
IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 23-0463

STATE OF MONTANA,

Plaintiff, Respondent and Appellee,

v.

SHEA TARYN SAMPSON,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from Montana's Eighteenth Judicial District Court, Gallatin County,
The Honorable Andrew Breuner Presiding

APPEARANCES:

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I. Statement of Issues

- A. Did the trial Court commit plain error by giving lesser included offense and Aggravated DUI instructions that are contrary to applicable legislation?
- B. Should the Court review for plain error the jury's verdict that is contrary to law as instructed by the trial Court?
- C. Did the trial Court commit plain error by giving a lesser included offense instruction when (i) the lesser included offenses had been repealed, (ii) the Appellant had not been given advance notice that she needed to defend against lesser included offense charges, and (iii) in the circumstances of this case, no jury could rationally conclude that the Appellant is guilty of the DUI *per se*, but not Aggravated DUI.
- D. Did the trial Court commit error by (i) considering a Breathalyzer result that the jury rejected in sentencing the Appellant to multiple days in jail, and (ii) ordering that she be given a probationary license equipped with an interlock device?

II. Statement of the Case

After a Breathalyzer test indicated that Shea Sampson had been driving with a blood alcohol concentration of .217, the State charged her with aggravated DUI in contravention of § 61-8-465, MCA. The trial Court gave a lesser included offense instruction. The jury found Ms Sampson not guilty of Aggravated DUI and DUI, but found her guilty of DUI *per se*. The trial Court sentenced her to 4-days in jail, as well as the maximum available fine. Additionally, he recommended that she

be given a probationary license and that she be restricted to driving only a motor vehicle equipped with a functioning ignition interlock device. Ms Sampson appealed, and the District Court affirmed the verdict and the sentence. It is from the District Court's decision that Ms Sampson appeals.

III. Statement of Facts

Shea Sampson is a twenty-four-year-old woman who has no criminal history – not even a speeding ticket. On 23 December 2021 when driving home from work at a brewpub during a snowstorm, she failed to yield to a police officer, Hannah Helsby, who had entered a roundabout. When Officer Helsby stopped her, Ms. Sampson admitted that she consumed a couple of beers after completing her shift, and she had in her possession a full Solo Cup of beer that she intended to drink once she got home.

Officer Helsby administered field sobriety tests. Although Ms. Sampson performed the tests remarkably well, Officer Helsby arrested her on suspicion of DUI and transported her to the Gallatin Valley Detention Center where Ms. Sampson voluntarily provided breath samples into the Intoxilyzer 8000. The Breathalyzer test indicated that Ms. Sampson had a blood alcohol concentration of .217. Accordingly, the officer charged her with aggravated DUI in contravention of § 61-8-465, MCA. She also charged Ms. Sampson with failure to yield and open

container violations.

The trial Court instructed the jury on the offense of Aggravated DUI, and gave a lesser included offenses instruction that included the offenses, DUI and DUI *per se*.

The jury acquitted Ms. Sampson of the Aggravated DUI and the DUI charges, but convicted her on the lesser included DUI *per se* offense. The jury also found her guilty on the failure to yield and open container charges.

Even though the jury acquitted Ms. Sampson of the Aggravated DUI charge, the prosecutor recommended that she serve 8-days of jail time on the DUI *per se* conviction. Before announcing his sentence, Municipal Court Judge Seel remarked that he was “glad to see a recommendation for more serious jail time for DUI offenses” and noted that the prosecution’s recommendation was higher than in the past for DUI *per se* convictions.

Judge Seel then sentenced Ms. Sampson to 4-days of jail time, a fine of \$1000, and other terms, including a probationary license and an interlock device.

It is from the DUI *per se* conviction and, in the alternative, the sentence that Judge Seel imposed, that Ms. Sampson appeals. Ms. Sampson does not appeal against the failure to yield or the open container convictions.

IV. Standard of Review

The standard of review of jury instructions in criminal cases is whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case. State v. Dunfee, 2005 MT 147, ¶ 20, 327 Mont. 335, 114 P.3d 217. Plain error review is undertaken in those cases that implicate a criminal defendant's fundamental constitutional rights, where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. State v. Dubois, 2006 MT 89, ¶ 31, 322 Mont. 44, 134 P.3d 82. This Court reviews the district court's findings on which its sentence is based to determine whether they are clearly erroneous. State v. Shults, 2006 MT 100, ¶ 34, 322 Mont. 130, 136 P.3d 507.

