IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0463

CITY OF BOZEMAN,

Plaintiff and Appellee,

v.

SHEA TARYN SAMPSON,

Defendant and Appellant.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUES

1. Whether this Court should review Sampson's aggravated driving under the influence instruction and lesser-included offense instruction claims under plain error review when she acquiesced to both instructions, she was acquitted of aggravated driving under the influence, both instructions reflect the statutory provisions, and the verdict form indicated that the jury approached the lesser-included offenses in accordance with what Sampson claims would have been the proper instruction.

2. Whether Sampson received sufficient notice that she could face a conviction for the lesser-included offense of driving with a blood alcohol concentration of 0.08 or above when she was charged by complaint with aggravated driving under the influence for driving with a blood alcohol concentration of 0.16 or above.

3. Whether Sampson's conviction for the lesser-included offense of driving with a blood alcohol concentration of 0.08 or above was illegal when the prior version of the statute was repealed and renumbered, and Sampson was charged with aggravated driving under the influence before the effective date of the new statute.

4. Whether the municipal court properly instructed the jury that driving with a blood alcohol concentration of 0.08 and above is a lesser-included offense

of aggravated driving under the influence when Sampson challenged the correctness of the 0.217 intoxilyzer result at trial.

5. Whether the municipal court imposed an illegal sentence or abused its discretion when it sentenced Sampson well within the statutory maximum for driving with an alcohol concentration of 0.08 or above and expressly noted that it based its sentence on the charge Sampson was convicted of, not the original aggravated driving under the influence charge.

STATEMENT OF THE CASE

On December 23, 2021, Appellant Shea Taryn Sampson was charged with aggravated driving under the influence (DUI), unlawful possession of an open alcoholic beverage in a motor vehicle, and failure to yield the right of way after she failed to yield to a law enforcement officer in a roundabout, had an open container of beer in her vehicle, and the intoxilyzer results indicated she had an alcohol concentration (BAC) of 0.217. (Docs. 1, 4.)

The City and Sampson submitted proposed jury instructions a week before the trial. (Docs. 28, 29.) The City's proposed instructions included instructions on lesser-included offenses, the definition of aggravated DUI, the elements for aggravated DUI, and the definition of operating a noncommercial vehicle with an alcohol concentration of 0.08 or more (DUI per se). (Doc. 29 at 16-22, 35-36.) The

City also included a proposed verdict form that contained aggravated DUI and the lesser-included offenses of DUI and DUI per se within Count I. (*Id.* at 59.) Sampson's proposed instructions included a different definition of aggravated DUI, and her proposed verdict form did not include any lesser-included offenses. (Doc. 28 at 4-5, 24.) Sampson did not provide any lesser-included offense instruction.

The court and the parties addressed the jury instructions after the lunch break at trial. Sampson did not object to the lesser-included offense instruction or the aggravated DUI definition instruction and withdrew her own aggravated DUI definition instruction. (10/28/22 Trial at 1:21:26-1:21:53, 1:32:13-1:32:25.) Sampson also stated that she believed the City's proposed verdict form was better than the one she submitted and agreed the court should use the City's. (*Id.* at 1:31:19-1:31:24.)

The jury found Sampson guilty of the lesser-included offense of DUI per se in Count I, guilty of Count II, failure to yield the right of way, and guilty of Count III, unlawful possession of an open alcoholic container in a motor vehicle.[1] (Doc. 35.) The municipal court sentenced Sampson to 180 days in jail with all but 4 suspended and a $1,000 fine with $100 suspended for the DUI per se. (*Id.*) The court

[1] Sampson does not challenge her convictions or sentences for Counts II and III, which are thus not addressed further in this brief.

recommended a probationary driver's license for Sampson and imposed an interlock requirement. (*Id.*)

Sampson appealed to the district court, arguing that her conviction for DUI per se was unlawful because Mont. Code Ann. § 61-8-406 was repealed in 2021, and she was not convicted until October 28, 2022, that she was not provided adequate notice that she could be convicted of DUI per se, that the court committed plain error by instructing the jury on the lesser-included offense of DUI per se when such a charge was unsupported by the facts introduced at trial, and that the court erred by sentencing Sampson under the aggravated DUI statute rather than the DUI per se statute. (Doc. 54.)

In response, the City pointed out that Sampson failed to object to the alleged errors at trial, that Sampson erroneously claimed she was not given an opportunity to object to jury instructions, that Sampson committed the offense prior to the effective date of the subsequent legislation, and that Sampson's sentence was well within the parameters for a DUI per se. (Doc. 54.)

