IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0367

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

BRIANNE NICOLE RANA,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Shane A. Vannatta, Presiding

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STATEMENT OF THE ISSUE

Whether the municipal court correctly denied Rana's motion to suppress and dismiss because, even if Rana had raised a pretrial sufficiency of the evidence argument, it would have been premature for the court to rule on the issue.

STATEMENT OF THE CASE

The City of Missoula (the City) charged Appellant Brianne Nicole Rana (Rana) with obstructing a peace officer or other public servant, driving under the influence of alcohol or drugs (1st offense), and making a left turn from an improper lane.[1] (*See* Doc. 17 at 254, 256.) Rana moved to suppress all evidence obtained by law enforcement following her arrest. (*Id*. at 219, Defendant's Opening Brief and Motion to Dismiss (herein: motion to suppress and dismiss); *see id*. at 222.) Rana also moved to dismiss the charge of obstructing a peace officer arguing that she was unlawfully arrested. (*Id*. at 229.) Following an evidentiary hearing, the City of Missoula Municipal Court (municipal court) denied the motion and the matter proceeded to jury trial. (*Id*. at 184.) The jury

[1] The City also charged Rana with failure to carry or exhibit proof of insurance, as well as a municipal code violation of refusing to submit to a breath test. (Doc. 17 at 244, 254, 256.) These charges were ultimately dismissed by the City. (*Id*. at 91.)

convicted Rana of obstructing a peace officer and making an improper turn, but acquitted on the charge of driving under the influence. (*Id*. at 92.)

Rana appealed her conviction of obstructing a peace officer to the Montana Fourth Judicial District Court, Missoula County (district court). (Doc. 17 at 89.) On appeal, Rana argued the municipal court erred when it denied her motion to suppress and dismiss. (*Id*. at 52.) The district court disagreed and affirmed the municipal court's order denying the motion. (*Id*. at 25.)

STATEMENT OF THE FACTS

On March 20, 2019, at approximately 2:00 a.m., Missoula City Police Officer Josh Harris (Officer Harris) observed a vehicle traveling west on Main Street in Missoula, Montana. (Doc. 17 at 181.) While at the intersection of Main Street and Orange Street, Officer Harris observed the vehicle make an illegal left turn onto Orange Street from the far-right lane of Main Street. (*See id*. at 181; *see also id.* at 257 (Officer Harris's affidavit of probable cause stating that the lane was clearly marked as "a straight/right turn only lane").) Officer Harris pulled behind the vehicle, activated his overhead lights, and conducted a traffic stop. (*Id*.;

Video at 2:05:10-06:30.)[2] The driver of the vehicle would later be identified as Rana.

Upon contact with the Rana, Officer Harris detected a strong odor of an alcoholic beverage coming from the vehicle. (Doc. 17 at 181, 257.) Officer Harris also noted that the Rana's eyes were bloodshot and glossy. (*Id*.) Officer Harris immediately identified himself to Rana and stated that he had pulled her over because she made a left-hand turn from a straight-only lane. (Video at 2:06:35-06:45.) Rana stated that she was "sorry," and that she was "new to town." (*Id*. at 2:06:45-06:50.) Officer Harris replied that the roadway was marked with signs. (*Id*. at 2:06:50-06:53.) Rana replied, "OK," and Officer Harris asked for her driver's license, registration, and proof of insurance. (*Id*. at 2:06:53-06:57.) Rana stated that she had just moved to Missoula from Colorado, and handed Officer Harris her license, the vehicle's registration, and an insurance card that had expired in 2016. (*See id*. at 2:06:58-07:06.)

Officer Harris asked Rana where she "was coming from tonight," and Rana replied that she was going to see a friend. (*See* Video at 2:07:07-07:13.) Officer Harris repeated his question as he had asked where she was coming from, not

[2] The video and audio footage from Officer Harris's patrol vehicle camera and body camera were introduced into evidence at the July 3, 2019 evidentiary hearing. (Plaintiff's Exhibit 1a.) All citations to "Video" refer to this exhibit.

where she was going. (*Id*. at 2:07:14-07:22.) Rana replied that she had been at home. (*Id*. at 2:07:14-07:18.)

Officer Harris informed Rana that the insurance card was expired, and she asked if she could look for a current proof of insurance. (*See* Video at 2:07:28-07:40.) Officer Harris replied, "Yeah," and Rana looked around for a few seconds before stating, "that looks like that's all I have." (*Id*. at 2:07:41-07:51.) Rana stated that she could look on an "app" on her phone for proof of insurance and began operating her phone. (*Id*. at 2:07:51-07:56.) Shortly thereafter, she asked Officer Harris to confirm that her insurance card was expired, and Officer Harris stated, "mm-hmm, 2016." (*See id.* at 2:07:56-08:45.) Rana replied, "that's very expired." (*Id.* at 2:08:45-08:48.)