V. Summary of Argument

The trial Court committed plain error by instructing the jury, contrary to statute, that they could consider lesser included offenses only if they were unable to reach a verdict on the charged offense. Moreover, the trial Court committed plain error by giving a lesser included offense instruction because (1) the lesser included offense that Ms. Sampson was convicted of had been repealed prior to trial, (2) no jury could rationally conclude that the Ms. Sampson is guilty of the lesser offense, but not the greater offense, and (3) Ms Sampson had no prior notice that she would be tried on lesser included offenses. The trial Court also committed

plain error by erroneously instructing the jury as to when a person commits the offense of Aggravated DUI. The verdict was contrary to law because the jury failed to follow the Court's instruction that they could only consider lesser included offenses if they were unable to reach verdicts on the greater offenses. Finally, the trial Court erred by sentencing Ms. Sampson based on a Breathalyzer result that the jury rejected, and ordered that she be given a probationary license equipped with an interlock device when that order was not available to him?

VI. Argument

A. The Municipal Court committed plain error by giving multiple inaccurate jury instructions.

Even though Ms. Sampson's public defender did not object to the giving of any jury instruction, this Court should review her claim for instructional error pursuant to the plain error doctrine. In *State of Montana v. Cord*, 2022 MT 220N (2022), a case in which this Court invoked the plain error doctrine, the Court explained the doctrine at paragraph 17:

The plain error doctrine allows this Court to discretionally review claims not preserved at trial that implicate a criminal defendant's fundamental rights. State v. George, 2020 MT ¶ 4, 399 Mont. 173, 459 P.3d 854. We invoke plain error review "on a case-by-case basis, according to narrow circumstances, and by considering the totality of the circumstances." State v. Williams, 2015 MT 247, ¶ 16, 380 Mont. 445, 358 P.3d 127. We may

review and correct an unpreserved assertion of error based upon a showing of: (1) a plain or obvious error; (2) that affected a constitutional or other substantial right; and (3) which prejudicially affected the fundamental fairness or integrity of the proceeding. State v. Abel, 2021 MT 293, ¶ 4, 406 Mont. 250, 498 P.3d 199. For example, “[i]f a defendant had the opportunity to object to a jury instruction at trial but failed to do so, we will ordinarily not examine the issue unless it qualifies for plain error review.” State v. Birthmark, 2013 MT 86, ¶ 11, 369 Mont. 413, 300 P.3d 1140. The remedy following application of plain error review is reversal, in which this Court has the authority to “rectify a trial court judgment that . . . leaves unsettled the question of the fundamental fairness of the trial.” State v. Akers, 2017 MT 311, ¶ 20, 389 Mont. 531, 408 P.3d 142.

Here, the Municipal Court committed plain instructional error by (1) giving an instruction on lesser included offenses that is contrary to the lesser included offense statute, § 46-16-607, MCA, (2) giving an instruction on what constitutes Aggravated DUI that is contrary to the Aggravated DUI statute, § 61-8-465, MCA and (3) erroneously instructing the jury that, in the circumstances of this case, DUI *per se* was a lesser included offense of the Aggravated DUI charge.

This Court reviews jury instructions in criminal cases to “determine whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law”. State v. Scarborough 2000 MT 301, ¶ 47, 14 P.3d 1202 734, 737. In this case the instructions as a whole misstated the law in several respects, thereby prejudicially

affecting the fundamental fairness and integrity of the trial. As such this Court should undertake plain error review and reverse the trial court's conviction of Ms. Sampson on the DUI *per se* charge.

1. The lesser included offense instruction is contrary to the lesser included offense statute

Montana's lesser included offense statute is codified at § 46-16-607, MCA, and provides as follows:

46-16-607. Conviction of lesser included offense. (1) *The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included in the offense charged.*

(2) *A lesser included offense instruction must be given when there is a proper request by one of the parties and the jury, based on the evidence, could be warranted in finding the defendant guilty of a lesser included offense.*

(3) When a lesser included offense instruction is given, the court shall instruct the jury that it must reach a verdict on the crime charged before it may proceed to a lesser included offense. *Upon request of the defendant at the settling of instructions, the court shall instruct the jury that it may consider the lesser included offense if it is unable after reasonable effort to reach a verdict on the greater offense.*

Thus, as clearly stated in subsection (3) of the statute, the jurors must reach a verdict on the charged offense before considering any lesser included offenses. If

they are unable to reach a unanimous verdict on the charged offense, they are only permitted to consider the lesser included offenses if the defendant requests that they do so.

