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Indictment and Information Included Offenses: The North Dakota Supreme Court Holds That Actual Physical Control of a Motor Vehicle While under the Influence of Alcohol Is a Lesser Included Offense of Driving a Motor Vehicle While under the Influence of Alcohol

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INDICTMENT AND INFORMATION INCLUDED OFFENSES:
THE NORTH DAKOTA SUPREME COURT HOLDS THAT ACTUAL
PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER
THE INFLUENCE OF ALCOHOL IS A LESSER INCLUDED
OFFENSE OF DRIVING A MOTOR VEHICLE WHILE
UNDER THE INFLUENCE OF ALCOHOL
State v. Huber, 555 N.W.2d 791 (N.D. 1996)

I. FACTS

On August 4, 1995, a deputy sheriff observed a pickup on the side of Mercer County Road Twenty-One.¹ The deputy saw the pickup move forward but could not identify the person driving.² After approaching the vehicle, the deputy noticed that Benjamin Huber was in the driver's seat and that the engine was running.³ Two other people were at the scene, and both stated that Huber had not been driving.⁴ The deputy tested Huber's sobriety and arrested him for driving a motor vehicle while under the influence of alcohol (DUI).⁵

On the day of Huber's trial, the prosecutor requested that the jury instructions regarding the elements of a DUI be amended to include "or was in actual physical control of" a motor vehicle.⁶ Over Huber's objection, the lower court amended the jury instructions.⁷ The amended instructions provided that the state needed to prove beyond a reasonable doubt that Huber "did operate or was in actual physical control of" a motor vehicle while under the influence of alcohol.⁸ However, the state

1. *State v. Huber*, 555 N.W.2d 791, 793 (N.D. 1996).

2. *Id.*

3. *Id.* The deputy also observed that Huber and the person standing outside the pickup were arguing. *Id.*

4. *Id.* The two additional witnesses asserted that Huber moved to the driver's seat after the driver stepped out of the vehicle. *Id.*

5. *Id.* In North Dakota, the DUI statute, in pertinent part, provides:

A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:

b. That person is under the influence of intoxicating liquor.

N.D. CENT. CODE § 39-08-01(1)(b) (1997). This statute provides for two different offenses, driving while under the influence of alcohol (DUI), and being in actual physical control of a motor vehicle while under the influence of alcohol (APC). See *State v. Jacobson*, 338 N.W.2d 648, 650 (N.D. 1983) (noting that the use of the word "or" between "drive" and "be in actual physical control of" evidenced the North Dakota Legislature's intent to create two different offenses).

6. *Huber*, 555 N.W.2d at 793. The initial jury instructions provided that the prosecution satisfied its burden if it proved beyond a reasonable doubt that Huber "did operate a motor vehicle" while under the influence of alcohol. *Id.*

7. *Id.*

8. *Id.*

did not amend the complaint, and the lower court did not modify the verdict forms to add a possible verdict of guilty of actual physical control of a motor vehicle while under the influence of alcohol (APC).⁹ The jury subsequently convicted Huber of DUI, and Huber appealed, arguing that the lower court erred in amending the jury instructions to include APC.¹⁰ The North Dakota Supreme Court *held* that APC is a lesser included offense of DUI and that inadequate jury instructions violated Huber's right to due process of law.¹¹

II. LEGAL BACKGROUND

Generally, a lesser included offense is defined as an offense which is composed of some of the elements of a greater offense so that it is impossible to commit the greater offense without committing the lesser offense.¹² For instance, a jurisdiction might provide for the crime of unlawful entry and also include unlawful entry as an element of the crime of burglary which carries a greater punishment.¹³ A person consequently could not commit burglary without committing unlawful entry.¹⁴ Unlawful entry would then be a lesser included offense of burglary.¹⁵

Under N.D. CENT. CODE Section 12.1-01-04(15), an "included offense" is one which can be proven by the same or less than all the facts required to prove the offense charged. The included offense is composed of an attempt or solicitation to commit, or differs from the offense charged only because it constitutes a lesser harm or risk of harm.¹⁶ Rule 31(c) of the North Dakota Rules of Criminal Procedure similarly pro-

9. *Id.* Thus, the verdict forms provided for only two possible verdicts; guilty of DUI or not guilty of DUI. *Id.* at 797.