Officer Harris asked Rana how much she had had to drink that night and she replied that she had not been drinking. (Video at 2:08:48-08:52.) Officer Harris stated that he could smell alcohol coming from her, and she replied that she had "a concussion." (*Id*. at 2:08:52-08:58.) Officer Harris replied that he did not understand what a concussion had to do with the smell of alcohol, and Rana replied that her "neurologist" said she was not supposed to be drinking. (*Id*. at 2:09:01-09:08.) Officer Harris asked Rana why she got a wristband to drink if she does not drink, and Rana gestured toward the green wristband on her right hand and stated

that it was for people "21 and over," and that she had been at a concert that night. (*See id*. at 2:09:11-09:23.)

Officer Harris asked Rana whether, if she took a preliminary breath test, it would be "all zeros" and show that she did not have any alcohol in her system, and Rana replied that she would not "consent to a breath test." (Video at 2:09:23-09:35.) Officer Harris stated that he had "been doing this for a number of years," repeated that he could smell alcohol coming from her, and asked her again how much she had to drink that night. (*Id*. at 2:09:38-09:47.) Rana again denied that she had been drinking. (*Id*. at 2:09:47-09:49.) Officer Harris stated, "but you won't consent to a breath test," and Rana replied, "no." (*Id*. at 2:09:50-09:52.) After Officer Harris asked Rana for her current address, he told her to "hang tight," and he returned to his patrol vehicle. (*Id*. at 2:10:08-10:42.) At this point a second officer arrived and stood by Rana's vehicle. (*Id*. at 2:10:48-10:52.)

After speaking with dispatch, Officer Harris returned to Rana's vehicle and stated that he was going to have her "hop out of the vehicle." (Video at 2:12:50-12:55.) Rana asked if there was "a reason for this," and Officer Harris replied, "Yep." (*Id*. at 2:12:55-12:57.) Rana asked for "the reason," and Officer Harris stated that he needed her "to hop of the vehicle for [him]." (*Id*. at 2:12:57-13:00.) Rana asked if she was being arrested, and Officer Harris replied, "Not right now, no." (*Id*. at 2:13:00-13:03.) Rana again asked for "a reason," and Officer Harris

replied, “Because I’m asking you to hop out, OK.” (*Id*. at 2:13:03-13:08.) Rana stated that she did not “feel comfortable with that without a good reason,” and Officer Harris replied, “You have to.” (*Id*. at 2:13:10-13:14.) Rana stated, “I don’t have to,” and Officer Harris said, “You do, actually.” (*Id*. at 2:13:09-13:14.) Rana stated, “If you want to arrest me for something, then?” (*Id*. at 2:13:13-13:16.)

At this point, Officer Harris opened the driver’s side door and several seconds went by before Rana asked what she was “being arrested for.” (Video at 2:13:16-13:24.) Officer Harris replied that he did not say she was “being arrested,” and stated that he was “telling [her] to get out of the vehicle, OK.” (*Id*. at 2:13:24-13:28.) Rana again stated that she did not feel comfortable with that unless she was being arrested, and asked Officer Harris if there was something that she was “being charged with.” (*Id*. at 2:13:26-13:34.) Officer Harris replied, “Brianne, if a law enforcement officer asks you to get out of a vehicle, by law you have to. Now I will talk to you once we get out here and get on the sidewalk, OK.” (*Id*. at 2:13:34-13:45.) Rana asked if there was someone else that could come out and meet them and stated that she did not understand what was going on. Officer Harris replied that he would explain it in a second. (*Id*. at 2:13:45-13:53.) Rana asked if she had been “speeding, or something?” (*Id*. at 2:13:53-13:55.) Officer Harris replied, “Do you not remember . . . why I stopped you? Literally two minutes ago I told you, and you don’t remember?” (*Id*. at 2:13:56-14:02.) Rana then stated, “I have a

concussion, I told you that." (*Id*. at 2:14:02-14:05.) Officer Harris repeated his request for her to "hop out of the vehicle," and Rana asked if a "supervisor" could meet them. (*Id*. at 2:14:05-14:18.)

The Video shows that, for the next minute, Officer Harris repeats his requests for Rana to exit the vehicle and tells her multiple times that he will explain everything once she gets out of the vehicle. (Video at 2:14:20-15:29.) Rana also states that she wants to be cooperative, and Officer Harris tells her that she is not being cooperative because she is not getting out of the vehicle. (*Id*. at 2:14:38-14:46.) Rana continues to refuse to exit and argues about whether she did anything wrong, saying she is confused about why she was pulled over. Officer Harris repeats that she made an illegal turn. (*Id*. at 2:15:10-15:29.)

Rana continues to argue with Officer Harris before he states, "Brianne, you've been drinking tonight and I need to make sure you're safe to drive, OK." (Video at 2:15:29-15:32.) When Rana continues to argue with Officer Harris, he eventually tells her that she will be "arrested for ignoring a lawful command." (*Id*. at 2:15:32-16:05.) Rana replies, "That's OK, if you like," and Officer Harris asks, "so you're wanting to be arrested for simply not listening to what I'm telling you to do? You'd rather go to jail than get out of the vehicle and come talk to me?" (*Id*. at 2:16:05-16:16.) Rana continues to tell Officer Harris that he can arrest her. (*Id*. at 2:16:16-16:27.)