The legislature's intent in enacting the lesser included offense statute is obvious. If the jury finds the defendant guilty of the charged offense, then the lesser included offenses are rendered superfluous. If, on the other hand, the jury finds the defendant not guilty of the charged offense, the jury can then decide whether the defendant is guilty of the less serious offenses.

However, if the jurors are deadlocked on the charged offense, then the trial ends in a mistrial and the State can re-try the defendant on that offense. That is, unless the defendant seeks an instruction for the jury to consider the lesser included offenses. The reason a defendant might make that request is because, if the jury was to reach a verdict on the lesser included offense, double jeopardy would prevent the State from re-trying her on the more serious charge.

Here, the trial Court instructed the jury exactly the opposite of what the lesser included offense statute provides. In relevant part, jury instruction number 6 reads as follows:

If you are unable after reasonable effort to reach a verdict on Aggravated Driving under the influence, you may consider the lesser included offenses of Driving under the Influence, in violation of M.C.A. § 61-8-401, and

Operating a Noncommercial Vehicle with an Alcohol Concentration of 0.08 or More (sic), in violation of M.C.A. § 61-8-406.

Even though the trial Court improperly instructed the jurors that they could consider lesser included offenses if they were unable to reach a verdict on the Aggravated DUI charge, the jury ironically reached not guilty verdicts on the Aggravated DUI and DUI charges before reaching a guilty verdict on the DUI *per se* charge. In other words, the jury seemingly stumbled its way into following the statute rather than following the judge's erroneous instruction.

As the District Court clearly found, the jury's verdict is inconsistent with the Municipal Court's instructions. The District Court Judge wrote¹:

Here, in Instruction no. 6, the jury was instructed that it could consider the lesser included offenses of DUI and DUI per se only if they were "unable after reasonable effort to reach a verdict on Aggravated Driving under the Influence." (Emphasis added)

Instruction no. 6 also indicated that if the jury reached a guilty verdict on the charged offense, they could stop since they "will have reached a verdict."

The same instructions attended the lesser included offense options. In other words, if the jury was unable to reach a verdict on the DUI charge, then they could consider the DUI per se charge. If, on the other hand, the jury reached a guilty verdict on the DUI charge, they could stop since, again, they "will have reached a verdict."

¹ Opinion and Order on Appeal at p. 11

The Verdict Form listed the charged offense and two (2) lesser included offenses in order---Aggravated DUI, DUI, and DUI per se---separated by “or” and with the option of “guilty” or “not guilty” for each.

But the Verdict Form expressly invited only a single “unanimous verdict” for the three (3) options under Count I.

What the instructions did not give the jury permission to do was to reach a verdict of “not guilty” on the charged offense and then to move on to consideration of the lesser included, offenses.

In this case, the jury did that not once but two times. That is, they entered pleas of “not guilty” to both Aggravated DUI and DUI before finding Sampson “guilty” of the DUI per se charge.

The jury’s action is inconsistent with the Court’s instructions because the jury was instructed to consider the lesser included offenses only if unable to reach a verdict on the charge under consideration.

It was inconsistent with the Verdict Form which only called for a single verdict.

*It was inconsistent with the Montana Criminal Jury Instructions (MCJI)--- Lesser Included Offense Verdict---Multiple Offenses (2022) form because that form states in bold lettering that the jury is only to reach a single verdict from the charged offense and lesser included offenses (“**[E]nter your verdict to one, but not more than one, of the offenses listed below**”) (bold in original; italics added).*

Even though it appears that the jury somehow reached a verdict that appears to be consistent with the lesser included offense statute, its failure to follow the

Court's instructions constitutes plain error. In instruction number 1, the trial Court instructed the jury as follows:

You should take the law in this case from my instructions alone. You should not accept anyone else's version as to what the law is in this case. You should not decide this case contrary to these instructions, even though you might believe the law ought to be otherwise.

