

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0079

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BETHANY LYNN LEX,

Defendant and Appellant.

REDACTED BRIEF OF APPELLEE

On Appeal from the Montana Second Judicial District Court,
Butte-Silver Bow County, The Honorable Robert Whelan, Presiding

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STATEMENT OF THE ISSUES

1. Whether Lex's counsel was ineffective for failing to object to restitution that was supported by an unsworn affidavit and attached documents when the victim was present at sentencing and the prosecution declined to seek restitution for medical costs paid by an insurer as well as mandatory fines and surcharges.
2. Whether a condition imposed for the period of Lex's suspended sentence improperly imposes supervision fees on Lex while she is incarcerated.
3. Whether a condition imposed for the period of Lex's suspended sentence that requires her to pay, if able, the cost of her imprisonment, probation, and alcohol treatment improperly applies to Lex's negligent vehicular assault sentence which does not contain any suspended time.

STATEMENT OF THE CASE

The State charged Appellant Bethany Lynn Lex (Lex) with negligent vehicular assault and driving under the influence of alcohol (DUI) after Lex hit a motorcycle rider, Daniel Taylor (Daniel), with her vehicle while she was under the influence of alcohol. (Doc. 3.) At the time, Lex had three prior DUI convictions, making it a fourth offense felony DUI. (*Id.*)

Pursuant to a plea agreement, Lex pled no contest to both counts. (Docs. 19 at 4, 20.) Prior to sentencing, the Department of Corrections (DOC) completed a Presentence Investigation Report (PSI). (Doc. 28.) Two Affidavits of Victim's Pecuniary Loss, a victim impact letter, and numerous documents for medical costs, wages, and the purchase of a motorcycle were attached to the PSI. (*Id.* at 12-47.) The two affidavits contained identical lists and amounts of losses. (*Id.* at 13-14, 46-47.) One of the affidavits was signed. (*Id.* at 13-14.) On the signed affidavit, the first item, Medical Bills and the amount were crossed out and initialed, the date was crossed out and a new date was handwritten above, and the total pecuniary loss amount on the second page was crossed out and a reduced amount was handwritten next to the prior amount. (*Id.* at 46-47.) Neither affidavit contained a notary seal.

At sentencing, Daniel and his mother, Lori Taylor-Dorscher (Lori), testified about the injuries Daniel suffered from the crash, about his prior and upcoming surgeries, and the impact Lex's crime had on Daniel and his family. (11/2/22 Tr. at 8-15.) Lex did not challenge the lack of notary seal on the affidavits or the amount of restitution, nor did she question Daniel or Lori about the amounts listed in the affidavits.

The district court sentenced Lex to seven years at the Montana Women's Prison (MWP) for the negligent vehicular assault. (*Id.* at 25; Doc. 29 at 2, attached

to Appellant's Br. as App. B.) The court sentenced Lex to the Department of Corrections (DOC) for five years, all suspended, for the DUI. (11/2/22 Tr. at 25; Doc. 29 at 2.) The court imposed the \$48,057.31 restitution amount listed in the signed Affidavit of Victim's Pecuniary Loss. (11/2/22 Tr. at 25; Doc. 29 at 3.)

The court ordered that Lex would be subject to the terms and conditions set forth in the PSI "[d]uring any suspended portion of the sentence[.]" (11/2/22 Tr. at 25-26; Doc. 29 at 3.) One of the conditions stated that Lex's probation and parole officer shall determine the supervision fee amount to be paid each month to the DOC, and the "DOC shall take a portion of the Defendant's inmate account if the Defendant is incarcerated." (Doc. 29 at 4-5.) Another condition stated, "The Defendant, if financially able, as a condition of probation, shall pay for the cost of imprisonment, probation, and alcohol treatment for the length of time he/she is imprisoned, on probation, or in alcohol treatment." (*Id.* at 7.) An identical condition was included in the PSI. (Doc. 28 at 10.) The condition in the PSI included a citation to a DUI sentencing statute. (*Id.*) The condition in the written judgment did not contain a statutory citation. (Doc. 29 at 7.) Lex did not object to any of the conditions.