Officer Harris repeats his suspicions that she has been drinking, but states that does not mean she is unsafe to drive. (Video at 2:16:27-16:39.) Officer Harris tells Rana that he wants to make sure that she is safe to drive and then she can continue on her way, but if she continues to refuse to exit the vehicle she will go to jail. Rana again replies to Officer Harris that he can arrest her. (*Id*. at 2:16:39-16:54.)

At this point, Officer Harris removed Rana from the vehicle and arrested her for DUI and obstructing a peace officer. (Doc. 17 at 258.) At the Missoula County Detention Center, Rana refused Officer Harris's request to participate in standardized field sobriety tests (SFSTs). (*Id*.) She also refused to provide a sample of her breath for testing. (*Id*. at 127, 258-59.)

Following her arrest, Rana filed a motion to suppress and dismiss in the municipal court. (Doc. 17 at 219.) Rana argued that when Officer Harris opened the door to the vehicle, and requested that she step out of the vehicle, he "was attempting to conduct a field sobriety test on [Rana]." (*Id*. at 221.) Rana argued that because a field sobriety test is a search protected by the Fourth Amendment and the Montana Constitution, Rana had a constitutionally protected right to refuse to exit the vehicle. (*Id*. at 222-23.) Rana argued that the municipal court should dismiss the obstruction charge because "[a]n individual cannot be charged with a

crime for exercising this constitutional right." (*Id*.) Rana also argued that all evidence following her "unlawful arrest" must be suppressed. (*Id*.)

The City responded to the motion and argued that, contrary to Rana's argument, Officer Harris had not asked her to perform SFSTs, but simply requested that she exit her vehicle and walk to the sidewalk so he could continue to investigate his suspicions that she was operating a vehicle while under the influence of alcohol. (Doc. 17 at 201-02.) While requesting that a driver perform SFSTs is a common part of an officer's DUI investigation, Officer Harris was not asking Rana to perform SFSTs when she refused to cooperate. (*Id*. at 202.) Rather, he was simply asking her to step out of the vehicle and come up to the sidewalk so he could continue to talk with her to make sure she was safe to drive. (*Id*. at 201-02.) Given that Officer Harris lawfully stopped Rana for making an illegal turn and immediately recognized signs that she might be impaired, his decision to expand the scope of the seizure to investigate the possible DUI was not a violation of the Fourth Amendment or the Montana Constitution. (*See id*. at 205-06.)

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On July 3, 2019, the municipal court held an evidentiary hearing on the motion.[3] (Doc. 17 at 217.) At the hearing, Officer Harris testified that it is his practice not to tell a suspected drunk driver that he intends to begin a DUI investigation while they are still behind the wheel of their vehicle due to the risk of harm to himself or the community if the driver makes a poor choice such as trying to flee. (Doc. 17 at 35; *see also* 11/07/19 Trial, Disc. 5 at 21:30-22:35 (Officer Harris testifying at trial that it is his common practice to ask individuals who are suspected of DUI to exit the vehicle before explaining that he suspects that they are impaired because it prevents the individual from reaching for potential weapons or fleeing the scene).)

Following the evidentiary hearing, the municipal court denied the motion, finding that Officer Harris's request for Rana "to exit her vehicle during a traffic stop [did] not constitute a search." (Doc. 17 at 184.) In support of its order, the municipal court found that when Officer Harris made contact with Rana, he noted several indicators of impairment, including the odor of alcohol, glossy and bloodshot eyes, and that she had "difficulty providing relevant answers to Harris'

[3] A review of the recording from the July 3, 2019 hearing reveals that it is incomplete. That said, the State does not believe that it is necessary for the Court to remand to reconstruct or supplement the record to rule on Rana's appeal. *See* M. R. App. 8(2); *see also* M. R. App. 8(7)-(8) (providing that it is the appellant's duty to present a sufficient record on appeal and giving procedures for when a record or transcript is unavailable).

questions among other things." (Doc. 17 at 181.) The municipal court recognized that "[b]ased on his observations, training, and experience, Officer Harris was concerned that [Rana] might be under the influence of alcohol." (*Id*.) Per these indicators, the municipal court found that Officer Harris had "particularized suspicion that [Rana might] be under the influence of alcohol and permissibly extended the stop beyond the initial traffic violation investigation." (*Id*. at 182)

The court recognized that "[o]nce a driver is lawfully detained, they have already been seized and asking that driver to exit the vehicle is considered a de minimis intrusion on that driver." (*Id*. at 183 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).) The municipal court further found that "[e]xiting a vehicle, while part of the observation keys of the officer during a traffic stop, does not qualify as part of the Field Sobriety Tests." (*Id*.) The municipal court ended its analysis by stating that it was not addressing the issue of whether "refusing to exit a vehicle constitutes obstructing a peace officer [as] this is an issue to be decided by the trier of fact." (*Id*.)

On November 7, 2019, Rana proceeded to jury trial and was convicted of obstruction of a peace officer and making an illegal turn. (Doc. 17 at 92-93.) The jury acquitted Rana of DUI. (*Id*. at 92.) At the trial, Officer Harris testified as to the events proceeding Rana's arrest and her refusal to exit the vehicle and walk to the sidewalk despite his clear requests. (11/07/19 Trial, Disc. 6 at 00:50-24:40.)