As courts have long held, it is the duty of the jury to take the law from the court, whether the court in so giving it is right or wrong. Hence, the jury violate their duty if they fail to follow instructions, even if the instructions are wrong, and a verdict based on a breach of the jury's duty cannot be allowed to stand, even though intrinsically correct. Murray v. Heinze, 17 Mont., 353 (1895).²

In sum, the trial Court's erroneous lesser included offense instruction, combined with the jury's verdict that is contrary to the law as instructed by the Court, should result in plain error review by this Court. Although an obvious misstatement of the law, the trial Court instructed the jury to consider the lesser included offenses only if they were unable to reach a verdict on Aggravated DUI. Since they did reach a not guilty verdict on the Aggravated DUI charge, their consideration of the lesser included offense of DUI *per se* was contrary to law and their guilty verdict on that charge should be quashed.

2. *The trial Court's instruction as to what constitutes Aggravated DUI is wholly inconsistent with the Aggravated DUI statute.*

As noted above, the jury's verdict is a head scratcher. In acquitting the Appellant of the Aggravated DUI charge, the jury determined either (1) that the .217 Breathalyzer reading was inaccurate because the video evidence established that she didn't appear impaired, let alone that she was falling-down drunk, or (2) the .217 reading was accurate, but she somehow wasn't under the influence of alcohol. Most likely, the jury was confused by the multitude of inaccurate and confusing jury instructions, none of which were more flawed than jury instruction 7 in which the trial Court incorrectly instructed the jury on the offense of Aggravated DUI.

The instruction contains a hodgepodge combination of Aggravated DUI, DUI and DUI *per se*, and does not even remotely state with accuracy when a person commits the offence of Aggravated DUI. The Court instructed the jury as follows:

A person commits the offense of Aggravated Dul if the person is Driving Under the Influence, in violation of Montana Code Annotated 61-8-401, or the person is Operating a Noncommercial Vehicle with an Alcohol Concentration of 0.08 or More, in violation of Montana Code Annotated 61-8-406, and the person's alcohol concentration, as shown by analysis of the person's blood or breath, is 0.16 or more.

² See also, *Talley v. Whitlock*, (Ala., 1917) 73 So. 976; *Gartner v. Mohan*, 39 S. D. :202; *Yellow Poplar Lumber Co., v. Bartley*, 164 Ky., .763; *Soderburg v. Chicago St. P. M. & O. Ry. Co.*, 67 Ia., 123; *Freel v. Pietzsch*, 22 N. D., 113; *Barton v. Shull*, 62 Neb., 570; *Dent v. Bryce* 16 S. C., 14

Thus, according to the instruction, a person commits the offense of Aggravated DUI if:

1. The person commits the offense of DUI; **OR**
2. The person commits the offense of DUI per se; **AND**
3. The person's BAC is 0.16 or more..

The instruction is bewildering and an obvious misstatement of the law. Instruction number 10-109 of the Montana Criminal Jury Instructions (MCJI) correctly explains when a person commits the offense of Aggravated DUI. That instruction provides as follows:

A person commits the offense of aggravated driving under the influence of alcohol if, while under the influence of alcohol, she is in actual physical control of a vehicle upon the ways of this state open to the public and the Defendant's alcohol concentration, as shown by analysis of her blood, breath, or other bodily substance was 0.16 or more.

Rather than properly instructing the jury that a person commits the offense of Aggravated DUI if she drives while under the influence of alcohol and has a BAC of .16 or more, the Municipal Court instructed the jury that a person commits the offense only if she also commits either the offense of DUI or DUI *per se*, and she has a BAC of .016 or more.

Thus, the trial Court instructed the jury that it could convict the Appellant of Aggravated DUI if (1) she was driving with a BAC of .08, regardless of whether she was under the influence of alcohol, and (2) she was driving with a BAC of .16 while under the influence of alcohol. The contradictions that are inherent in the instruction make it incomprehensible.

While the jury found the Appellant not guilty of the Aggravated DUI offense, the inexplicable verdict suggests that the jurors were hopelessly confused by the instruction. How else can one make sense of how they concluded that the Appellant drove with a BAC of .217, yet wasn't under the influence of alcohol?

B. The State convicted Ms. Sampson of violating a statute that the Montana legislature explicitly repealed.

The jury convicted Ms. Sampson of violating the DUI *per se* statute, § 61-8-406, MCA. That statute makes it unlawful for any person to:

drive or be in actual physical control of a noncommercial vehicle upon the ways of this state open to the public while the person's alcohol concentration, as shown by analysis of the person's blood, breath, or urine, is 0.08 or more.