STATEMENT OF THE FACTS

I. The offenses

On June 23, 2021, Daniel was riding his motorcycle headed north in the left lane on Harrison Avenue in Butte, Montana, going 30 to 35 miles per hour as he approached the Grand Avenue intersection. (Doc. 1 at 4.)¹ As Daniel proceeded through the intersection, Lex entered the intersection traveling south on Harrison Avenue. (*Id.*) Without slowing down, Lex abruptly turned left onto Grand Avenue and struck Daniel on his left side. (*Id.*) The impact threw Daniel from his motorcycle onto the pavement, knocking the air out of him. (*Id.*) After Daniel caught his breath, he felt an intense pain in his leg. (*Id.*)

At 10:19 p.m. officers were dispatched to the scene of the accident. (*Id.* at 2.) Officer Butorovich began speaking with Lex once he arrived. (*Id.*) Officer Butorovich noticed the smell of an alcoholic beverage emanating from Lex. (*Id.*) He asked Lex to describe how the accident occurred, but all Lex said was that she was heading from the Scoop Bar to a house near Clark[] Park. (*Id.*) Officer Butorovich noticed Lex was slurring her speech and asked if she had been drinking at the bar, but Lex denied drinking. (*Id.*) Officer Butorovich asked Lex for her

¹ Because Lex entered a plea of no contest to the charges, the State relies upon the charging documents for the recitation of facts.

driver's license. (*Id.*) Officer Butorovich watched as Lex passed over her license in her wallet. (*Id.*)

Officer Butorovich took Lex to the detention center to conduct field sobriety testing. (*Id.* at 2-3.) Lex told the officer that he was ruining her life, that she had done nothing wrong, and that she would not do the tests. (*Id.* at 3.) Officer Butorovich applied for and was granted a warrant for a blood draw. (*Id.*) Lex became increasingly aggressive once Officer Butorovich told her that he obtained the warrant, and Officer Butorovich eventually requested the assistance of another officer. (*Id.*) Lex finally permitted the nurse to retrieve the blood draw at about 1 a.m. (*Id.*) After transporting Lex back to the detention center, Officer Butorovich returned to the hospital to speak with Daniel. (*Id.* at 4.)

Daniel explained that he had multiple breaks along the entire length of his leg. (*Id.*) Daniel's femur was "completely broken at the joint." (*Id.*) The rest of his leg was essentially shattered with numerous breaks to his femur, tibia, fibula, and ankle joint. (*Id.*)

II. Sentencing

Prior to sentencing, the DOC completed a PSI. (Doc. 28.) [REDACTED]

[REDACTED]

[REDACTED]

A series of horizontal black bars of varying lengths, some solid and some with a dashed line, arranged in a vertical sequence. The bars are of different heights and are positioned at irregular intervals, creating a fragmented, abstract vertical composition. The bars vary in length, with some extending across the full width of the frame and others being shorter. Some bars are solid black, while others have a dashed line running through them. The overall effect is a rhythmic, vertical arrangement of geometric shapes.

The defense identified corrections that it believed needed to be made to the PSI. (*Id.*) Lex's attorney said that the operating while intoxicated occurred in 2004

and that Lex's second DUI was in 2014, not 2012. (*Id.*) She also asserted that Lex was due 192 days of credit for time served, not 160 days. (*Id.*) Lex's counsel also said that corrections should be made regarding Lex's previous supervision. (*Id.*) The district court accepted Lex's corrections. (*Id.* at 7, 26-27.) Lex did not challenge the restitution amount or the affidavits.

Daniel and his mother Lori were present at sentencing and the prosecutor indicated that they would like to address the court. (*Id.* at 7.) Daniel, still utilizing a cane, told Lex that she "made [his] life a living hell." (*Id.* at 7-8.) He told Lex that he and his wife had married on May 18, and he was getting ready for his honeymoon when she hit him. (*Id.* at 8.)

Daniel told Lex she "almost killed [him]." (*Id.* at 9.) He said, "You don't know how much pain you have put me through, how much pain you have put my family through." (*Id.*) Daniel said that he would have to go through surgery again in January because of the extent of damage to his leg. (*Id.*) Daniel outlined how Lex's actions took away so many things from his life:

I can't walk right. I can't play with my kids right. I can't hunt. I can't fish. I can't even do the thing I love anymore because of you, and that is riding a Harley. I am a Harley man. I don't know if I can do that anymore because of you.