Officer Harris testified that when he asked Rana to exit the vehicle, he was concerned that she was under the influence of alcohol and wanted to investigate further. (*Id*. at 19:20-19:50.)

Officer Harris testified that he did not initially tell Rana the reason he was requesting that she exit the vehicle because that can create a safety issue given that a person can still reach for weapons or flee in the vehicle. (*Id*. at 21:30-22:18.) Officer Harris testified that this is his common practice. (*See id*. at 22:18-22:33.) However, in this case, due to Rana's refusals, Officer Harris testified, he eventually explained to Rana that he suspected that she was under the influence of alcohol and he wanted her to exit so he could make sure she was safe to drive. (*See id*. at 22:33-23:07.)

Officer Harris testified that he wanted to investigate further to determine if she was safe to drive but Rana's repeated refusals were hindering his ability to conduct an investigation. (*Id*. at 23:14-23:55.) Officer Harris testified that, based on Rana's refusals to exit the vehicle, he was left with the only option—to arrest her—because he could not allow a person he suspected of DUI to leave and put motorists and other members of the community at risk. (*Id*. at 23:33-23:38.) A video of Rana's stop and arrest was admitted into evidence and played for the jury. (Plaintiff's Ex. 2a-2c.)

Officer Harris also testified about the events following Rana's arrest. He testified that he continued his investigation into whether Rana had been operating her vehicle while impaired. (11/07/19 Trial, Disc. 5 at 24:40-25:05.) He testified that he transported Rana to the Missoula County Detention Center and requested that Rana perform STFTs, which she refused. (*Id*. at 24:40-33:30.) Officer Harris also testified that he attempted to obtain a breath sample from Rana, but she refused to provide one. (*Id*. at 33:30-33:41.)

SUMMARY OF THE ARGUMENT

On appeal, Rana abandons her argument that Officer Harris's request for her to exit her vehicle was an unlawful search under the federal and Montana constitutions. Instead, she now makes the argument that the municipal court erred by denying the motion to suppress and dismiss because the court should have made a pretrial determination regarding whether sufficient evidence supported the mental state requirement of obstruction of a peace officer. Rana's argument fails for multiple reasons.

First, Rana failed to raise her sufficiency argument before the district court and has now waived the issue. Second, even if this Court were to entertain Rana's argument, asking the municipal court to make a pretrial determination of the evidence would have been premature. Montana law provides that a motion to

dismiss for insufficient evidence is not ripe until trial. Specifically, the motion should be made at the close of the prosecution's evidence or at the close of all evidence. Thus, even if Rana had made this request—which she did not—it would have been premature and inappropriate for the municipal court to prejudge the evidence.

Furthermore, although Rana does not argue that the City failed to present sufficient evidence at trial to support her conviction for obstruction of a peace officer and has waived the issue, if the Court were to consider the question, the jury was presented with sufficient evidence to support the statute's mental state requirement. Officer Harris specifically told Rana multiple times that he was requesting that she exit the vehicle because he wanted to make sure she was safe to drive. Officer Harris also repeatedly told Rana that she would be arrested for ignoring a lawful command. Viewing the evidence in the light most favorable to the prosecution, this evidence was sufficient to support Rana's conviction.

ARGUMENT

I. Standards of review

"On appeal from a municipal court, the district court functions as an intermediate appellate court." *City of Missoula v. Iosefo*, 2014 MT 209, ¶ 7, 376 Mont. 161, 330 P.3d 1180. "This Court reviews cases that originate in

municipal court as if the appeal originally had been filed in this Court, examining the record independently of the district court's decision and applying the appropriate standard of review." *Id*. (internal quotation marks omitted). "[The] ultimate determination is whether the district court, in its review of the trial court's decision, reached the correct conclusions under the appropriate standards of review." *State v. Davis*, 2016 MT 102, ¶ 31, 383 Mont. 281, 371 P.3d 979.

This Court "review[s] the denial of a motion to suppress to determine whether the trial court's findings of fact are clearly erroneous and whether it correctly applied those findings as a matter of law." *Iosefo*, ¶ 8. A trial court's "factual findings are clearly erroneous if they are not supported by substantial credible evidence, if the court has misapprehended the effect of the evidence, or if our review of the record leaves us with a definite or firm conviction that a mistake was made." *State v. Robertson*, 2019 MT 99, ¶ 17, 395 Mont. 370, 440 P.3d 17.

"The grant or denial of a pretrial motion to dismiss in a criminal case is a question of law." *State v. Baker*, 2004 MT 393, ¶ 12, 325 Mont. 229, 104 P.3d 491. "This Court reviews conclusions of law to determine if they are correct." *Baker*, ¶ 12.

