem – i.e., if the parenting coordinator's authority to schedule and coordinate parenting time encompassed the authority to decide when or if Luke had successfully completed a parenting phase and could move to the next phase. Scheduling parenting time and deciding Luke's success at a particular parenting phase are not the same thing. Sufficient hearings already had occurred for the District Court to have clarified this core issue. Instead, what now faces the Court are three criminal convictions on direct appeal of right over not-unordinary parenting disputes.

This Court's recent decision in the parenting plan appeal pursued by Lyndsey's former husband in Park County District Court regarding her oldest child depicts a different portrait of Lyndsey than the person the State describes or the Gallatin County District Court decisions reflect. *Compare L.G.L. I* and *Parenting of L.G.L.*, 2021 MT 313N, ¶ 12 (*L.G.L. II*), *with Lalicker v. Hartkopf*, 2021 MT 265N, ¶ 11.[2] In *Hartkopf*, the Court noted that Luke and Hartkopf were friends and timed their order of protection requests against Lyndsey on the weekend at issue in this case. *Hartkopf*, ¶ 8 n.2. The Court affirmed the District Court order awarding Lyndsey "complete physical custody of [their son]" and temporarily suspended Hartkopf's ability to contact the boy until, *inter alia*, Hartkopf attended mental health treatment sessions. *Hartkopf*, ¶ 2.

By contrast, the Gallatin County Court granted an order of protection on L.G.L.'s and Luke's behalf against Lyndsey for *one year* based solely on the testimony of Luke and one law enforcement officer.

[2] Pursuant to Internal Operating Rule 3(I)(3)(c)(ii), the Court may take judicial notice of the memorandum dispositions in Lyndsey's three parenting plan cases, which are all related to the instant appeal.

L.G.L. II, ¶ 5. *Contra Hartkopf*, ¶¶ 5 – 16 (summarizing lay and expert witness testimony and the procedures undertaken by the Park County Court to analyze and resolve the parties' alleged disputes). The Gallatin County order of protection expressly hinged on the instant "custodial interference charge".[3] *L.G.L. II*, ¶ 5.

In the case at bar, the District Court was eager to comply with the Prosecutor's desire to criminally punish Lyndsey for, in its view, not obeying McLaughlin's directives without question and taking up what it perceived as too much of the court's time. (App. B at 40 (stating the court "was involved repeatedly" because attempts to get Lyndsey's attention in the parenting plan case "were unsuccessful").) But presiding over a parenting plan case *is* the District Court's job, just as it was the Park County District Court's job to preside over disputes concerning Lyndsey's oldest child.

McLaughlin was not an elected officer of the court, a court employee, or a state or local government employee. She was not an appointed *guardian ad litem* with specified duties under Mont. Code

[3] On the weekend at issue in this case, when her mother was forcibly removed from her daily life, LL had spent only two prior weekends overnight with Luke. (04/18/2019 Tr. at 270 – 71; *L.G.L. II*, ¶ 4 – 5.)

Ann. § 40-4-205. McLaughlin was a private individual who possessed no licensing credentials whom Luke, or his attorney, identified and paid as a "parenting coordinator" to schedule parenting time when the parties could not agree.

The District Court did not address why it declined to hold a hearing on Luke's contempt motions.[4] Instead, after Lyndsey was arrested for this manufactured crime, with no apparent regard for potential long-term psychological and emotional effects of a forcible separation of then three-year-old LL from her mother who had had sole custody of LL for her entire life, including during the years Luke was an absent father who suffered from mental health problems and substance abuse and lacked the capacity to marry,[5] the District Court let the contempt motions remain unadjudicated. The District Court treated LL not as a young child who was bonded to her mother and who could not understand what was occurring, but rather as an object it could use to punish Lyndsey. (App. B at 40 (stating Lyndsey "has already had her rights to her child significantly restricted as a consequence of her

[4] Lyndsey timely responded to both of Luke's contempt motions. (App. F at 7 (Docs. 128 – 29, 140), 9 (Docs. 176 – 77, 180).

[5] (Exh. 1 at 1 – 4, ¶¶ 1 – 8; Exh. 7 at 2 – 4, ¶¶ 1 – 8.)

actions and she has faced that significant penalty already").) This Court has disapproved of intertwining child custody determinations with criminal sentencing. *Cf. State v. MacDonald*, 2013 MT 105, ¶¶ 11 – 13, 370 Mont. 1, 299 P.3d 839 (striking a reason for sentence in the judgment that altered child custody). Yet the State continues to defend Lyndsey's conviction and felony punishment.