(*Id.*)

Daniel recounted the moments after the accident and said Lex ran up behind him saying, "I was the one that hit you, I was the one that hit you." (*Id.*) Daniel

said that then, “all of a sudden [he] hear[d], ‘I’ve got to go get my kids.’” (*Id.*) He said he “freaked” because those kids were in danger if Lex was going to get them. Daniel said he “stood up,” and tried to grab Lex. (*Id.*) Daniel said he “hit the ground, knowing [his] leg was broken, as [he] bled from [his] mouth.” (*Id.*)

Daniel said the only thing he had time to say when Lex “went through that light and smoked [him] was the ‘F’ word.” (*Id.* at 10.) He said he “heard the crunch[,]” and he “felt the metal pressing around [him].” (*Id.*) The next thing he knew he “was smashing [his] face off the front of [his] fairing.” (*Id.*) Daniel did not remember hitting the ground, but he remembered fighting for air, thinking he had punctured one of his lungs. (*Id.*)

Daniel said he believed Lex deserved “the full time,” but he also thought she “deserve[d] to be helped with treatment.” (*Id.*) He told her he hoped she got out and was a better mom to her kids because he no longer could play with his own the way he used to. (*Id.*)

Daniel’s mother, Lori, also addressed Lex and the court. (*Id.* at 11.) Lori said treatment programs obviously had not worked for Lex because this was her fourth DUI. (*Id.* at 11.) She said Lex almost took her son away from her. (*Id.*) Lori told Lex she had seen the video of her hitting her son. (*Id.* at 12.) She said Daniel “was thrown off his motorcycle and slid across Harrison and Grand Avenue. Had

he—had his leg not come lo[o]se, he would have been pulled along with that bike all the way across Grand Avenue and probably would have been killed.” (*Id.* at 11.)

At the hospital, Lori said Daniel endured five hours of surgery, three attempts to repair his hips, and two to repair his broken leg. (*Id.* at 12.) She said Daniel had rods in his leg and hip as well as stitches because of the road rash “all up and down his leg even though he had pants on.” (*Id.*) Lori said Daniel had been fighting his injuries for “a year and four months, still in pain[,]” and now he would have to go through surgery again. (*Id.*) Lori explained that Daniel would need to go to Salt Lake City for the surgery, which would require even more time away from his family. (*Id.*)

Lori said they had recently found out that the vehicle Lex was driving was not in her name nor was it insured. (*Id.* at 13.) Lori said her son’s insurance “[wa]s paying for his stuff, that he’s paid into his insurance, but, yet, it’s him being slapped in the face again, paying for what you did to him.” (*Id.*) Lori said people in town had also told her that after Lex “bailed out” of jail, she was telling people that she had only ran over Daniel’s leg and that “he was not hurt that badly[.]” (*Id.*)

Lori explained that Daniel had to live with her for a month because he needed 24/7 care. (*Id.* at 15.) Lori said she had to help Daniel to get in and out of the shower and in and out of a chair. (*Id.*) She said Daniel had nightmares, dreaming they were putting a sheet over him because he was dead. (*Id.*)

Lori said she thought Lex should serve time in prison to prevent her from killing someone. (*Id.* at 14.) Lori told Lex that she hoped that when she got out, she would choose a better life. (*Id.* at 15.)

Lex told the court there was no excuse for what she did. (*Id.* at 16.) She acknowledged that she had previous DUIs, that she went through treatment, and that she “fought it the whole way.” (*Id.*) Lex apologized to Daniel and his friends and family. (*Id.*) Lex said she could not change what she had done but that she “c[ould] and w[ould] change [her] behavior moving forward[.]” (*Id.* at 17.) Lex said she “c[ould] work hard to financially compensate [Daniel][.]” (*Id.*)

The State recommended a seven-year commitment to MWP for the negligent vehicular assault, to run consecutively to the sentence imposed by Judge Krueger in Lex’s other case. (*Id.* at 18.) For the DUI, the State recommended a five-year commitment to the DOC, all suspended, to run consecutively to the sentence out of Judge Krueger’s court as well as to the sentence imposed on the negligent vehicular assault. (*Id.*)

The prosecutor said the State was not asking for the court to impose the mandatory fine because the money should go to restitution. (*Id.* at 20.) The prosecutor asked the court to impose all the conditions outlined in the PSI “[d]uring the suspended sentence[.]” (*Id.*) The State also asked the court to waive surcharges, given the amount of restitution. (*Id.*)

The State explained, “Ms. Lex has—she’s had every opportunity. We’ve tried—we’ve tried treatment. We’ve tried treatment incarceration when she got the 13-month sentence with Judge Krueger. None of that has worked.” (*Id.* at 20-21.) The prosecutor said at some point they had to say “Enough is enough” and send Lex somewhere where she could not hurt anyone anymore. (*Id.* at 21.)