II. The municipal court correctly denied Rana's motion.

On appeal, Rana abandons her argument that Officer Harris's request for her to exit her vehicle was a search and that she had the right to decline to exit based on her rights under the federal and Montana constitutions. This is, of course, because this Court has never held that requesting a driver to exit their vehicle constitutes a search protected by either the federal or Montana constitutions. In fact, this Court has found that an officer's observation of a driver's physical traits during a valid traffic stop, such as a person's gait, does not constitute a search. *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶ 32, 289 Mont. 1, 961 P.2d 75 (citing *People v. Carlson*, 677 P.2d 310, 316 (Colo. 1984) (an officer's observation of an individual's gait upon exiting the vehicle and walking to the rear of the vehicle does not differ from observation of an individual's general physical characteristics, such as height and weight). Thus, before this Court, Rana is not arguing that her Fourth Amendment rights, or her rights under article II, sections 10 and 11, of the Montana Constitution, were violated. Consequently, because Rana abandons this argument on appeal, this Court should decline to address it. *See Ford v. State*, 2005 MT 151, ¶ 35, 327 Mont. 378, 114 P.3d 244 (finding that the Court has "no occasion to review the District Court's decision" when the appellant abandoned certain contentions on appeal); *Skinner v. Allstate Ins. Co*., 2005 MT 323, ¶ 9, 329 Mont. 511, 127 P.3d 359 (noting that a party did not brief

certain issues on appeal and "[t]hose issues, therefore, have been abandoned on appeal, and we do not address them").

A. A pretrial determination of the evidence by the municipal court would have been premature.

Rana argues that the municipal court should have granted her motion to suppress and dismiss because it should have made a pretrial determination that there was not sufficient evidence that she had knowingly obstructed Officer Harris in the performance of his duties. (Appellant's Br. at 10, 12.) First, Rana's motion never made this argument before the municipal court and, instead, attacked her arrest under the theory that she had a right to decline Officer Harris's request for her to exit her vehicle. Consequently, because Rana changes her legal theory on appeal, the Court should decline to address it. *State v. Heath*, 2004 MT 58, ¶ 39, 320 Mont. 211, 89 P.3d 947 ("A party may not raise new arguments or change his legal theory on appeal.").

Second, even if this Court were to entertain Rana's argument, it is without legal support. Montana law provides that, "[w]hen, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant." Mont. Code Ann. § 46-16-403. This Court has repeatedly held that a pretrial motion to dismiss based on insufficient evidence is "premature because such a challenge can only be made

after the State has had an opportunity to present its evidence to the trier of fact." *State v. Nichols*, 1998 MT 271, ¶ 4, 291 Mont. 367, 970 P.2d 79.

In *State v. Tichenor*, 2002 MT 311, ¶ 20, 313 Mont. 95, 60 P.3d 454, the defendant was charged with stalking and burglary and filed a pretrial motion to dismiss arguing that he lacked the requisite intent to be convicted of the crimes. The district court denied the motion as premature because the defendant was asking the court to judge the evidence prior to trial. *Id*. On appeal, this Court affirmed the district court and stated that it "would have been improper for the judge to step into the jury's place and resolve these issues pretrial." *Id*. ¶ 21. Distinguishing from cases where the defendant immediately challenged his arrest based on a motion to dismiss for lack of probable cause, the Court affirmed the motion as premature. *Id*.

Here, even though Rana did not raise the argument before the municipal court, it would have been improper for the municipal court to weigh the evidence prior to the City's presentation of the evidence at trial. A motion to dismiss for insufficient evidence should only be made at trial after the State has presented its case. Mont. Code Ann. § 46-16-403; *Nichols*, ¶ 4; *Tichenor*, ¶ 21. Indeed, the cases cited by Rana in support of her argument are all distinguishable on this point because they involve questions regarding the sufficiency of the evidence after the prosecution made its case to the jury, not pretrial. (*See* Appellant's Br. at 17

(listing cases).) Thus, even if Rana had made this argument, it would have been premature.

B. Rana does not argue that the municipal court should have sua sponte acquitted her of obstruction of a peace officer following the City's presentation of the evidence.

Notably, Rana does not argue that the City presented insufficient evidence *at trial* that she lacked the requisite mental state to commit obstruction of a peace officer. Indeed, her argument focuses squarely on the state of the evidence pretrial and the municipal court's denial of her motion to suppress and dismiss. Rana also did not raise a sufficiency of the evidence argument in her appeal before the district court. (Doc. 17 at 55 (stating the issue on appeal as "When a police officer suspects a driver is under the influence of alcohol and wishes to have the driver step out of the vehicle to perform field sobriety tests, does the driver have a right to refuse to exit the vehicle to perform these tests?").) Given that Rana was permitted to raise the argument before the district court, even without a proper motion at trial,[4] she has waived the claim on appeal. *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 33, 397 Mont. 134, 447 P.3d 1048 (concluding the appellant

[4] *See State v. Skinner*, 2007 MT 175, ¶ 21, 338 Mont. 197, 163 P.3d 399 (stating that a defendant does not have to raise a sufficiency of the evidence objection at trial to preserve the issue for review) (citing *State v. Granby*, 283 Mont. 193, 198-99, 939 P.2d 1006, 1009 (1997)).

implicitly waived his sufficiency of the evidence challenge to his conviction for obstruction of a peace officer because he failed to raise it on intermediate appeal). However, assuming *arguendo* that Rana properly raised the issue on appeal, the City provides the following response out of an abundance of caution.[5]

"A person commits the offense of obstructing a peace officer or public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law." Mont. Code Ann. 45-7-302(1); *Eisenzimer*, ¶ 7 ("[A]n individual obstructing a peace officer must engage in conduct under circumstances that make him or her aware that it is highly probable that such conduct will impede the performance of a peace officer's lawful duty." (quoting *City of Kalispell v. Cameron*, 2002 MT 78, ¶ 11, 309 Mont. 248, 46 P.3d 46 (interpreting the statutory definition of "knowingly" under Mont. Code Ann. § 45-2-101(35), in the context of Mont. Code Ann. § 45-7-302(1)))).