The district court found that the repeal of Mont. Code Ann. §§ 61-8-406, -465 did not invalidate Sampson's conviction for the lesser-included offense of DUI per se, that Sampson received adequate notice that she faced the possibility of a conviction of the lesser-included offense in the charging complaint, that Sampson failed to object to the jury instructions at issue, that the court appropriately instructed

the jury to consider the lesser-included offense of DUI per se, and that Sampson's sentence was lawful and well within the parameters for a DUI per se. (Doc. 58.)

The district court sua sponte considered whether the jury's deviation from the court's instruction that the jury only consider the lesser-included offenses if it could not reach a verdict on aggravated DUI constituted plain error warranting reversal. (*Id.* at 10-15.) The district court noted that the municipal court instructed the jury to consider the lesser-included offenses if it was unable, after a reasonable effort, to reach a verdict on the charged offense of aggravated DUI. (*Id.* at 10.) However, the jury did reach a verdict on aggravated DUI, finding Sampson not guilty, before moving on to the lesser-included offenses of DUI and DUI per se. (*Id.* at 10-11.) The district court noted that the jury's action was inconsistent with the court's instructions and the verdict form. (*Id.* at 12.)

However, the district court found that the jury's action was not the type of "exceptional circumstance" that would warrant plain error review. (*Id.* at 13.) The court noted that Sampson consented to the instructions and verdict form, that evidence presented at trial supported the DUI per se conviction, that the not guilty verdicts on the aggravated DUI and DUI were not inconsistent with the guilty verdict on the DUI per se, that both statutory provisions and case law recognize the propriety of acquitting on a greater offense while convicting on a lesser offense, and that Sampson suffered no prejudice. (*Id.* at 13-14.)

STATEMENT OF THE FACTS

I. The offenses

On December 23, 2021, Bozeman Police Officer Hannah Helsby was patrolling on the south side of town. While driving East on College Street, approaching a roundabout at the intersection of 11th Avenue, Officer Helsby noticed a gold Chrysler sedan on 11th Avenue approaching the intersection at a rate of speed that indicated the driver was not going to yield. Officer Helsby engaged her brakes and testified that if she had not braked "pretty significantly," she would have run into the sedan. Officer Helsby said there was snowpack on the ground, but the roads were not icy. (10/28/22 Trial at 10:29:06-10:29:49, 11:36:30.)

Upon making contact with Sampson, Officer Helsby noticed she had glassy eyes and a dazed expression, and she seemed confused. Officer Helsby noticed a nearly full red solo cup on the floorboards that Sampson appeared to be attempting to hide from view. Officer Helsby noticed a strong odor of alcohol and fine motor skill impairment as Sampson gathered her registration and insurance documents. (*Id*. at 10:33:10-10:33:52; 10:37:18-10:37:52.)

Officer Helsby conducted field sobriety tests and observed three clues of impairment during the walk and turn and one during the one-leg stand tests. (*Id*. at 10:59:13-11:01:04.) Officer Helsby asked Sampson to submit to a portable breath

test, but she refused. (Trial Ex. 14 at 8:40-8:43, admitted and published to the jury at 11:03:36.) Based on the totality of the circumstances, Officer Helsby believed Sampson was impaired and arrested Sampson. (*Id.* at 11:13:25-27.) At the detention center, Sampson agreed to take a breath test on the intoxilyzer, which indicated a BAC of 0.217. (*Id.* at 11:14:10-11:14:35, 11:20:00-11:20:20; Trial Exs. 15, 22.)

II. Jury instructions

The City filed its proposed jury instructions and verdict form on October 20, 2022, and provided a copy to Sampson's counsel. (Doc. 29.) The City's proposed instruction number 7, modeled almost word-for-word after Montana Pattern Criminal Jury Instruction No. 1-111(a), instructed the jury on lesser-included offenses and how to approach multiple lesser-included offenses. (*Id.* at 16-18, Proposed Inst. No. 7.) Proposed instruction number 8, modeled closely after Mont. Code Ann. § 61-8-465 (2019), defined aggravated DUI. (*Id.* at 19-20, Proposed Inst. No. 8.) Proposed instruction number 9, using almost word-for-word the language from Montana Pattern Criminal Jury Instruction 10-109(a), listed the elements the City must prove to convict a defendant of aggravated DUI. (*Id.* at 21-22, Proposed Inst. No. 9.) Proposed instruction number 16 defined DUI per se. (*Id.* at 35-36, Proposed Inst. 16.) Count I in the City's proposed verdict form

included aggravated DUI and the lesser-included offenses of DUI and DUI per se. (*Id.* at 59, Verdict Form.)