The defense asked the court to impose a ten-year commitment to the DOC with five suspended for the negligent vehicular assault. (*Id.* at 22.) For the DUI, the defense recommended five years with the DOC, all suspended, to run consecutively to the negligent vehicular assault. (*Id.*) Lex did not challenge the recommended restitution amount.

The district court told Lex, “but for the grace of God you’re not standing before me on a vehicular homicide. As you’ve heard, this gentleman barely survived that accident. You’re very fortunate in that regard.” (*Id.* at 24.) The court noted how Lex’s actions changed Daniel’s life, his family’s life, and Lex’s own children’s lives. (*Id.*)

The court told Lex she had been given too many chances, that if she had received more punishment on previous charges, maybe this charge would never have occurred. (*Id.*) The court said it did not doubt that Lex believed things had changed, but told her it could not put community safety at risk to see if things had actually changed. (*Id.* at 24-25.)

The district court sentenced Lex to MWP for seven years for the negligent vehicular assault and ordered it to run consecutively to her other case. (*Id.* at 25.) For the DUI, the court sentenced Lex to five years with the DOC, all suspended, to run consecutively as well. (*Id.*) The court expressly did not impose any fines or surcharges. (*Id.*) The court imposed restitution in the amount of \$48,057.31. (*Id.*) The court ordered that “[d]uring any suspended portion of the sentence,” Lex would be subject to the “terms and conditions” set forth in the PSI. (*Id.*) The court said the sentence gave Lex an opportunity for rehabilitation, noting that Lex could work towards early parole. (*Id.* at 26.)

Lex’s counsel told the court that her copy of Daniel’s affidavit was not signed. (*Id.* at 27.) The parties and the court brought up the amended affidavit and the court noted the amended copy was signed. (*Id.*) Lex’s counsel responded, “Okay. Okay. Thank you. I just wanted to make sure that that didn’t get overlooked.” (*Id.*)

SUMMARY OF THE ARGUMENT

Lex’s claim that her counsel was deficient for failing to challenge the restitution requested in an unsworn affidavit is not appropriate for direct appeal because the record does not explain why Lex’s counsel did not object. There are reasonable tactical reasons why Lex’s counsel may not have challenged the

restitution, particularly when the State opted not to seek restitution for over \$150,000 in medical costs paid by an insurer or to seek any mandatory fines or surcharges. Lex has also failed to establish that her counsel was deficient for failing to object or that the outcome would have been more beneficial for Lex if counsel had objected when the victim was present at the sentencing and could have testified and provided context for his documentation of his pecuniary losses. However, Lex's counsel was deficient for failing to notify the court of the mathematical error on the victim's Affidavit of Pecuniary Loss and had she raised it, there is a reasonable probability that the district court would have corrected it.

Contrary to Lex's assertions, Condition 13(a), imposed for the duration of Lex's suspended sentence, does not impose supervision fees on an incarcerated individual. The challenged provision authorizes the DOC to collect supervision fees while Lex is on probation, as authorized by Mont. Code Ann. § 46-23-1031.

Condition 33 in Lex's written judgment does not conflict with the oral pronouncement of sentence which incorporated the same condition from the PSI, nor does it impermissibly apply to her negligent vehicular assault charge. The district court ordered that Lex would be subject to certain conditions during the suspended portion of her sentence. This includes Condition 33, which requires Lex, if financially able, to pay for the cost of imprisonment, probation, and alcohol treatment as a condition of her probation. Lex only received a suspended sentence

for the DUI and, thus, despite Lex’s assertions, the condition could only apply to her DUI sentence.