Lyndsey's motion to dismiss for insufficient evidence should have been granted. The parenting interference charge should not have been allowed to go to the jury. No rational juror could have found the State proved the essential elements of parenting interference beyond a reasonable doubt, even when considering the evidence in the light most favorable to the State. *State v. Polak*, 2018 MT 174, ¶ 34, 392 Mont. 90, 422 P.3d 112. "A new trial cannot be granted where the evidence adduced at the first trial proves insufficient to support a conviction. . . . Once a reviewing court has found the evidence legally insufficient, the proper remedy is a judgment of acquittal." *Polak*, ¶ 35 (citations omitted). The District Court ruling denying Lyndsey's motion to dismiss for insufficient evidence was incorrect as a matter of law. *Polak*, ¶ 39.

B. The State improperly dismisses legislative history as irrelevant upon which this Court has relied when deciding previous parenting and custodial interference cases.

The State criticizes Lyndsey for providing the statutory background of Mont. Code Ann. § 45-5-634, felony parenting interference. (Appellee Br. at 28 – 32.) The State mischaracterizes Lyndsey's argument and the significance of the legislative history.

The State contends the legislative history of the felony custodial interference statute, Mont. Code Ann. § 45-5-304, "has no application to this case because [Ms.] Lalicker was convicted of parenting interference under Mont. Code Ann. § 45-5-634." (Appellee Br. at 28, citing Appellant Br. at 26 – 38.) This contention is incorrect. Conveniently, the State omits reference to the first two pages of Lyndsey's legislative history explaining that the parenting interference statute enacted in 1997, § 45-5-634, stems from the older custodial interference statute, § 45-5-304, enacted in 1973, as part of an overhaul of Montana's domestic relations statutes regarding custody and visitation of children. (Appellant's Br. at 24 – 25.) The parenting interference offense is merely one piece of the revision to domestic relations and related laws

to reflect society's evolution from the former concept of child custody to child parenting.

Contrary to the State's assertion that the two statutes merely "share similarities", the legislature created parenting interference, § 45-5-634, by lifting provisions from custodial interference, § 45-5-304, and plunking them verbatim into the new parenting interference offense, subject to changing the phrase "custody orders" to "parenting plans". (*See* Appellant Br. at 31 (explaining the 1997 amendments).) This Court has recognized as much:

> The custodial interference statute in *Price* and the parenting interference violation charged here differ only in the status of the people involved. One refers to a legal custodian while the other applies to interference with a parent. The act of interference, however, continues to require a withholding and a deprivation.

Young, ¶ 29. The State's effort to camouflage the direct relationship between the two statutes, as well as its claim the legislative history of custodial interference "has no application to this case", is necessarily misplaced. (Appellee Br. at 28.)

In *Price*, the Court determined the objective of the custodial interference statute is

> to facilitate the return of children who are taken during parental custody disagreements, rather than to prosecute those persons who took the child. This objective is clearly a legitimate one, given the State's concern with the best interests of children and in light of the Criminal Law Commission's Comments warning against injecting criminal sanctions into disputes between "estranged parents".

Price, ¶ 40. The legislative history of the custodial interference statute is relevant to Lyndsey's appeal because the pertinent elements of both statutes are the same. Mont. Code Ann. § 45-5-634(1) (parenting interference) and § 45-5-304(1) (custodial interference) both require the respective offense to be committed "knowing that the person has no legal right to do so[.]" The essential elements of the first offense exceptions in both statutes are also the same. *Compare* Mont. Code Ann. § 45-5-634(3) *with* § 45-5-304(3). The only differences between the two statutes involve whether "custody" or "parenting" rights are allegedly violated. *Young*, ¶ 29.

Though the State seems to believe the language of the parenting interference statute is sufficiently plain to make reference to legislative history unnecessary (Appellee Br. at 31 – 32), this Court has found otherwise when construing the same terms in the custodial interference

statute. *Price*, ¶¶ 18 (relying on the Criminal Law Commission Comments to determine the interest protected by the statute is "*the maintenance of parental custody against all unlawful interruption*") (emphasis in original), 39 – 43, 47 – 49 (analyzing legislative history of first offense exception, which the Court called "an escape clause" and relying on that history to construe the meaning of the clause, but construing the terms "voluntarily returned" and "lawful custody" by their plain language meanings); *State v. Lance*, 201 Mont. at 33, 651 P.2d at 1004 (analyzing and agreeing with the Commission's comments that courts should be "especially cautious" in imposing penal sanctions on estranged parents struggling over custody of their children, "since such situations are better regulated by custody orders enforced through contempt proceedings"); *Contway v. Camp*, 236 Mont. 169, 173, 768 P.2d 1377, 1380 (1989). *Cf. Young*, ¶ 55 (dissent) (observing there are no previous cases interpreting the parenting interference statute).