Effective 1 January 2022, nine days after the State charged Ms. Sampson with Aggravated DUI, the Montana legislature repealed the DUI *per se* statute when it enacted Senate Bill 365. Thus, the Municipal Court instructed the jury on, and the jury convicted Ms. Sampson of, a non-existent law.

It is well settled that “after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force unless some special provision be made for that purpose by statute.” Yeaton v United States, 9 U.S. 281 (1809). In United States v Tynen, 11 Wall. 88, 78 U.S. 95, the U.S. Supreme Court stated the principle applicable to criminal proceedings:

There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal, the legislative will is expressed that no proceedings be had under the Act repealed.

An exception to the general rule that the State cannot prosecute a person for an alleged violation of a repealed law is when the repeal legislation makes clear in a savings clause that it didn’t intend to prohibit prosecutions for acts that occurred prior to the effective date of the repeal legislation. As the Court explained in *State v Clifton*, 177 Md. 572, 576:

While the repeal of a statute prevents any further proceedings thereunder at common law, it is well established that where there is a saving clause granting to the state or federal government the right to punish for offenses committed before the repeal, the general rule is rescinded.

In determining whether the legislature intended for the repeal legislation to allow prosecution for acts that were committed, but not charged as an offense,

prior to effective date of the enactment, the Court is restrained from considering anything other than the plain meaning of the words used in the savings clause. As explained in State v. Thomas, 396 Mont. 284, 445 P.3d 777 (2019):

In applying a statute, our purpose is to “ascertain the legislative intent and give effect to the legislative will[,]” S.L.H. v. State Comp. Mut. Ins. Fund, 2000 MT 362, ¶ 16, 303 Mont. 364, 15 P.3d 948, and our role “is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” Diaz v. Blue Cross & Blue Shield, 2011 MT 322, ¶ 14, 363 Mont. 151, 267 P.3d 756 (internal quotations and citations omitted). Thus, legislative intent, in the first instance, is to be ascertained “from the plain meaning of the words used.” Mont. Vending, Inc. v. Coca-Cola Bottling Co. of Mont., 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499. “Where the plain language of the statute is clear and unambiguous, no further statutory interpretation is necessary.” Diaz, ¶ 14 (internal citation omitted); State v. Stiffarm, 2011 MT 9, ¶ 12, 359 Mont. 116, 250 P.3d 300 (“a statute is to be construed according to its plain meaning, and if the language is clear and unambiguous, no further interpretation is required.

Here, while the repeal legislation contains a savings clause, the clear and unambiguous language of the clause limits its scope to “proceedings” that had “begun” prior to the effective date of the repeal legislation. The savings clause reads as follows:

Section 46. Saving clause. *[This act] does not affect rights and duties that*

matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

No “rights” or “duties” had “matured” in relation to Ms. Sampson prior to the effective date of the repeal legislation. Likewise, no “penalties” “were incurred” prior to the effective date. Therefore, in determining whether the State could validly bring a criminal charge against Ms. Sampson under the repealed DUI *per se* statute, it is necessary to determine whether a “proceeding” against Ms. Sampson for DUI *per se* had “begun before the effective date of” the repeal legislation.”

Clearly, no proceeding for an alleged DUI *per se* had been brought against Ms. Sampson prior to the repeal of the statute. The only proceeding that had “begun before the effective date of” the repeal legislation was a criminal complaint against Ms. Sampson for an alleged Aggravated DUI. When Ms. Sampson went to trial, the Aggravated DUI charge was the only “proceeding” that had been “begun before the effective date of” the repeal legislation. As such, the Court unlawfully permitted the State to resurrect a repealed statute by including it as a lesser included offense to the only proceeding that had been brought against Ms. Sampson prior to the effective date of the repeal statute.

In addition to the savings clause contained in the repeal legislation, the

Montana legislature has enacted a general savings clause that provides as follows:

The repeal of any law creating a criminal offense does not constitute a bar to an indictment or information and the punishment of an act already committed in violation of the law so repealed unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act.

The general savings clause, however, has no applicability to the prosecution of Ms. Sampson for allegedly violating the repealed DUI *per se* statute. The provision only applies when the State brings criminal charges against someone by issuing an “indictment” or an “information.”