ARGUMENT

I. Standard of review

Claims of ineffective assistance of counsel (IAC) present mixed questions of law and fact which this Court reviews de novo. *State v. Pine*, 2023 MT 172, ¶ 16, 413 Mont. 254, 548 P.3d 390 (citation omitted). If the claim relies on matters outside the record, this Court will not review the claim on direct appeal. *Id.*

Generally, this Court will not review a challenge to a probation condition if the defendant did not object to the condition at or before sentencing. *State v. Coleman*, 2018 MT 290, ¶ 7, 393 Mont. 375, 431 P.3d 26. As a narrow exception, this Court will review a challenge to the legality of a sentence even if it is raised for the first time on appeal. *Id.* (citations omitted). “A sentencing condition is illegal if the sentencing court lacked statutory authority to impose it, if the condition falls outside the parameters set by the applicable sentencing statutes, or if the court did not adhere to the affirmative mandates of the applicable sentencing statutes.” *Id.* (citation omitted). While this Court may address illegal sentences for the first time on appeal, this Court refuses to address objectionable sentences not challenged at the trial court. *Id.* (citing *State v. Ashby*, 2008 MT 83, ¶ 22,

342 Mont. 187, 179 P.3d 1164; *State v. Heddings*, 2008 MT 402, ¶¶ 19-21, 347 Mont. 169, 198 P.3d 242).

II. This Court should decline to review Lex’s IAC claim on direct appeal because it is not record-based and Lex has failed to establish that her counsel’s representation was deficient or that she was prejudiced by her counsel’s performance.

A defendant “may raise only record-based [IAC] claims on direct appeal.” *Pine*, ¶ 34. If the record does not fully explain why counsel took, or failed to take, a particular course of action, the claim is based on matters outside the record and this Court will refuse to address the issue on direct appeal. *Id.* (citations omitted). Instead, the defendant may raise the claim in a postconviction proceeding where he or she can develop a record as to why counsel acted or failed to act as alleged, “thus allowing the court to determine whether counsel’s performance was ineffective or merely a tactical decision.” *Id.* (citation omitted).

This Court reviews IAC claims applying the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on an IAC claim, the defendant must show: “(1) counsel’s performance was deficient; and (2) the deficient performance prejudiced the defendant.” *Pine*, ¶ 36. When considering whether counsel was deficient, this Court does not analyze the conduct with hindsight but rather, this Court indulges “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional

assistance.” *Whitlow v. State*, 2008 MT 140, ¶ 15, 343 Mont. 90, 183 P.3d 861 (quoting *Strickland*, 466 U.S. at 689); *Pine*, ¶ 16 (citation omitted). This is because counsel “observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence.’” *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citations omitted).

The burden falls on the defendant to overcome the presumption that counsel’s representation fell within the range of acceptable professional assistance. *Id.* ¶ 36 (citation omitted). The mere fact that counsel failed to take an available measure or action is generally insufficient to establish that counsel’s performance was deficient. *State v. Mahoney*, 264 Mont. 89, 101-02, 870 P.2d 65, 73 (1994).

To establish prejudice, a defendant must prove a “reasonable probability” that, but for counsel’s errors, “the result of the proceeding would have been different.” *State v. Dineen*, 2020 MT 193, ¶ 25, 400 Mont. 461, 469 P.3d 122 (citation omitted). “A defendant must do more than just show that the alleged errors of a trial counsel ‘had some conceivable effect on the outcome of the proceeding.’” *Id.* (citation omitted). The likelihood of a different result must be “substantial.” *Richter*, 562 U.S. at 112.

Lex claims she received deficient counsel at sentencing because her counsel failed to challenge the restitution requested in Daniel’s unsworn affidavit. Lex

contends there is no plausible justification for her counsel's failure to object. (Appellant's Br. at 17.) The record does not explain why Lex's counsel did not challenge the restitution and, therefore, it would be inappropriate to find Lex's counsel's performance deficient without providing her counsel with an opportunity to explain. Further, there are reasonable tactical reasons why Lex's counsel may have chosen not to challenge the requested restitution.

Lex's counsel challenged portions of the PSI at the hearing indicating she had reviewed it before the hearing. While the prosecutor alerted the court to an amended affidavit from Daniel at the hearing, the amended affidavit did not contain any new claims of pecuniary losses that were different from those in the affidavit attached to the PSI. Counsel expressly noted that she had an unsigned copy of the affidavit.