On October 20, 2022, Sampson's counsel submitted the defense's proposed jury instructions and verdict form. (Doc. 28.) Sampson's proposed instruction number two defined aggravated DUI. (*Id.* at 4-5, Proposed Inst. No. 2.) Sampson's proposed verdict form did not include any lesser-included offenses and she did not provide a lesser-included offense instruction. (*Id.* at 24, Verdict.)

At the beginning of the trial, both parties confirmed that they had received the other party's proposed instructions. (10/28/2022 Trial at 8:17:09-8:19:00.) After lunch, the parties addressed the jury instructions on the record outside the jury's presence. (*Id.* at 1:19:06-1:32:25.) Sampson's counsel indicated there was no objection to the City's proposed instructions numbers seven and eight, which instructed the jury on the lesser-included offenses and aggravated DUI and withdrew Sampson's proposed instruction number two, which addressed aggravated DUI. (*Id.*1:21:26-1:21:53, 1:32:13-1:32:25.) Sampson's counsel also indicated there was no objection to the City's proposed verdict form, and counsel indicated that the City's proposed verdict form was formatted better. (*Id.* at 1:31:19-1:31:24.)

III. Sentencing

The municipal court held a sentencing hearing on January 5, 2023. At the start of the hearing, the City reminded the court that Sampson had been found guilty of DUI per se at a jury trial. (1/5/23 Hr'g at 11:34:30.)

The City recommended six months in jail with all but eight days suspended, with four days to serve and four days eligible for a work program. The City recommended a $1,000 fine, $50 prosecution fee, $85 court surcharge, jury costs, and the cost of assigned defense counsel. The City also recommended the assessment, course, and treatment program [ACT class] and that Sampson be prohibited from consuming alcohol or entering bars or other establishments where the primary sale of goods was alcohol. The City explained that the recommendation was based on Sampson's high BAC, that she almost ran into the officer's patrol vehicle, and that she failed to take responsibility for her actions. (*Id.* at 11:34:40-11:35:42.)

The defense recommended no jail time, 50 hours of community service, the "standard fines," and the ACT class. Sampson asserted she should "not be punished" for going to trial by imposing the cost of the trial and defense counsel. (*Id.* at 11:35:42-11:36:33.)

After discussing whether Sampson had any prior criminal history and the disposition of the other two charges, the court stated it "ha[d] reviewed part of the

record there, did hear the evidence, and that the defendant did have a blood alcohol level tested at 0.217." (*Id.* at 11:30:00-11:40:29.) The court pronounced the sentence stating:

> Hopefully, this won't change the State's view. I'm glad to see that finally, some recommendation for some more serious time on DUI offenses, but transition here, it does seem like it's higher than what's been given in the past for a per se conviction, which is what was the decision of the jury. And respecting that, the sentence is going to be a six-month jail sentence, all but four days suspended, with two days to serve and two days eligible for the work program, a fine of $1,000 plus $85 in surcharges, $50 prosecution fee.

(*Id.* at 11:42:45-11:43:44.)

The court addressed Sampson's income and current work status and said it would waive the prosecution and defense fees and suspend $100 of the fine. The court imposed the ACT class, ordered Sampson to attend the victim impact panel, and recommended Sampson for a probationary license with the condition of installing interlock. (*Id.* 11:44:30-11:45:00.) The court noted that Sampson's mother had posted a bond that indicated it could be applied toward any fine. The court explained to Sampson that after applying the amount posted for bond toward her fines and fees, she owed $10. Sampson confirmed she could pay the $10. (*Id.* at 11:47:40-11:47:47.) The court declined to impose jury costs. (*Id.* at 11:48:17-11:48:30.)

SUMMARY OF THE ARGUMENT

This Court should decline to invoke plain error review for Sampson's claims regarding the aggravated DUI and the lesser-included offense instructions. Sampson acquiesced to both instructions, the aggravated DUI instruction accurately reflects the aggravated DUI statute, and the language in the lesser-included offense instruction also closely mirrors the statutory provision for lesser-included offenses. Sampson has failed to establish how failing to address the aggravated DUI instruction—an instruction relevant only to the offense she was acquitted of—would result in a manifest miscarriage of justice or leave unsettled questions of the fundamental fairness of her trial. Sampson also failed to establish how failing to address the lesser-included instruction would result in a manifest miscarriage of justice or leave unsettled the fundamental fairness of her trial when she concedes that the jury appears to have approached the lesser-included offenses in accordance with the instruction Sampson claims should have been given.

Sampson received sufficient notice that she faced the possibility of a conviction for DUI per se when she was charged by complaint with aggravated DUI for driving with a BAC of 0.16 or above. DUI per se is a lesser-included offense of aggravated DUI and, thus, Sampson received sufficient notice that she faced the possibility of conviction for the lesser-included offense once she was charged by complaint.