Section 46-11-101, MCA provides that “a prosecution may be commenced by:”

- (1) *a complaint;*
- (2) *an information following a preliminary examination or waiver of a preliminary examination;*
- (3) *an information after leave of court has been granted; or*
- (4) *an indictment upon a finding by a grand jury.*

In enacting the general savings clause, the legislature clearly limited it to prosecutions commenced by way of information and indictment. The Aggravated DUI charge was brought by way of a complaint. Thus, it was improper for the Court to instruct the jury on a repealed DUI *per se* offence as a lesser included

offense to a charge that had been commenced by a criminal complaint, and not by way of indictment or information.

In short, the Municipal Court erred by instructing the jury on the lesser included offense of DUI *per se* when the legislature had repealed it some 10-months prior to Ms. Sampson's trial and neither the savings clause in the repeal legislation or the general savings clause statute apply to a prosecution for the repealed offense.

- C. *In violation of the 6th Amendment of the United States Constitution, the State failed to give notice to Ms. Sampson prior to trial that she needed to defend against a charge of DUI per se.*

As far as the record reveals, Ms. Sampson was unaware until the Judge instructed the jury on the lesser included offense of DUI *per se* that she needed to defend against that charge. The Sixth Amendment of the United States Constitution provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The constitutional right to be informed of the nature and cause of the

accusation entitles the defendant to insist that the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge. Burton v. United States, 202 U.S. 344 (1906). No indictment is sufficient if it does not allege all of the ingredients that constitute the crime. Where the language of a statute is, according to the natural import of the words, fully descriptive of the offense, it is sufficient if the indictment follows the statutory phraseology, Potter v. United States, 155 U.S. 438, 444 (1894) but where the elements of the crime have to be ascertained by reference to the common law or to other statutes, it is not sufficient to set forth the offense in the words of the statute. The facts necessary to bring the case within the statutory definition must also be alleged. United States v. Carll, 105 U.S. 611 (1882).

If an offense cannot be accurately and clearly described without an allegation that the accused is not within an exception contained in the statutes, an indictment which does not contain such allegation is defective. United States v. Cook, 84 U.S. (17 Wall.) 168, 174 (1872).

The right to notice of accusation is so fundamental a part of procedural due process that the States are required to observe it. Rabe v. Washington, 405 U.S.

313 (1972).³

As noted above, the State did not give Ms Sampson notice prior to trial that it intended to prosecute her for the crime of DUI *per se*. The only crime that she was charged with required the jury to find beyond a reasonable doubt the following elements:

1. That she was driving a vehicle upon the ways of this state open to the public;
2. That she was under the influence of alcohol at the time; and
3. That her alcohol concentration as shown by analysis of her breath was .16 or more.

Ms Sampson defended against that charge solely on the basis that she was not under the influence of alcohol at the time of the alleged offense. Had she been informed that the State intended to charge her with the additional offense of DUI *per se* – a charge that doesn't require proof that she was under the influence of alcohol – she undoubtedly would have presented expert evidence establishing that the breath test that yielded a staggering .217 result was flawed.

As a trial strategy, she and her attorney clearly determined that it was unnecessary to present expert evidence because it was manifestly clear that the test result was flawed because someone blowing a .217 on a Breathalyzer test would be

³ This Sixth Amendment analysis is abstracted from: <https://www.govinfo.gov/content/pkg/GPO-CONAN->

so drunk that she would need assistance in walking, would be suffering total mental confusion, along with possible dysphoria with nausea and vomiting and possible blackout.

That Ms. Sampson was able to stand in blizzard conditions with one leg lifted off the ground for 30 seconds; that she was able to walk a straight line and recite the alphabet perfectly; that she spoke clearly with no slur in her speech – made it manifestly clear that, not only did she not have an alcohol concentration of .217, but as the jury concluded, she was not driving under the influence of alcohol.

In sum, in giving an instruction on the lesser included offense of DUI *per se* when Ms. Sampson had not been informed prior to trial that she faced prosecution for that offense, the State violated her Sixth Amendment rights, thereby denying her the fundamental right of procedural due process.