There are reasonable strategic reasons why counsel may have chosen not to object to the restitution requested in Daniel's affidavit, particularly when Daniel and Lori were present and able to testify at the sentencing hearing. Lex's counsel may have investigated the legitimacy of the itemized pecuniary losses prior to the sentencing hearing and chose not to object because she knew Daniel could explain the listed pecuniary losses. She also may have declined to object because the prosecution was not seeking restitution for medical expenses already incurred—let

alone future medical costs—even though the State could have,² and because the State was requesting that the district court wave even the mandatory minimum fines and the surcharges.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] On appeal, Lex challenges, for the first time, the amount of lost wages, claiming the [REDACTED] amount of lost wages is “unmoored to any record evidence.” (Appellant’s Br. at 18-19.) However, the provided

² See Mont. Code Ann. § 46-18-241(1) (“a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss”); Mont. Code Ann. § 46-18-243(2)(a)(iv) (victim includes “an insurer or surety with a right of subrogation to the extent it has reimbursed the victim of the offense for pecuniary loss”); Mont. Code Ann. § 46-18-243(1)(c) (pecuniary loss includes “future medical expenses that the victim can reasonably be expected to incur as a result of the offender’s criminal conduct, including the cost of psychological counseling, therapy, and treatment”); *State v. Sharp*, 2006 MT 301, 334 Mont. 470, 148 P.3d 625 (insurance company that paid for repairs to vehicle damaged by defendant was a victim entitled to restitution); *State v. Fenner*, 2014 MT 131, ¶¶ 10-12, 375 Mont. 131, 325 P.3d 691 (defendant is not entitled to benefit from an offset based on the insurance pay-out of his victim when the victim’s insurance, not the defendant’s, paid for the costs).

paystubs reflect a reasonable explanation of how Daniel arrived at that figure, and had Lex objected, Daniel—who was present at sentencing—could have testified and explained the calculation.

As Lex notes, the paystubs provided were for a period of time immediately before the accident. Lex speculates that because the paystubs and W2 only show a yearly gross pay of [REDACTED] by July 1, 2021, Daniel would have only made roughly [REDACTED] for the year. However, it is entirely possible Daniel started his position with that employer not long before the accident.

The accident occurred on June 23, 2021. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The district court sentenced Lex on November 2, 2022. If Daniel had testified, he may have explained that he was still unable to work and that he had incurred additional lost wages from the time he prepared the first affidavit until the sentencing hearing.

the requested restitution or why she did not object. It would be inappropriate to find Lex's counsel's performance deficient without providing her an opportunity to explain.

Lex has also failed to establish that her counsel was deficient for failing to object under the circumstances or that she was prejudiced by the outcome of the proceeding. Had Lex's counsel objected, Daniel could have testified to the itemized pecuniary losses and provided context for the attached documentation. As noted above, there are reasonable explanations for the items Lex challenges for the first time on appeal and had Daniel testified, his testimony may have established additional pecuniary losses for upcoming surgeries and lost wages. Lex has not established that her counsel was deficient for failing to challenge the restitution, nor has she established that she was prejudiced by her attorney's decision not to challenge the restitution.

However, the State concedes that Lex's counsel was deficient for failing to address the incorrect arithmetic on the Victim's Affidavit of Pecuniary Loss and there is a reasonable probability the court would have corrected the amount had counsel pointed out the mathematical error.

III. Lex has failed to establish that Condition 13(a) is an illegal condition that imposes supervision fees on an incarcerated person.

Lex asserts that this “Court should remand the judgment with instructions to strike Condition 13(a) because there is no statutory authority to impose supervision fees on an incarcerated person.” (Appellant’s Br. at 21-22.) Lex misunderstands or mischaracterizes the condition.

In the Judgment and Order of Commitment, the district court ordered “that during the period of suspension, the Defendant shall abide by the following terms and conditions of supervision: [.]” (Doc. 29 at 3.) Condition 13(a) provides:

13. The Defendant shall pay the following fees and/or charges: . . .

a. The Probation & Parole Officer shall determine the amount of supervision fees (46-23-1031, MCA) to be paid each month in the form of money order or cashier’s check to the Department of Corrections Collection Unit, P.O. Box 201350, Helena, MT 59620 (\$50 per month if the Defendant is sentenced under 45-9-202, MCA, dangerous drug felony offense and placed on ISP). The DOC shall take a portion of the Defendant’s inmate account if the Defendant is incarcerated.

(*Id.* at 4-5.)

The condition does precisely what Lex acknowledges Mont. Code Ann. § 46-23-1031 authorizes: it permits the DOC to collect supervisory fees from Lex when she is supervised by the DOC on probation. Montana Code Annotated § 46-23-1031(1) provides:

- (a) Except as provided in subsection (1)(c), a probationer, parolee, or person committed to the department who is supervised by the department:
 - (i) shall pay to the department a supervisory fee of no less than \$120 a year and no more than \$360 a year, prorated at no less than \$10 a month for the number of months under supervision; or
 - (ii) under continuous satellite-based monitoring shall pay to the department a supervisory fee of no more than \$4,000 a year as established by rules adopted by the department under 46-23-1010.
- (b) A person allow to transfer supervision to another state shall pay a fee of \$50 to cover the cost of processing the transfer. The interstate fees required by this subsection must be collected by the department.
- (c) The court, department, or board may reduce or waive a fee required by subsection (1)(a) or (1)(b) or suspend the monthly payment of the supervisory fee if it determines that the payment would cause the person a significant financial hardship.