Sampson was charged by complaint with aggravated DUI on December 23, 2021. The 2021 legislature repealed, restructured, and moved the DUI statutes and provided an effective date of January 1, 2022. Sampson acknowledges that the 2021 legislative provision included a savings clause stating that the repeal does not apply to proceedings that commenced before the statute's January 1, 2022 effective date. Sampson claims that because she was convicted of a lesser-included offense, no proceedings began against her until the lesser-included offense instruction was read at trial. Sampson's argument implies that a defendant can be tried for a timely filed charge under a since-repealed statute but that the applicable lesser-included offenses cannot be included. Sampson offers no authority for her assertion. This Court should deny Sampson's claim that would deny both parties the benefit of lesser-included instructions.

The municipal court imposed a lawful sentence and did not abuse its discretion when it imposed a sentence well below the statutory maximum possible sentence provided for a DUI per se. Sampson incorrectly asserts that interlock requirements may only legally be imposed on second and subsequent DUI per se convictions. Sampson's assertion that the court sentenced her pursuant to the aggravated DUI statute rather than the DUI per se statute is also contradicted by the record. The court expressly indicated that it based its sentence on the offense Sampson was convicted of—DUI per se—and declined to impose the City's

requested length of jail time because Sampson was convicted of DUI per se and not aggravated DUI. This Court should affirm Sampson's conviction and her sentence.

ARGUMENT

I. Standard of review

"In an appeal from a municipal court, a district court acts as an intermediate court of appeal; the appeal is confined to review of the record and questions of law." *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 8, 400 Mont. 46, 462 P.3d 1219 (citing Mont. Code Ann. §§ 3-5-303, 3-6-110). In a subsequent appeal, this Court reviews the case as if the appeal had been filed directly with this Court. *Id.; City of Bozeman v. Cantu*, 2013 MT 40, ¶ 10, 369 Mont. 81, 296 P.3d 461.

Trial courts possess broad discretion in formulating jury instructions, and this Court "will not reverse on the basis of its instructions absent an abuse of discretion that prejudicially affects a defendant's substantial rights." *State v. LaFournaise*, 2022 MT 36, ¶ 16, 407 Mont. 399, 504 P.3d 486 (citation omitted). This Court reviews jury instructions to determine whether the instructions fully and fairly instruct the jury on the applicable law. *Id.* (citation omitted). This Court "generally decline[s] to consider issues raised for the first time on appeal when the appellant had the opportunity to make an objection at trial." *Id.* (citation omitted).

"Failure to make a timely objection during trial constitutes a waiver of the objection . . . ." *Id.* (quoting Mont. Code Ann. § 46-20-104(2)).

This Court reviews a trial court's interpretation and application of a statute de novo. *State v. Edmundson*, 2014 MT 12, ¶ 12, 373 Mont. 338, 317 P.3d 169. This Court's review of constitutional issues of due process involves questions of law, and this Court's review is plenary. *State v. Pyette*, 2007 MT 119, ¶ 11, 337 Mont. 265, 159 P.3d 232.

This Court reviews sentences of less than one year of incarceration for legality and abuse of discretion. *State v. Hafner*, 2010 MT 233, ¶ 13, 358 Mont. 137, 243 P.3d 435. "This Court's review for legality is confined to determining whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes." *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 12, 396 Mont. 57, 443 P.3d 504 (citation and internal quotation marks omitted). This determination is a question of law and, thus, this Court's review is de novo. *Id.* (citation omitted).

If a sentencing condition is legal, this Court reviews the challenged condition for an abuse of discretion. *Id.* (citation omitted). "A sentencing court abuses its discretion when it acts arbitrarily without employment of conscientious

judgment or exceeds the bounds of reason, resulting in substantial injustice." *Id.* (citation omitted).

II. Sampson has not met her burden to establish that declining to consider the allegedly erroneous jury instructions on appeal would result in a manifest miscarriage of justice or call into question the fairness or integrity of her trial.

On appeal, Sampson challenges the lesser-included offense instruction and the aggravated DUI definition instruction. (Appellant's Br. at 7-14.) Sampson failed to challenge the language of either the aggravated DUI or lesser-included offense instructions on appeal to the district court and, therefore, raising it for the first time with this Court is improper. *City of Missoula v. Asbury*, 265 Mont. 14, 20, 873 P.2d 936, 939 (1994) (In a case originating from a municipal court on appeal from a district court, a defendant's failure to properly raise an issue at the first appellate level renders any subsequent attempt to raise that issue improper.). Sampson also concedes she did not raise any objection to the instructions in the municipal court and asks this Court to review her claims under the plain error doctrine. (Appellant's Br. at 5.)