10. *Id.* at 793.

11. *Id.* at 798.

12. *Giles v. United States*, 144 F.2d 860, 861 (1st Cir. 1944); *see also* Christen R. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM. CRIM. L. REV. 445, 447-51 (1984) (describing three approaches to the lesser included offense doctrine).

13. *See generally* David E. Rigney, Annotation, *Propriety of Lesser-Included-Offense Charge to Jury in Federal Prosecution for Crime Involving Property Rights*, 105 A.L.R. FED. 669 (1991).

14. *Id.*

15. *See Giles v. United States*, 144 F.2d at 861.

16. N.D. CENT. CODE §12.1-01-04(15) (1997). The statute, in its entirety, provides:

Included offense means an offense:

- a. Which is established by proof of the same or less than all the facts required to establish commission of the offense charged;
- b. Which consists of criminal facilitation of or an attempt or solicitation to commit the offense charged; or
- c. Which differed from the offense charged only in that it constitutes a less serious harm or risk of harm to the same person, property, or public interest, or because a lesser degree of culpability suffices to establish its commission.

Id.

vides that a defendant may be convicted of an offense "necessarily included" in the offense charged.¹⁷

In accord with these provisions, the North Dakota Supreme Court has held that when a defendant is charged with a greater offense, the defendant is put on notice that he or she might also have to defend against a lesser included offense.¹⁸ More specifically, the Constitution's Due Process Clause does not require a state to amend a complaint in order to charge an individual with a lesser included offense.¹⁹ Jury instructions on a lesser included offense which "correctly and adequately" advise the jury of the appropriate law are the only additional requirements necessary for the conviction of a defendant for a lesser included offense.²⁰ The instructions may be requested by either the defendant or the prosecution when the evidence creates reasonable doubt in terms of the greater offense but no reasonable doubt of the lesser included offense.²¹

The North Dakota Supreme Court has frequently referred to the "lesser included offense" in the context of cases involving APC and DUI.²² In a 1983 decision, *State v. Klose*, the North Dakota Supreme Court suggested that APC was a lesser included offense of DUI.²³ In *Klose*, the defendant was originally charged with DUI, but he moved to amend the complaint to reflect only a charge of APC.²⁴ The lower court granted the defendant's motion and the defendant plead guilty to APC.²⁵ The court held that by amending a DUI charge to a charge of

17. N.D. R. CRIM. P. 31(c). Specifically, the rule provides:

(c) Conviction of lesser offense. 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 therein if the attempt is an offense.

Id.

18. *State v. Vance*, 537 N.W.2d 545, 548 (N.D. 1995).

19. *State v. Stopplesworth*, 442 N.W.2d 415, 417 (N.D. 1989); *see also* Blair, *supra* note 12, at 451-55 (analyzing the constitutional requirements of a lesser included offense conviction).

20. *State v. Azure*, 525 N.W.2d 654, 658 (N.D. 1994).

21. *Vance*, 537 N.W.2d at 548 (citing *State v. Sheldon*, 301 N.W.2d 604, 608 (N.D. 1980) (holding that either the prosecutor or the defendant may request a jury instruction on a lesser included offense)); *State v. Jacobson*, 338 N.W.2d 648, 651 (N.D. 1983) (citing *State v. Piper*, 261 N.W.2d 650, 654 (N.D. 1978) (holding that a jury instruction on a lesser included offense is appropriate where the jury could rationally find the defendant guilty of the lesser offense and not guilty of the greater offense)).

22. *See State v. Klose*, 334 N.W.2d 647, 650 (N.D. 1983) (holding that the issue in the case did not involve the lower court's authority to find the defendant guilty of a lesser included offense); *Jacobson*, 338 N.W.2d at 650 (holding that APC was not a lesser included offense of DUI). In addition to DUI and APC, context the lesser included offense doctrine has been used in many other contexts. *See generally* Rigney, *supra* note 13 (discussing use of the lesser included offense doctrine in robbery, burglary, and similar cases).

23. *See Klose*, 334 N.W.2d at 650 (referring to APC as a clear reduction in charge from DUI).