The legislative history of Mont. Code Ann. §§ 45-5-304, -634 and the Criminal Law Commission Comments to § 45-5-304, have been relied on by this Court repeatedly to ascertain the legislature's intent behind criminalizing parenting disagreements. Lyndsey accurately

stated in her opening brief, "it is useful to consider the history and interpretation of § 45-5-304." (Appellant's Br. at 26.) She makes no point beyond that in the legislative history section of her opening brief. The Court should not countenance the State's attempt to deny the direct relationship between custodial interference and parenting interference, which this Court settled nearly 15 years ago in *Young*, ¶ 29, nor its claim that the legislative history and Criminal Law Commission Comments concerning custodial interference are irrelevant to Lyndsey's appeal of her parenting interference conviction.

C. The State inveighs against arguments Lyndsey did not make.

Using its disagreement with Lyndsey's summary of legislative history and this Court's precedent interpreting § 45-5-634 and § 45-5-304 as a springboard, the State attacks arguments Lyndsey did not make. (Appellee Br. at 28 – 33.) The State perceives, incorrectly, that Lyndsey raised what the State calls "an affirmative defense" set forth in § 45-5-634(3), i.e., the first offense exception or "escape clause", to her parenting interference conviction because she "affirmatively pledged" to

return LL to Luke.[6] (Appellee Br. at 28 – 31.) The Court can reject this strawman argument.

Lyndsey did not make a "voluntary return" argument for a simple reason. This Court has stated once a person is arrested, voluntary return of the child is no longer available. *Price*, ¶ 48. *But see Lance*, 201 Mont. at 33 – 35, 651 P.2d at 1004 – 05 (reversing to allow defendant to withdraw his guilty plea to custodial interference where the record was devoid of any indication the escape clause was explained to defendant and where law enforcement did not give defendant an opportunity to return the child). Here, Lyndsey went to trial; she did not plead guilty. She did not argue for the benefit of the first offense exception to the jury. *Price*, ¶ 42. Further, she did not move to dismiss

[6] Lyndsey disagrees with the State's unsupported assertion the first offense exception is an affirmative defense. Whether an offense has been previously committed is a necessary element of the charged offense: a second or subsequent offense cannot be "committed", and thus charged, unless the offense has been previously "committed". Whether the offense was committed previously is, therefore, an element of the offense that must be proven to the jury beyond a reasonable doubt. It is not simply an affirmative defense. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970).

the Information on the basis of the first offense exception. She moved to dismiss for insufficient evidence at the close of the State's case at trial. Lyndsey's argument on appeal is tied to the record made in District Court.

II. The fine and costs imposed at sentencing are illegal, not objectionable, because the payment plan approved by the District Court does not allow Lyndsey to pay the financial obligation in full during her deferred sentence and facially precludes a request for early termination of the sentence.

Lyndsey made a straightforward, alternative argument and request for relief on appeal: the total financial obligation of $2,680 in her judgment is illegal because it cannot be fully paid at $25/month within the term of her six-year, i.e., 72-month, deferred sentence and, thus, violates her statutory right to request an early termination of her sentence. (Appellant's Br. at 44 – 48.) The State first asserts an impossible-to-fulfill sentence is objectionable not illegal and then quarrels Lyndsey did not mention a request for early termination of her deferred sentence during her sentencing hearing. (Appellee Br. at 38 – 39.) These arguments lack merit.

First, the State contends just because a sentence is impossible to fulfill and precludes a statutory right to request early termination, as if

these were trivial points, the sentence is merely objectionable, not illegal. (Appellee Br. at 37 – 39.) Therefore, according to the State, the fault – if any – lies on the Defense for not objecting to an arithmetically impossible sentencing condition.

The State's contention obscures Lyndsey's request. Lyndsey's argument was grounded upon: (1) elementary school math, i.e., $25 x 72 months = $1,800, not $2,680; (2) the plain statutory language of Mont. Code Ann. §§ 46-18-201(1)(a)(ii), -208(1)(a), (6)(c), which together permit a sentencing court to set a fine payable during a deferred imposition of sentence and establish a statutory right for defendants to request early termination of a deferred sentence as long as specific conditions are met in advance, including payment of all financial obligations in full; and (3) this Court's precedent distinguishing between an illegal sentence and an objectionable sentence in *State v. Kotwicki*, 2007 MT 17, ¶ 22, 335 Mont. 344, 151 P.3d 892 and *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). At Lyndsey's sentencing, apparently no one recognized the mathematical discrepancy between the payment plan and the ordered financial obligation.