Montana Code Annotated § 46-16-410(3) provides that "[a] party may not assign as error any portion of the instructions or omission from the instructions unless an objection was made specifically stating the matter objected to, and the grounds for the objection, at the settlement of instructions." Consistent with the

explicit mandate of Mont. Code Ann. § 46-16-410(3), case law holds that failure to timely object to jury instructions constitutes a waiver of the objection, and this Court will not entertain a challenge to a jury instruction made for the first on appeal. *See, e.g.*, *State v. Daniels*, 2019 MT 214, ¶¶ 39-40, 397 Mont. 204, 448 P.3d 511; *State v. Wilson*, 2007 MT 327, ¶ 36, 340 Mont. 191, 172 P.3d 1264.

As this Court has noted, "the rationale underlying the timely-objection rule is judicial economy and bringing alleged errors to the attention of each court involved, so that actual error can be prevented or corrected at the first opportunity." *State v. Hamilton*, 2018 MT 253, ¶ 17, 393 Mont. 102, 428 P.3d 849 (citation and internal quotation marks omitted). Thus, "[a] party waives the right to appeal an alleged error when the appealing party acquiesced in, actively participated in or did not object to the asserted error." *State v. Winter*, 2014 MT 235, ¶ 17, 376 Mont. 284, 333 P.3d 222 (citing *State v. Bomar*, 2008 MT 91, ¶ 33, 342 Mont. 281, 182 P.3d 47). This Court will not put a trial "court in error for an action in which the appealing party acquiesced or actively participated." *Id.* (citing *State v. Harris*, 1999 MT 115, ¶ 32 294 Mont. 397, 983 P.2d 881).

This Court may review an unpreserved claim alleging a violation of a fundamental constitutional right under the common law plain error doctrine where the defendant invokes this Court's inherent authority and establishes that failing to review the claimed error may result in a manifest miscarriage of justice, may leave

unsettled the questions of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. *Taylor*, ¶¶ 12-13. An error is plain only if it leaves one "firmly convinced" that some aspect of the trial, if not addressed, would result in one of the consequences listed above. *Taylor*, ¶ 17.

This Court invokes plain error review "sparingly, 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. "[A] mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine." *State v. King*, 2013 MT 139, ¶ 39, 370 Mont. 277, 304 P.3d 1 (citation omitted). This Court "will not undertake 'full analysis' of the alleged error each time a party requests plain error review." *State v. Griffin*, 2016 MT 231, ¶ 7, 385 Mont. 1, 386 P.3d 559 (citation omitted). "Conducting a full analysis in order to determine whether to find plain error would defeat the underlying rule that a party must object to error at trial, because errors should be brought to the attention of the trial court where they can be initially addressed." *Id.*

Sampson does not address how failing to review the claimed errors would result in a manifest miscarriage of justice, leave unsettled questions of the fundamental fairness of the trial or proceedings, or compromise the integrity of the

judicial process. Instead, Sampson merely argues that the instructions were incorrect and, therefore, constitute plain error. (Appellant's Br. at 11, 14.) Sampson also acknowledges that she was acquitted of aggravated DUI but does not explain how failing to review the allegedly erroneous instruction on the charge she was acquitted of would result in a manifest miscarriage of justice, call into question the fundamental fairness of the trial, or compromise the integrity of the judicial process. (Appellant's Br. at 14.)

The aggravated DUI instruction and lesser-included offense instruction Sampson challenges on appeal were closely modeled off the applicable statutes and accurately stated the law. As previously noted, Sampson acknowledges she never objected to either the aggravated DUI definition instruction or the lesser-included offense instruction, but Sampson also actively acquiesced in any purported error by withdrawing her own proposed aggravated DUI instruction and failing to provide her own proposed lesser-included offense instruction.

Because Sampson has failed to meet her required burden for establishing plain error, this Court should decline to undertake a full analysis of the claims and decline to invoke plain error review. However, even if this Court does undertake a full analysis of Sampson's claims, Sampson has failed to meet the high burden of establishing that failing to address the claimed errors may result in a manifest

miscarriage of justice, leave unsettled the questions of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.

A. The aggravated DUI definition instruction was consistent with the aggravated DUI statute, and even if Sampson could establish it was erroneous, she was found not guilty of aggravated DUI.