The condition expressly requires Lex to pay the supervision fee “during the period of suspension.” The circumstances surrounding Lex’s arrest on the charges in this matter illustrate a circumstance in which this provision would be implicated.

[REDACTED]

[REDACTED] Here,

Lex was sentenced to a five-year suspended sentence for the DUI offense. If Lex were to be arrested on new charges or violations while serving her suspended sentence, Lex could be sentenced on new charges or have her suspended sentence

revoked. If Lex had unpaid supervision fees, the disputed condition would permit the DOC to collect money from Lex's inmate account for the previously incurred supervision fees.

Lex misunderstands or mischaracterizes the condition and has failed to establish that the condition constitutes an illegal sentence. The condition does not impose supervisory fees on an incarcerated person, the provision permits the DOC to impose and collect supervisory fees during Lex's suspended sentence.

IV. Condition 33 conforms with the oral pronouncement of sentence and Lex has failed to establish that the condition is illegal.

Lex asserts that this Court should remand Lex's judgment with instructions to limit Condition 33 to Lex's DUI conviction because there is no statutory authority to apply the condition to Lex's negligent vehicular assault charge and because Lex claims that it does not conform with the oral pronouncement of the sentence. (Appellant's Br. at 23.) Lex misunderstands or mischaracterizes the condition and the condition in Lex's written judgment does not conflict with the court's oral pronouncement.

Where an oral pronouncement of sentence and a written judgment conflict, the oral pronouncement controls because it is the "legally effective sentence." *State v. Hammer*, 2013 MT 203, ¶ 27, 371 Mont. 121, 305 P.3d 843 (citation omitted); Mont. Code Ann. § 46-18-116(2).

As Lex notes, the district court did not suspend any portion of her custodial sentence for the negligent vehicular assault charge. (Doc. 29 at 2.) However, the district court imposed a five-year DOC commitment, all suspended, on the felony DUI charge. (*Id.*) In Lex’s judgment, the district court ordered conditions that would be applicable “during the period of suspension[.]” (Doc. 29 at 3.) Condition 33 states, “The Defendant, if financially able, as a condition of probation, shall pay for the cost of imprisonment, probation, and alcohol treatment for the length of time he/she is imprisoned, on probation, or in alcohol treatment.” (*Id.* at 7.)

Probation “means the release by the court without imprisonment, except as otherwise provided by law, of a defendant found guilty of a crime upon verdict or plea, subject to conditions imposed by the court and subject to the supervision of the department upon direction of the court.” Mont. Code Ann. § 46-23-1001(7). Parole refers to when the Board of Pardons and Parole releases an inmate, subject to conditions. Parole is “the release to the community of a prisoner by the decision of the board prior to the expiration of the prisoner’s term, subject to conditions imposed by the board and subject to supervision of the department.” Mont. Code Ann. § 46-23-1001(6).

Condition 33 is identical to the condition listed in the PSI, which was orally incorporated at sentencing. The only difference is that the cited statutory authority is not included in the judgment. Despite Lex’s contention, the absence of the cited

statutory authority did not change the meaning of the provision. The conditions imposed by the court were expressly applicable to Lex's suspended sentence. Additionally, Condition 33 expressly states that it is a condition of probation. By its plain language, the condition is inapplicable to Lex's negligent vehicular assault charge because the district court did not suspend any portion of that sentence. Should Lex be released from MWP early on the negligent vehicular assault charge, she would be on parole, not probation.

Lex has not established that the written condition conflicts with the district court's oral pronouncement, nor has she established that the condition impermissibly applies to the negligent vehicular assault charge.

CONCLUSION

This court should affirm Lex's sentence and remand this matter for the limited purpose of correcting the restitution amount to \$47,967.31.

Respectfully submitted this 28th day of February, 2025.

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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 6,517 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Christine Hutchison

CHRISTINE HUTCHISON

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 02-28-2025:

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