24. *Id.* at 648.

25. *Id.* The state then successfully moved to vacate the judgment, and the original DUI charge was reinstated. *Id.* The defendant again moved to amend the complaint to charge only APC, but a

APC, the trial judge had "clearly reduced the offense."²⁶ Thus, the court apparently considered APC to be a lesser offense than DUI.²⁷

The court further indicated that APC was a lesser included offense when it noted that the lower court could not have determined that the admitted evidence was insufficient to support DUI, but sufficient to support a lesser included offense.²⁸ Accordingly, the court concluded that the issue in the case did not involve the lower court's authority to find a defendant guilty of a lesser included offense.²⁹ As such, although the court never heard a lesser included offense argument, the court's dicta implied that such an argument might be appropriate in some DUI cases.³⁰

Later in 1983, the court first heard the argument that APC was a lesser included offense of DUI.³¹ In *State v. Jacobson*,³² a highway patrol officer observed the defendant drive over several parking lot barriers and arrested him for DUI.³³ At trial, the defendant requested a jury instruction addressing APC as a lesser included offense of DUI, but the trial court denied the request.³⁴ In affirming the trial court's decision, the court held that APC did not qualify as a lesser included offense of DUI.³⁵

specially appointed judge concluded that the court had improperly amended the complaint the first time. *Id.* However, the appointed judge dismissed the DUI charge, reasoning that the defendant had been placed in jeopardy because the court had accepted his guilty plea on the APC offense. *Id.*

26. *Id.* at 649. "The amendment clearly reduced the offense and as a result charged a different offense than the one set forth in the initial complaint. This is precisely what the rules do not permit." *Id.* (referring to rules 3(b) and 7(e) of the North Dakota Rules of Criminal Procedure and the implication that the language of the two rules does not suggest that the "court on its own or at the request of the defendant without the concurrence of the prosecution, may amend the complaint or information").

27. *Id.* Logically, if an offense is reduced it is lesser than the original offense. However, a lesser offense is not necessarily a lesser included offense. See *Giles v. United States*, 144 F.2d 860, 861 (1st Cir. 1944) (providing the "included" requirement, namely that a lesser included offense is necessarily committed if the greater offense is committed).

28. *Klose*, 334 N.W.2d at 650. The court recognized that "a court in a criminal bench trial may find the defendant guilty of a lesser offense." *Id.* However, the court noted that no trial took place and that the lower court failed to follow Rule 11 of the North Dakota Rules of Criminal Procedure regarding the acceptance of a guilty plea. *Id.* (citing N.D. R. CRIM. P. 11).

29. *Id.* The court specifically held that the lower court had violated Rule 3(b) of the North Dakota Rules of Criminal Procedure, which provides that the "magistrate may permit a complaint to be amended at any time before a finding or verdict if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." *Id.* at 649 (quoting N.D. R. CRIM. P. 3(b)).

30. See *id.* at 649, 650 (mentioning the lesser included offense issue even though neither party raised a lesser included offense argument and, thus, suggesting that one could legitimately raise the argument that APC is a lesser included offense of DUI).

31. See *State v. Jacobson*, 338 N.W.2d 648, 649-50 (N.D. 1983) (recognizing that the issue was whether the lower court erred in denying the petitioner's request for a jury instruction that APC was a lesser included offense of DUI).

32. 338 N.W.2d 648 (N.D. 1983).

33. *State v. Jacobson*, 338 N.W.2d 648, 649 (N.D. 1983).

34. *Id.* at 649-50. The jury then convicted the defendant of DUI. *Id.* at 651.

35. *Id.* at 650.