Montana Code Annotated § 61-8-465 (2019) provides that

> (1) A person commits the offense of aggravated driving under the influence if the person is in violation of 61-8-401, 61-8-406, or 61-8-411 and:
>
> (a) the person's alcohol concentration, as shown by analysis of the person's blood or breath, is 0.16 or more;

Montana Code Annotated § 61-8-401(1) (2019) defines DUI and provides that it is unlawful for a "person who is under the influence of alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public[.]" Montana Code Annotated § 61-8-406(1) (2019) defines DUI per se and provides that "[i]t is 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[.]" As this Court has previously explained,

Montana's DUI per se statute "requires no proof of diminishment." *State v. Olson*, 2017 MT 101, ¶ 15, 387 Mont. 318, 400 P.3d 214.[2]

Montana Code Annotated § 61-8-465 explains that a person commits aggravated DUI if they are in violation of Montana's DUI *or* DUI per se statutes *and* have a BAC of 0.16 or above.

The municipal court instructed the jury that,

> A person commits the offense of Aggravated DUI 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.

(Doc. 33 at 10, Instr. No. 7.)

The municipal court also instructed the jury on the elements required to prove aggravated DUI. The court instructed that,

> To convict the Defendant of the offense of Aggravated Driving under the Influence, the State must prove the following elements:
>
> 1. That the Defendant was driving a vehicle; and
>
> 2. That the vehicle was upon the ways of this state open to the public; and
>
> 3. That the Defendant was under the influence of alcohol at the time; and

[2] Montana Code Annotated § 61-8-411 addresses the operation of a noncommercial vehicle by a person under the influence of marijuana, which is not at issue in this case.

4. That the Defendant's alcohol concentration as shown by analysis of her breath was .16 or more.

(Doc. 33 at 11, Instr. No. 8.)

Sampson points to the Montana Pattern Criminal Jury Instruction 10-109 as the instruction the court should have given. (Appellant's Br. at 13.) Pattern jury instruction 10-109 provides that "[a] person commits the offense of aggravated driving under the influence of alcohol if, while under the influence of alcohol, she drives 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."

Instruction number seven is closely modeled off the statutory language of Mont. Code Ann. § 61-8-465(1) and accurately reflects the language of the aggravated DUI statute. Instruction number eight, which outlines the elements of aggravated DUI, mirrors the language that Sampson asserts should have been used to define aggravated DUI.

Considering the instructions as a whole, the jury was fully and fairly instructed on aggravated DUI. Further, Sampson was acquitted of aggravated DUI, and Sampson has not established how a failure to review the instruction of the offense she was acquitted of would result in a substantial miscarriage of justice or leave unsettled questions of the fundamental fairness of her trial. Sampson has not

met her burden of establishing that the court committed any error, much less plain error.

B. The lesser-included offense instruction aligned with the statutory language, and although the jury did not follow the instruction, the jury addressed the lesser-included offenses consistent with the instruction Sampson argues should have been provided.

On appeal, Sampson alleges for the first time that the lesser-included offense instruction was improper because it instructed the jury to consider the lesser-included offenses if it could not reach a verdict on aggravated DUI rather than instructing the jury that it must reach a verdict on the crime charged before it may proceed to a lesser-included offense instruction. (Appellant's Br. at 7-8.) As discussed above, Sampson never submitted a proposed lesser-included offense instruction, her counsel reviewed the City's proposed instruction, and counsel expressly confirmed on the record that there was no objection to the instruction.

A defendant is "entitled to an instruction on a lesser included offense if any evidence exists in the record from which the jury could rationally find him guilty of the lesser offense and acquit of the greater." *State v. Castle*, 285 Mont. 363, 367, 948 P.2d 688, 690 (1997) (emphasis omitted). Montana Code Annotated § 46-16-607(3) provides that,

> 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.

Here, instruction number six explained to the jury that DUI and DUI per se are lesser-included offenses of aggravated DUI and that Sampson could only be found guilty of one of the three offenses. (Doc. 33 at 8, Instr. No. 6.) The instruction told the jury to "first consider the verdict on the greater offense" of aggravated DUI. (*Id.*) If the jury found Sampson guilty of aggravated DUI, it instructed the jury that it "need go no further as you will have reached a verdict in this case and shall contact the bailiff to return you to open court." (*Id.*)

On the other hand, if the jury was "unable after reasonable effort to reach a verdict" on aggravated DUI, the jury was instructed it "may consider the lesser included offenses" of DUI and DUI per se. (*Id.*) Similarly, if the jury found Sampson guilty of DUI, it was instructed that it need not go any further and should contact the bailiff. (*Id.*)

The jury entered "not guilty" for both aggravated DUI and DUI and "guilty" for DUI per se. (Doc. 35.)

While it was not the defense that requested that the jury be instructed that they could consider the lesser-included offenses if the jury was unable after a reasonable effort to reach a verdict on the aggravated DUI charge, the instruction's language comported with the statute, and the defense expressly confirmed there was no objection to the instruction.