D. *Under the circumstances of this case, DUI per se is not a lesser included offense of Aggravated DUI.*

In State v. Freiburg, 2018 MT 145, 391 Mont. 502, 419 P.3d 1234, the Montana Supreme Court enunciated the test that trial courts must apply when deciding whether to give a lesser included offense instruction. In the unanimous decision, per Justice Rice, the Court stated at paragraph 13:

A lesser-included offense is defined in part as an offense that 'is established

by proof of the same or less than all the facts required to establish the commission of the offense charged.’” *Daniels*, ¶ 14 (quoting § 46-1-202(9)(a), MCA). “The term ‘facts’ in this statute ‘refers to the statutory elements of the charged offense and not to the individual facts of the case.’” *Daniels*, ¶ 14 (quoting *Jay*, ¶ 40). Criminal defendants are entitled to jury instructions that cover every issue or theory having support in the evidence. *State v. Castle*, 285 Mont. 363, 366-67, 948 P.2d 688, 690 (1997) (citations omitted). “A defendant may be convicted only of the ‘greatest included offense about which there is no reasonable doubt.’” *Castle*, 285 Mont. at 367, 948 P.2d at 690 (quoting § 46-16-606, MCA). Thus, under the “Castle test,” a trial court must give a proposed lesser-included offense instruction when two factors are met: (1) as a matter of law, the offense for which the instruction is requested is a lesser-included offense of the offense charged; and (2) the proposed lesser-included offense instruction is supported by the evidence in the case. *Daniels*, ¶ 12 (citations omitted). We have held the second prong is met when there is “some basis from which a jury could rationally conclude that the defendant is guilty of the lesser, but not the greater offense.” *Castle*, 285 Mont. at 369, 948 P.2d at 691.

Thus, under what the Court describes as the “Castle test,” a lesser included offense instruction could have only been given if the DUI *per se* charge is a lesser included offense of Aggravated DUI (it clearly is), and when there is some basis from which a jury could rationally conclude that Ms. Sampson was guilty of the DUI *per se* charge, but not the Aggravated DUI charge (there clearly isn’t).

To convict Ms. Sampson of DUI *per se*, the jury necessarily accepted that

she was driving with a blood alcohol concentration (BAC) of .08 or more. The only evidence in the record of her BAC is the Breathalyzer result that showed that she had a BAC of .217. Therefore, had the State charged Ms. Sampson solely with violating the DUI *per se* statute, there would be a basis from which a jury could rationally find her guilty of that offense.

However, under the second prong of the *Castle* test, there must be a basis from which a jury could rationally find her guilty of DUI *per se*, but not Aggravated DUI. To find Ms. Sampson not guilty of Aggravated DUI, the jury would need to conclude that she was either (1) not under the influence of alcohol, or (2) she did not have a BAC of at least .16. No jury could rationally conclude that, if she had a BAC of .217, she wasn't under the influence of alcohol. As discussed above, if she had a BAC of .217, she would have been in a catatonic state, yet she clearly wasn't.

The jury's verdict that is inexplicable. The jury was instructed that they could infer that if Ms. Sampson had a BAC of .08 or more, she was under the influence of alcohol. No jury could rationally conclude that a person who had a BAC approaching three times that level was not under the influence of alcohol.

In short, the Municipal Court committed clear error when it instructed the jury on the lesser included offense of DUI *per se* because no jury could rationally

conclude that Ms. Sampson violated the DUI *per se* statute by driving with a BAC of .217, but that she wasn't driving under the influence of alcohol.

E. The trial court erred in sentencing Ms. Sampson pursuant to the Aggravated DUI charge even though the jury acquitted her of that offense.

As indicated above, the prosecutor recommended an 8-day jail sentence based primarily on the fact that Ms. Sampson blew a .217 on the Breathalyzer test. The Municipal Court Judge acknowledged the extraordinarily high reading during the sentencing hearing and sentenced her to 4-days in jail, as well as the maximum available fine. Additionally, he recommended that she be given a probationary license and that she be restricted to driving only a motor vehicle equipped with a functioning ignition interlock device.

The Judge's sentence was extraordinary for a conviction for DUI *per se*. DUI *per se* is the only DUI offense that doesn't provide for mandatory jail time. As every criminal defense lawyer and prosecutor in Montana is keenly aware, in cases where it is questionable whether the State can prove that a defendant was driving under the influence, the State will agree to a plea deal in which it amends the complaint to DUI *per se* so that the defendant can plead guilty and avoid jail time.