The court defined a lesser included offense as an offense with the same or fewer elements than the greater offense and which carried a lesser punishment than the greater offense.³⁶ The court required the potential lesser included offense, APC, to satisfy two tests; the "included offense" test and the "lesser offense" test.³⁷ To satisfy the included offense test, the offense must have the same or fewer elements than the greater offense.³⁸ To satisfy the lesser offense test, the offense must carry a lesser punishment.³⁹ The court concluded that APC met the included offense test since one could not drive without being in actual physical control.⁴⁰ However, the court determined that APC did not meet the lesser offense test since the criminal penalties for DUI and APC were the same.⁴¹ Consequently, the court determined that APC was not a lesser included offense of DUI.⁴²

However, the court in *Jacobson* noted that APC was not appropriate under the circumstances regardless of whether it was a lesser included offense of DUI.⁴³ The court held that instruction on a lesser included offense is justified when the evidence "creates a reasonable doubt as to the greater or primary offense and supports a conviction of the lesser included offense."⁴⁴ The evidence in the case consisted solely of the arresting officer's observations of the defendant driving his vehicle.⁴⁵ As such, since the evidence created reasonable doubt as to DUI, the evidence necessarily created reasonable doubt as to APC as well.⁴⁶ Thus, the court found that the defendant was either innocent or guilty of DUI.⁴⁷

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 651. The court found that assessing points to one's driver's license was an administrative or civil penalty. *Id.* It reasoned that the point system provided for suspension of licenses through administrative proceedings. *Id.* The court further noted that the defendant "presented no authority in support of his contention that APC is a lesser included offense of DUI," and that it was unaware of any "authority holding that civil or administrative penalties are considered in determining if the offense is a lesser included offense." *Id.* at 650-51. The court consequently held that administrative or civil penalties are not considered in determining if an offense meets the lesser offense test. *Id.* at 651.

42. *Id.* at 650. Thus, the court held that the lower court did not err in denying the defendant's request for a lesser included offense instruction. *Id.* at 651.

43. *Id.* The court initially stated that it did not have to decide the issue of whether driver's license point assessments could be used in determining whether APC was a lesser offense than DUI. *Id.* at 650. After holding that the point assessments could not be used, the court returned to its initial statement and reasoned that it did not matter whether APC was a lesser included offense of DUI. *Id.* at 651.

44. *Id.* (quoting *State v. Piper*, 261 N.W.2d 650, 654 (N.D. 1978)). The federal courts use similar criteria to determine when jury instructions on a lesser included offense are appropriate. See *Rigney*, *supra* note 13, at 481 (examining the tests used by federal courts in assessing the propriety of lesser included offense instructions).

45. *Jacobson*, 338 N.W.2d at 651.

46. *Id.* In other words, the evidence of APC was exactly the same as the evidence of DUI.

47. *Id.*

Also in 1983, the North Dakota Legislature amended the DUI/APC statute by providing for suspension of sentence for APC convictions but not for DUI convictions.⁴⁸ Previously, the DUI/APC statute provided the same criminal penalty for DUI and APC.⁴⁹ By creating unequal criminal penalties, the legislators likely intended to foster plea bargaining in the DUI/APC context, and thereby intended for APC to be a lesser offense than DUI.⁵⁰

In 1993, the court recognized this difference in penalties in *State v. Schuh*.⁵¹ In *Schuh*, a deputy sheriff found the defendant "slumped over" the steering wheel of her car which was stuck in a patch of trees.⁵² The state initially charged the defendant with DUI but later amended the complaint to include APC.⁵³ The jury then found the defendant guilty of APC.⁵⁴ Arguing that DUI and APC were different offenses and that the amended complaint prejudiced her right to a fair trial, the defendant moved for a new trial.⁵⁵ The North Dakota Supreme Court affirmed the granting of a new trial.⁵⁶ The court reasoned that DUI and APC address different conduct and have different elements.⁵⁷ Moreover, the court noted that the Legislature provided for suspension of sentences only for APC convictions.⁵⁸ Therefore, the court concluded that the amended complaint added a new offense and prejudiced the defendant's right to a

48. N.D. CENT. CODE § 39-08-01(4)(e)(1) (1997). The statute reads as follows:

- e. The execution or imposition of sentence under this section may not be suspended or deferred under subsection 3 or 4 of Section 12.1-32-02 except that a fine or a sentence of imprisonment may be suspended in any of the following instances:
 - (1) Upon conviction of being in actual physical control of a motor vehicle in violation of this section or equivalent ordinance.

Id.

49. N.D. CENT. CODE § 39-08-01(2) (1981). However, the civil penalties differed; an APC violation resulted in the assessment of six driver's license points while a DUI violation resulted in the assessment of fifteen driver's license points. N.D. CENT. CODE § 39-06.1-10(3)(b)(5)-(6) (1981).