Here, Rana takes the position that the municipal court should have dismissed the charge of obstructing a peace officer because the City could not have satisfied the knowingly element of obstruction of a peace officer. Specifically, Rana argues

[5] When appropriately raised, this Court will "review the denial of a motion to dismiss for insufficient evidence de novo." *State v. Eisenzimer*, 2014 MT 208, ¶ 5, 376 Mont. 157, 330 P.3d 1166. This Court will "review a question on the sufficiency of the evidence to determine whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*.

that because she was asserting what she thought was a constitutional right to decline Officer Harris's command to exit the vehicle, she could not have acted knowingly under the obstruction statute. Harris's argument is foreclosed by *Eisenzimer.*

In *Eisenzimer*, the defendant was charged and convicted of obstruction of a peace officer after approaching an officer in the midst of a traffic stop and repeatedly asking for a ride home. *Eisenzimer*, ¶ 3. In the process, the defendant hindered the officer's efforts to complete the traffic stop. *Id*. ¶¶ 3, 11. The officer was only able to complete the traffic stop after arresting the defendant. *Id*.

On appeal, the Court rejected the defendant's argument that the State failed to prove the knowingly element of obstruction of a peace officer. Although the officer acknowledged at trial that he did not think the defendant intended to impede his work when asking for a ride, this Court found that the subjective intent of a defendant charged with obstruction of a peace officer "is not the issue." *Eisenzimer*, ¶ 11. The issue, the Court reasoned, was whether the defendant engaged in conduct that impeded the performance of the peace officer's lawful duties under circumstances that made him aware it was highly probable his conduct would impede the performance of those duties. *Id*.

Here, Rana's subjective intent—i.e., that she refused to follow Officer Harris's request for her to exit her vehicle because she thought she had the right

to—is irrelevant to this Court's analysis as to whether sufficient evidence was presented to support her conviction. Rather, the question is whether Rana engaged in conduct that impeded the performance of Officer Harris's lawful duties under circumstances that made her aware it was highly probable that her conduct would impede the performance of those duties. A review of the evidence meets this standard.

At trial, Officer Harris testified about his actions during the stop and the video of the stop was played for the jury and introduced into evidence. Officer Harris testified that Rana had displayed indicators of intoxication and he was concerned that she might be impaired when he asked her to exit the vehicle. (Tr. at 19:20-19:50.) When requesting that Rana exit her vehicle, Officer Harris testified, he told Rana he was concerned that she had been drinking and he wanted to make sure she was safe to drive. (*See* Tr. at 22:33-23:07; *see also* Video at 2:15:29-15:32 ("Brianne, you've been drinking tonight and I need to make sure you're safe to drive, OK?").) Officer Harris testified that he repeatedly told Rana that he would be forced to arrest her unless she exited the vehicle so he could complete his investigation. (Tr. at 23:14-23:55; *see also* Video at 2:15:32-16:05 (Officer Harris telling Rana she will be "arrested for ignoring a lawful command."); Video at 2:16:05-16:16 (Officer Harris stating "so you're wanting to be arrested for simply

not listening to what I'm telling you to do? You'd rather go to jail than get out of the vehicle and come talk to me?").)

These facts distinguish this case from other cases, like *Cameron*, where the facts and the officer's testimony at trial established that the defendant's conduct did not impede the officer's lawful duty. *See Cameron*, ¶ 12 (officer testifying that his investigation was not impaired by the defendant's refusal to get back in the vehicle). Because Rana repeatedly refused his requests, Officer Harris testified, he was forced to arrest Rana to continue his investigation into whether she was driving under the influence; he could not allow Rana to leave the scene and possibly put members of the community at risk. This evidence establishes that it his highly probable that Rana was aware that her refusals to exit her vehicle were hindering Officer Harris in the performance of his duties—namely the investigation and enforcement of DUI and traffic safety laws. Reviewing the evidence in a light most favorable to the prosecution, this Court should conclude that a rational trier of fact could have made this finding beyond a reasonable doubt. *Eisenzimer*, ¶ 11.

C. Rana's argument that her refusal to exit the vehicle could not constitute obstruction because Officer Harris's request was beyond his authority is irrelevant to a sufficiency of the evidence determination.