While the jury reached not guilty verdicts on aggravated DUI and DUI before considering the lesser-included offenses despite there being no instruction that should the jury find Sampson not guilty of aggravated DUI, it could then consider the lesser-included offenses, Sampson has not met her burden to establish that failure to review the claim would result in a manifest miscarriage of justice, leave unsettled the questions of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. Notably, Sampson acknowledges that the jury reached its verdict in a manner consistent with the instruction Sampson claims the court should have given. (Appellant's Br. at 10.) Sampson has not met her burden to establish that the court committed plain error warranting reversal.

III. Sampson received sufficient notice that she could be convicted of the lesser-included offense of DUI per se in the charging document.

Sampson claims she did not receive adequate notice that she could be convicted of the lesser-included offense of DUI per se, asserting she first received notice of the possibility when the court instructed the jury on the lesser-included offenses. (Appellant's Br. at 19.)

Under Mont. Code Ann. § 46-16-607(1), a "defendant may be found guilty of an offense necessarily included in the offense charged." In *State v. Black*, 270 Mont. 329, 329, 891 P.2d 1162, 1165 (1995), the defendant, like Sampson,

claimed that he received insufficient notice that he could be convicted of the lesser-included offense of sexual assault at his sexual intercourse without consent trial. *Black*, 270 Mont. at 329, 891 P.2d at 1165. As this Court noted, the unambiguous and express statutory permission to convict a defendant of a lesser-included offense in Mont. Code Ann. § 46-16-607(1) "itself provides the notice that a conviction for a lesser included offense is possible." *Black*, 270 Mont. at 329, 891 P.2d at 1165.

> Included offense means an offense that:
>
> (a) is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (b) consists of an attempt to commit the offense charged or to commit an offense otherwise included in the offense charged; or
>
> (c) differs from the offense charged only in the respect that a less serious injury or risk to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

Mont. Code Ann. § 46-1-202(9). As Sampson expressly concedes, DUI and DUI per se are lesser-included offenses of aggravated DUI as a matter of law. (Appellant's Br. at 23.)

Like the defendant in *Black*, Sampson does not claim the charging documents themselves were insufficient. Instead, she claims that she had insufficient notice that she could face the lesser-included offense of DUI per se

at trial. However, like Black, Sampson received notice via the charging documents that she could be convicted of the lesser-included offenses of DUI or DUI per se, and in accordance with that possibility, the City provided Sampson with proposed jury instructions and a verdict form a week before trial that addressed the lesser-included offenses of DUI and DUI per se.

The complaint charging Sampson with aggravated DUI for driving with a BAC over 0.16 sufficiently notified Sampson that she could be convicted of the lesser-included offense of DUI per se.

IV. Proceedings for the original charge of aggravated DUI, as well as the lesser-included offense of DUI and DUI per se, commenced before the repeal date of Mont. Code Ann. §§ 61-8-406, -465.

During the 2021 legislative session, the Montana Legislature repealed, moved, and reorganized Montana's impaired driving statutes—including DUI per se—effective January 1, 2022. 2021 Mont. Laws, Ch. 498. Sampson was cited for aggravated DUI on December 23, 2021.

Sampson implies that the 2021 legislature's repeal of the former DUI statutes removed DUI per se as a crime. (Appellant's Br. at 14-19.) However, the new statutory scheme contains a nearly identical offense with the same elements. Montana Code Annotated § 61-8-406(1)(a) (2019) provides that it is 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." Following the 2021 legislative session, DUI per se is now addressed under Mont. Code Ann. § 61-8-1002 and subsection (1)(b) makes it unlawful "if the person drives or is 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 other bodily substance, is 0.08 or more."

Sampson argues that the applicable savings clause for prosecutions under Mont. Code Ann. §§ 61-8-406 and -465 required that the proceedings be in place before the repeal date and that she was not charged with DUI per se until it appeared as a lesser-included offense on the jury instructions and verdict form at trial. (Appellant's Br. at 17.) However, as previously addressed, DUI per se is a lesser-included offense of aggravated DUI. Sampson was charged with aggravated DUI—and faced the possibility of conviction of DUI per se—when she was issued a Notice to Appear and Complaint charging her with aggravated DUI on December 23, 2021. Mont. Code Ann. § 46-11-101(1) (prosecution may be commenced by complaint).

Sampson provides no authority for her implied assertion that the lesser-included offense provision in Mont. Code Ann. § 46-16-607(1) is

inapplicable to otherwise properly charged but since-repealed original charges. This Court should deny her claim because Sampson failed to provide any authority for her assertion. *State v. Hicks*, 2006 MT 71, ¶ 22, 331 Mont. 471, 133 P.3d 206 (this Court does not "conduct legal research on appellant's behalf, [] guess as to his precise position, or [] develop legal analysis that may lend support to his position"); *see* M. R. App. P. 12(1)(g) (requiring the argument section of an appellant's brief to contain "citations to the authorities, statutes, and pages of the record relied on").