50. *Senate Judicial Conference Comm. on S.B. 2373*, 48th Legis. (N.D. 1983). Representative Pat Conmy felt that the amendment would "have an affect on physical control and plea bargaining." *Id.* Senator John M. Olson also discussed plea bargaining from DUI to APC. *Id.* More specifically, Senator Olson and Representative Conmy "discussed . . . plea bargaining with physical control as the answer sometimes." *Id.* Since plea bargaining involves a defendant exchanging a guilty plea for a lesser charge or penalty, the legislators must have perceived APC as satisfying the lesser offense test. See *Jacobson*, 338 N.W.2d at 650 (holding that a lesser included offense must pass both a lesser offense test and an included offense test).

51. 496 N.W.2d 41, 45 (N.D. 1993).

52. *State v. Schuh*, 496 N.W.2d 41, 42 (N.D. 1993).

53. *Id.* at 43.

54. *Id.*

55. *Id.* In support of the argument, the defendant cited *Klose*. *Id.* (citing *State v. Klose*, 334 N.W.2d 647, 649 (N.D. 1983)).

56. *Id.* at 46.

57. *Id.* at 45.

58. *Id.* at 45 n.4.

fair trial.⁵⁹ However, the state never asserted a lesser included offense argument, and the court never discussed the issue.⁶⁰

The court followed the *Schuh* decision with *City of Fargo v. Schwagel*.⁶¹ In *Schwagel*, the defendant was charged with DUI and, at trial, asserted that the city failed to prove the element of driving.⁶² Although the complaint did not charge APC and the city never moved to amend the complaint, the trial court found the defendant guilty of APC.⁶³ In reversing the conviction, the court held that the defendant could not be charged with DUI and be convicted of a different offense.⁶⁴ The court noted that it did not hear the city's argument that APC was a lesser included offense of DUI since that argument was not included in the city's brief.⁶⁵ Consequently, the question of whether APC met the lesser offense test, and qualified as a lesser included offense of DUI, remained unanswered.⁶⁶

III. ANALYSIS

Justice Sandstrom began the majority opinion in *Huber* by explaining that a reversal of Huber's conviction would require two findings: First, the lower court must have erred in amending the jury instructions, and, second, the error must not have been harmless.⁶⁷ The court noted that jury instructions "must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury."⁶⁸ The court then reviewed the differences between DUI and APC.⁶⁹ While DUI

59. *Id.* at 46.

60. *See id.* at 41-45 (showing the absence of a lesser included offense argument). The State's main argument was that APC and DUI were the same offense under Rule 3(b) of the North Dakota Rules of Criminal Procedure. *Id.* at 45 (citing N.D. R. CRIM. P. 3(b)).

61. 544 N.W.2d 873 (N.D. 1996).

62. *City of Fargo v. Schwagel*, 544 N.W.2d 873, 873 (N.D. 1996). The defendant waived his right to a trial by jury and argued that the city failed to prove the element of driving. *Id.*

63. *Id.* at 873-74.

64. *Id.* at 874. More specifically, the defendant's constitutional right to notice of the charges against him was violated. *Id.*

65. *Id.* at 875.

66. *See id.* (holding that the lesser included offense argument was not timely raised); *State v. Jacobson*, 338 N.W.2d 648, 650 (N.D. 1983) (holding that a lesser included offense must satisfy both the included offense test and the lesser offense test).

67. *State v. Huber*, 555 N.W.2d 791, 793 (N.D. 1996) (citing *State v. Marshall*, 531 N.W.2d 284, 287 (N.D. 1995)). The court also noted Huber's argument that the amended instructions added a different offense (APC) and, thus, prejudiced his substantive rights. *Id.* The State asserted that Huber "acquiesced in the instruction on APC" since he submitted a proposed APC instruction. *Id.* at 794. However, the court recognized that before jury selection Huber objected to the inclusion of APC in the jury instructions. *Id.*

68. *Id.* at 793 (quoting *City of Minot v. Rubbelke*, 456 N.W.2d 511, 513 (N.D. 1990)).