Rana also argues that Officer Harris's request for her to exit her vehicle so he could continue his DUI investigation was not a lawful command. (Appellant's

Br. at 26.) Specifically, Rana argues that absent the authority granted to Officer Harris under Montana's investigative stop and frisk statute, he could not command Rana to exit the vehicle. (Appellant's Br. at 26 (citing Mont. Code Ann. § 46-5-401 ("Investigative stop and frisk")).) Consequently, Rana argues, she was free to decline to exit the vehicle because a driver cannot be compelled to obey an officer's physical commands during a temporary investigatory stop. (*See id*. at 25-26). As well as changing her legal theory on appeal,[6] Rana is incorrect for two reasons.

First, even if Officer Harris's request was unlawful, it is not a defense to obstruction of a peace officer that law enforcement is acting illegally. The obstruction of a peace officer statute states that "[i]t is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority." Mont. Code Ann. § 45-7-302(2). The comments to the obstruction statute state that "[s]ubsection (2) of this section makes a distinction between the obstruction of

[6] As discussed, because Rana is not arguing on appeal that the municipal court erred under the Fourth Amendment or the Montana constitution when it denied her motion to suppress and dismiss, and, instead, is challenging the denial of the motion on sufficiency of the evidence grounds, this Court should decline to inquire into the constitutional arguments raised by Rana in the municipal court. *State v. Still*, 273 Mont. 261, 263, 902 P.2d 546, 548 (1995) ("This Court has repeatedly recognized that courts should avoid constitutional issues whenever possible.") (citation and internal quotation marks omitted).

illegal activity by a peace officer and a public servant. The commission has followed the basic premise that a person should not take the law into his own hands when faced with illegal police activity." Comments to Mont. Code Ann. § 45-7-302(2). Thus, even if Officer Harris's request for Rana to exit the vehicle was illegal, subsection (2) clearly forecloses Rana's argument that she was not in violation of the statute by refusing to comply with his request.

Second, although the Court need not rule on this issue and may affirm on other grounds, Officer Harris's request for Rana to exit her vehicle was a permissible and reasonable investigatory procedure. States and local governments retain an inherent "police power to establish and enforce laws protecting the welfare, safety, and health of the public." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 65, 382 Mont. 256, 368 P.3d 1131; *see also State v. Skurdal*, 235 Mont. 291, 294, 767 P.2d 304, 306 (1988) ("[S]tate and local governments possess an inherent power to enact reasonable legislation for the health, safety, welfare or morals of the public."). "Police officers are 'vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of the person's authority.'" *State v. Marcial*, 2013 MT 242, ¶ 17, 371 Mont. 348, 308 P.3d 69 (citing Mont. Code Ann. § 46-1-202(17)). "Further, officers have authority to investigate and cite motorists for traffic code violations." *Marcial*, ¶ 17; *see also State v. Sharp*, 217 Mont. 40, 46, 702 P.2d 959, 963 (1985) (stating

that an officer "investigating an alleged criminal activity and using all of his facilities to determine what had occurred" was doing "his job, and his duty"); *Hiibel v. Sixth Judicial Dist. Court,* 542 U.S. 177, 185 (2004) ("[A] law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further.").

Balanced against this authority is an individual's right to be free from unreasonable, or otherwise warrantless, searches and seizures. *See* U.S. Const. amend. IV; Mont. Const. art. II, § 11; *see also City of Missoula v. Kroschel*, 2018 MT 142, ¶ 10, 391 Mont. 457, 419 P.3d 1208. A recognized exception to the warrant requirement is the temporary investigative stop, or *Terry* stop, as first recognized by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 16 (1968). *Kroschel*, ¶ 11. *Terry* stops have subsequently been codified in Montana at Mont. Code Ann. §§ 46-5-401 and -403. *Kroschel*, ¶ 11. Thus, "[i]n order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense." Mont. Code Ann. § 46-5-401(1).

An investigatory stop "may not last longer than is necessary to effectuate the purpose of the stop." *State v. Case*, 2007 MT 161, ¶ 34, 338 Mont. 87, 162 P.3d 849 (citing Mont. Code Ann. § 46-5-403). "If additional objective data of wrongdoing exists, however, the additional information may give rise to further suspicions and enlarge the scope of the investigation." *Case*, ¶ 34. Consequently, "[a] founded suspicion to stop for investigative detention may ripen into probable cause to arrest through the occurrence of facts or incidents after the stop." *Sharp*, 217 Mont. at 46, 702 P.2d at 963.

"An investigation or investigatory stop is guided by principles of reasonableness." *Sharp*, 217 Mont. at 47, 702 P.2d at 963. "The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures." *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (emphasis in original). "The reasonableness of a seizure under the Fourth Amendment is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Hiibel,* 542 U.S. at 187-88 (citation and internal quotation marks omitted).

During an investigatory stop, "[e]ffective law enforcement requires some latitude to be given to investigating officers to react to and follow up on their observations." *Sharp*, 217 Mont. at 47, 702 P.2d at 963; *Kroschel*, ¶ 13 ("[J]udicial

assessment of the reasonableness of the duration and scope of an investigative stop must recognize that the State's compelling interest in 'effective law enforcement' demands that officers in the field have reasonable 'latitude' to reach, follow up on, and confirm or dispel initial suspicions of criminal activity.").