The sentencing hearing took place some three months after the hearing and, from listening to the audio transcript of the hearing, it was clear that Judge Seel

had little memory of what had transpired at Ms. Sampson's trial. After hearing the sentencing recommendations made by the prosecutor and Ms. Sampson's lawyer, he proceeded to rummage through files and papers, whispering at one point words to the effect of, "there must be another file around here somewhere." The audio recording suggested that he never found the missing file because he said to the prosecutor something like, "you'll have to remind me, what did the jury find on the open container and failure to yield charges."

Once informed by the prosecutor that she had been found guilty of those offenses, he went on to blindly sentence her to a four-day jail sentence. He gave no reasons for the exceptional sentence other than the fact that Ms. Sampson blew a .217 on the Breathalyzer test – a result that the jury clearly found was flawed.

That the trial Judge sentenced Ms. Sampson as if she was convicted of Aggravated DUI is self-evident. In addition to the jail time and the maximum fine, over the vociferous objection of her lawyer, he restricted Ms. Sampson to driving with a probationary license and only in a motor vehicle equipped with a functioning ignition interlock device.

That condition of her sentence, however, was not available to the sentencing Judge. The statute that authorizes a Court to restrict a person from driving only a motor vehicle equipped with an ignition interlock device does not authorize that

restriction for a first offense DUI *per se*. Rather, the statute in effect on the date that Ms. Sampson was arrested that authorized that condition, § 61-8-733, MCA, empowers the Court to order it only “[o]n the second or subsequent conviction of a violation of . . . 61-8-406.” As noted above, prior to these charges, Ms. Sampson had never been convicted of any offense, let alone a DUI.

The Court in State v. Shults, 332 Mont. 130, 138 (Mont. 2006) announced the rule for reviewing sentences imposed by the trial Court:

In Montana, criminal sentencing alternatives are strictly a matter of statute. Our standard of review, therefore, includes the question of whether the district court correctly applied the applicable statutes. We review the district court's findings on which its sentence is based to determine whether they are clearly erroneous. State v. Alden (1997), 282 Mont. 45, 49, 934 P.2d 210, 213.

As already noted, the sole factual basis that the trial Court gave for imposing a four-day jail sentence for an offense that carries no mandatory jail time was the fact that Ms Sampson’s BAC was recorded at a level of .217. Because the jury clearly rejected the results of that breath test, his factual basis for imposing the sentence was clearly erroneous and this Court should quash the sentence. As for the interlock device condition that the trial Court imposed, that condition is unlawful and should likewise be quashed. *See, City of Bozeman v. Cantu*, 2013 MT 40, ¶ 10, 369 Mont. 81, 296 P.3d 461.

VII. Conclusion

The trial Court gave multiple erroneous jury instructions, and the jury failed to follow those instructions. As discussed above, those mistakes constitute a plain or obvious error that affected Ms. Sampson's substantial rights which prejudicially affected the fundamental fairness or integrity of the proceeding. As such, this honorable Court should undertake plain error review.

Moreover, the jury convicted Ms. Sampson of an offense that had been repealed by the legislature and without prior notice from the State that it intended to bring that charge. It did so by improperly including it as a lesser included offense to the Aggravated DUI charge that the jury acquitted her of. Accordingly, on that basis, this Court should reverse the trial Court and quash the conviction.

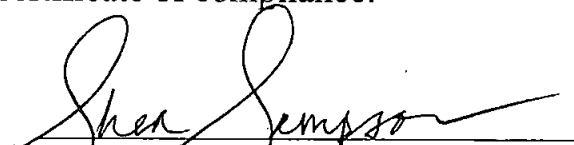
Finally, should the Court reject Ms. Sampson's argument that she was unlawfully convicted of DUI *per se*, this Court should quash the sentence because the factual basis upon which it was imposed was rejected by the jury. At the very least, the Court should vacate that part of the sentence that imposes the interlock device condition because it is clearly unlawful.

Dated this 1st day of November, 2023.


Shea Taryn Sampson
Pro se Appellant

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 not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.



Shea Taryn Sampson

CERTIFICATE OF SERVICE

The undersigned certifies that on the 1st day of November 2023, a true and accurate copy of the foregoing document was duly served by hand delivery upon the Attorney General for the State of Montana, and by U.S. Post and email upon the Bozeman City Attorney as follows:

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