Consequently, on appeal Lyndsey requested a modest remedy under established precedent – a remand for a hearing into her ability to pay a $2,680 financial obligation in light of the District Court's authorization of a $25/month payment plan. The proper remedy where part of a sentence is illegal is to remand for the District Court to correct the illegal portion of the sentence. *State v. Heafner*, 2010 MT 87, ¶ 11, 356 Mont. 128, 231 P.3d 1087. On remand, the District Court should determine whether (a) Lyndsey can only afford $25/month, in which case the total must be lowered to $1,800, or (b) she could afford roughly $37.22/month to meet the ordered amount of $2,680 or whether she could afford some amount between $1,800 to $2,680.

Controlling statutes and this Court's precedent set forth factors the District Court must consider to rectify the discrepancy between the ordered financial obligation and the authorized payment plan. "In determining the amount and method of payment [of a fine], the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose." Mont. Code Ann. § 46-18-231(3). Similarly, "In determining the amount and method of payment

of costs, the court shall take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose." Mont. Code Ann. § 46-18-232(2). Lyndsey's request for a $25/month installment plan should have set into motion the District Court's consideration of these factors to reconcile the difference between the payment plan and the orally pronounced amount. *State v. Reynolds*, 2017 MT 317, ¶ 27, 390 Mont. 58, 408 P.3d 503 (upholding fees and costs where district court undertook a scrupulous and meticulous examination of statutory factors).

The State correctly observes that Mont. Code Ann. § 46-18-234 authorized the District Court to allow Lyndsey to pay her financial obligations in installments and that Lyndsey herself requested the $25/month payment plan. (Appellee Br. at 18 – 19, 39.) But the issue is not that Lyndsey requested a payment plan which the District Court approved. The issue is that the authorized payment plan results in an $1,800, not a $2,680, financial obligation. The State points to no statute or precedent authorizing an impossible task to be performed as a lawful sentencing condition, probably because none exists.

Under the State's flawed reasoning, Lyndsey's obviously impossible-to-fulfill sentencing condition falls within statutory parameters. (Appellee Br. at 34, 37 – 39.) Understandably, the State sidesteps an explanation of how Mont. Code Ann. §§ 46-18-231 or -232 encompasses performance of an impossible task. Not only is such a proposition absurd, it would upend the *Lenihan* rule allowing an illegal sentence to be challenged and corrected on appeal regardless of whether the Defense objected to the sentence below.

If the State's analysis were accepted as correct, an impossible condition resulting in the violation a statutory right may be construed to be within statutory parameters, and thus within a judge's discretion to impose at sentencing. No condition would be illegal, only objectionable. Any condition would be fair game to impose at sentencing as long as the Defense failed to object. The State effectively is asking the Court not only to eviscerate *Lenihan* and render *Kotwicki* meaningless, but also to overrule *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 45, 396 Mont. 57, 443 P.3d 504 (*en banc*) (holding a defendant cannot actively acquiesce or participate in imposition of a sentencing

condition that is not statutorily authorized). The Court must reject the State's request to rewrite its precedent in this sweeping fashion.

Second, Mont. Code Ann. § 46-18-208 specifies a number of requirements before a defendant may request or receive early termination of a deferred sentence.[7] Preserving the ability to exercise this statutory right by arguing it at sentencing is not among them. This assertion by the State should be flatly rejected.

Lyndsey maintains her request for alternative relief. The Court should strike the ordered financial obligation of $2,680 and remand for hearing in which the District Court scrupulously and meticulously considers Lyndsey's ability to pay applying the specified statutory factors in conjunction with her right to request early termination of her sentence.

[7] The alleged offense in this case occurred in April 2018, when the 2017 version of § 46-18-208 was in effect. The legislature amended § 46-18-208 in 2019 before Lyndsey's sentencing. The 2019 amendments do not affect Lyndsey's argument herein in response to the State.

CONCLUSION

For the reasons above and those contained in her opening brief, Lyndsey Mae Lalicker respectfully requests the Court to reverse the District Court's denial of her motion to dismiss for insufficient evidence, vacate her conviction and the sentence related thereto, and remand with instructions to enter a judgment of acquittal. Alternatively, Lyndsey requests the Court to strike the financial obligation of $2,680 and remand for a hearing into her ability to pay a fine and costs within the term of her deferred sentence that does not preclude her statutory right to request early termination of her sentence.

Respectfully submitted this 28th day of December 2021.

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

By: /s/ Deborah S. Smith
DEBORAH S. SMITH
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 4,993, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
DEBORAH S. SMITH

CERTIFICATE OF SERVICE

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 12-28-2021:

Martin D. Lambert (Govt Attorney)
1709 W. College
Bozeman MT 59715
Representing: State of Montana
Service Method: eService

Roy Lindsay Brown (Govt Attorney)
Appellate Services Bureau
Attorney General's Office
215 N Sanders St
P.O. Box 201401
Helena MT 59601
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of Deborah Susan Smith
Dated: 12-28-2021