On appeal, Rana does not challenge the municipal court's factual findings, namely that Officer Harris retained particularized suspicion to conduct a traffic stop of Rana's vehicle because she made an illegal left turn. Further, Rana does not challenge the municipal court's factual finding that, once her vehicle was stopped, Officer Harris developed a sufficient particularized suspicion that Rana may have been operating her vehicle under the influence of alcohol and further investigation was warranted to determine if she could operate her vehicle safely before releasing her from the traffic stop. Instead, Rana appears to argue that once an officer has lawfully stopped a vehicle for a traffic violation, the officer is limited in the investigative actions they may take, specifically, the actions described under Mont. Code Ann. § 46-5-401(2)(b) (stating that an officer may "request the person's name and present address and an explanation of the person's actions and, if the person is the driver of a vehicle, demand the person's driver's license and the vehicle's registration and proof of insurance"). Rana is incorrect.

Montana Code Annotated § 46-5-401(2)(b) is not a limitation of an officer's authority during a traffic stop, but merely a codification of *Terry*. Indeed, this

Court has recognized that once a vehicle is lawfully stopped, "[e]ffective law enforcement requires some latitude to be given to investigating officers to react to and follow up on their observations." *Sharp*, 217 Mont. at 47, 702 P.2d at 963; *Kroschel*, ¶ 13. Requesting that a suspected drunk driver exit their vehicle so an officer can continue their DUI investigation is the exact type of latitude that must be afforded to officers when enforcing Montana's criminal statutes.

Critically, this Court has recognized that once a person is lawfully stopped for a traffic violation, and the investigating officer develops further suspicions that additional criminal activity is afoot, the investigating officer may take reasonable investigatory actions to confirm or dispel their suspicions. *See State v. Roy*, 2013 MT 51, ¶¶ 17-19, 369 Mont. 173, 296 P.3d 1169. In *Roy*, this Court found that an officer's request for a driver to exit his vehicle was a reasonable investigative action and did not impermissibly extend the duration or scope of the stop in violation of the driver's constitutional rights. *Roy*, ¶ 18. Specifically, the officer suspected that the driver was trafficking marijuana, and requested that the driver exit the vehicle—and move away from numerous car deodorizers—so he could better detect if the driver smelled like marijuana. *Roy*, ¶ 8. The Court found that this was a reasonable investigative action and compared it to when an officer "requir[es] a person suspected of driving under the influence of alcohol or drugs to

exit the vehicle for field sobriety tests to confirm or dispel the suspicion of impairment." *Roy*, ¶ 18.

Here, as stated, Rana does not dispute that Officer Harris retained the requisite particularized suspicion that she was operating her vehicle while under the influence of alcohol, nor does she dispute that Officer Harris's request was in furtherance of his DUI investigation. Indeed, the City recognizes that if Rana had complied with Officer Harris's request and allowed him to continue his DUI investigation on the side of the road, he might have eventually requested that she perform SFSTs. At that point, Rana would have been free to decline the request—like she did following her arrest. However, the record is clear that Officer Harris's investigation had not yet reached that point. Thus, because Rana cannot show that the request to exit the vehicle was in violation of her constitutional rights, and because Officer Harris's request was a reasonable investigatory action intended to further his duty of enforcing the law, his request was lawful.

Furthermore, this Court has recognized that law enforcement may request that lawfully stopped drivers exit their vehicles without running afoul of the federal or Montana constitutions if the request is made for a valid safety reason. *State v. Bailey*, 2021 MT 157, ¶ 37, 404 Mont. 384, 489 P.3d 889. Indeed, in what has been described as a "bright line" rule, the United States Supreme Court has found "that once a motor vehicle has been lawfully detained for a traffic violation, the police

officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Mimms*, 434 U.S. at 111 n.6; *see also Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997) ("But, that we typically avoid per se rules concerning searches and seizures does not mean that we have always done so; *Mimms* itself drew a bright line, and we believe the principles that underlay that decision apply to passengers as well."). This is because the "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Michigan v. Summers*, 452 U.S. 692, 703 (1981).

Here, although the municipal court did not expressly make this factual finding, the record supports the conclusion that Officer Harris's request for Rana to exit her vehicle was also a common safety practice that he employed during DUI investigations. Officer Harris testified that he often asks people to exit their vehicles during DUI investigations and does not tell that them at that point that he is investigating them for DUI because there is a risk the driver could reach for a weapon or flee in the vehicle. (Doc. 17 at 35; 11/07/19 Trial, Disc. 5 at 21:30-22:35.) Thus, while also serving to facilitate his DUI investigation, Officer Harris's request for Rana to exit her vehicle also served to alleviate a potential safety issue—namely, removing a possibly intoxicated person from a situation where they could react badly and harm the officer or other members of the public by reaching

for a weapon or fleeing the scene. Accordingly, Officer Harris's request was reasonable, lawful, and within his authority to investigate and enforce the law.

CONCLUSION

This Court should affirm the municipal court's denial of Rana's motion to suppress and dismiss.

Respectfully submitted this 28th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,705 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, Michael Patrick Dougherty, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-28-2022:

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