Further, as the district court noted, were this Court to adopt Sampson's argument, a defendant could be prosecuted for a timely original charge after the repeal date but without its applicable included offenses. This would deny both parties the benefit of the lesser-included offense instruction and run afoul of the requirement that a defendant may be convicted only of the "greatest included offense about which there is no reasonable doubt." *Castle*, 285 Mont. 363, 948 P.2d at 690 (citation omitted).

Proceedings commenced against Sampson prior to the repeal date. Sampson was legally convicted of the lesser-included offense of DUI per se.

V. The municipal court properly instructed the jury that DUI per se was a lesser-included offense of aggravated DUI when Sampson challenged the accuracy of the 0.217 breath result at trial.

Trial courts "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." *State v. Freiburg*, 2018 MT 145, ¶ 13, 391 Mont. 502, 419 P.3d 1234 (citation omitted). This Court has "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." *Id.* (citation and internal quotation marks omitted).

Sampson concedes that DUI per se is a lesser-included offense of aggravated DUI as a matter of law but contends evidence at trial provided no factual basis for a jury to conclude Sampson was guilty of DUI per se but not guilty of aggravated DUI. (Appellant's Br. at 23.)

At trial, Sampson challenged the 0.217 result, arguing that there was no way Sampson appeared over 0.217 in her field sobriety testing. (10/28/2022 Trial at 3:40:45.) Officer Helsby also testified that individuals' tolerance levels could affect their performance on the field sobriety tests. (*Id.* at 1:50:30-1:57:30.)

Sampson argued in her defense that the 0.217 result was incorrect, thus presenting the possibility that her BAC was lower than 0.16 when she drove. The

municipal court properly instructed the jury that DUI per se was a lesser-included offense of aggravated DUI.

While there is no way to know what the jury believed, the jury may have concluded that while the 0.217 BAC taken at the detention center was correct, Sampson's BAC while she was driving an hour prior was just below 0.16. The jury also may have concluded, in accordance with Officer Helsby's testimony regarding tolerance and field sobriety testing, that while Sampson's BAC was 0.217, her high tolerance indicated that despite her high BAC, she was not under the influence of alcohol. Either way, the court properly instructed the jury that DUI per se is a lesser-included offense of aggravated DUI.

VI. Sampson's sentence was legal, and Sampson cannot establish that the court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason when it sentenced her well within the statutory parameters for DUI per se.

Sampson argues that the municipal court sentenced her pursuant to the aggravated DUI charge rather than the DUI Per se charge the jury convicted her of and that the interlock requirement was illegal. (Appellant's Br. at 25-28.) Sampson's assertion that the interlock requirement is only permissible on a second or subsequent DUI per se conviction is incorrect. Further, Sampson's assertion that the court's sentence was premised on an aggravated DUI rather than DUI per se is contradicted by the record.

"[A] person convicted of a first violation of 61-8-406 . . . shall be punished by imprisonment for not more than 6 months and by a fine of not less than $600 or more than $1,000[.]" Mont. Code Ann. § 61-8-722 (2019). Additionally, pursuant to Mont. Code Ann. § 61-8-442(1)(a) (2019),

> regardless of disposition and if a probationary license is recommended by the court, the court may, for a person convicted of a first offense under . . . 61-8-406, . . . restrict the person to driving only a motor vehicle equipped with a functioning ignition interlock device during the probationary period and require the person to pay the reasonable cost of leasing, installing, and maintaining the device[.]

The municipal court sentenced Sampson to 180 days in jail with all but 4 suspended and a $1,000 fine with $100 suspended for the DUI per se. The court recommended a probationary driver's license for Sampson and imposed an interlock requirement. Sampson's sentence was well within the statutory parameters.

In imposing Sampson's sentence, the court noted the City's recommendation for all but eight days of jail suspended and stated that while it thought it was appropriate that the City was asking for more jail time for DUI offenses, it also noted that eight days unsuspended was more than typically imposed for DUI per se offenses. Noting and respecting the jury's decision to find Sampson guilty of DUI per se rather than aggravated DUI, the court ordered six months of jail with all but four days suspended.

The court expressly based Sampson's sentence on the charge the jury found Sampson guilty of committing. The court imposed a legal sentence, and Sampson has not met her burden of establishing that the court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason, resulting in substantial injustice.

CONCLUSION

This Court should affirm Sampson's conviction and sentence.

Respectfully submitted this 29th day of February, 2024.

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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 7,251 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Christine Hutchison
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CERTIFICATE OF SERVICE

I, Christine M. Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-29-2024:

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