69. *Id.* at 794-95. The court reaffirmed that DUI and APC were different offenses. *Id.* at 794. The "or" between DUI and APC in the statute evidenced legislative intent to create two offenses. *Id.* (citing *Jacobson*, 338 N.W.2d at 650). In addition, the court recognized that the North Dakota Legislature provided for suspension of APC violations but provided that no suspensions or deferrals

requires vehicular motion, the court stated that APC only requires "bodily restraint, directing influence, domination, or regulation" of a vehicle.⁷⁰ Consequently, it is possible to be in actual physical control without driving, but it is not possible to drive without being in actual physical control.⁷¹ The court also recognized that under the North Dakota statute, APC fits the description of an included offense of DUI.⁷²

In deciding the state's lesser included offense argument, the court reviewed *Jacobson*.⁷³ At the time of *Jacobson*, DUI and APC carried the same criminal penalty and, consequently, APC did not satisfy the lesser offense test.⁷⁴ However, after *Jacobson*, the North Dakota Legislature amended the penalty portion of the statute and provided for mandatory minimum sentences for DUI but allowed for suspension of sentences in APC cases.⁷⁵ The court reasoned that since the penalties were "now different," APC satisfied the lesser offense test.⁷⁶ Therefore, the court held that APC was a lesser included offense of DUI.⁷⁷ In addition, the court stated that to the extent this holding was inconsistent with *Schuh*, *Schuh* was overruled.⁷⁸

After holding that APC was a lesser included offense of DUI, the court noted the propriety of giving instructions on a lesser included offense.⁷⁹ The court reasoned that a lesser included offense instruction should be given when a jury could reasonably find a defendant guilty of a lesser offense and not guilty of the greater offense.⁸⁰ Applying its

would be allowed for DUI violations. *Id.* (citing N.D. CENT. CODE § 39-08-01(4)(e)(1) (1997)). The State argued that the section on commercial drivers' licenses should control the definition of "drive." *Id.* at 794 (citing N.D. CENT. CODE § 39-06.2 (1997)). Under that section, "drive" means "drive, operate, or be in physical control of a motor vehicle." *Id.* (citing N.D. CENT. CODE § 39-06.2). Holding the definition of "drive" to be limited to that section, the court rejected the argument. *Id.* (noting that § 39-06.2-02 limits "drive" to the commercial chapter "unless the context or subject matter otherwise requires").

70. *Id.* at 795 (citing James O. Pearson, Jr., Annotation, *What Constitutes Driving, Operating, or Being in Control of a Motor Vehicle for Purposes of Driving While Intoxicated Statute or Ordinance*, 93 A.L.R.3d §§ 3a-3c (1980)).

71. *Id.*

72. *Id.* APC differs from DUI in that "it constitutes a less serious harm or risk of harm to the same person, property, or public interest." *Id.* (quoting N.D. CENT. CODE § 12.1-01-04(15)(c) (1997)). The court also noted that "[b]oth the criminal rules and the criminal code use the term 'included offense' rather than 'lesser included offense.'" However, the court never explained the significance of that difference. *Id.* at 796.

73. *Id.*

74. *Id.*

75. *Id.* (citing N.D. CENT. CODE § 39-08-01(4)(e)(1) (1997)).

76. The court reasoned that "[w]e have recognized the legally significant difference between the possibility of suspending [a] sentence and a mandatory minimum sentence." *Id.* (recognizing that Rule 11(b)(2) of the North Dakota Rules of Criminal Procedure requires the court to inform the defendant of any mandatory minimum sentence).

77. *Id.* APC now met both the included offense test and the lesser offense test. *See State v. Jacobson*, 338 N.W.2d 648, 651 (N.D. 1983) (providing the two tests that a potential lesser included offense must satisfy).

78. *Huber*, 555 N.W. 2d at 795.

79. *Id.*

80. *Id.* (citing *State v. Tweed*, 491 N.W.2d 412, 414 (N.D. 1992)).

reasoning, the court pointed out the dispute as to who was the driver of the vehicle in the instant case.⁸¹ In light of this dispute, while Huber could reasonably be found not guilty of DUI, he was very likely guilty of APC since the officer found him behind the wheel when the car was stopped.⁸² Therefore, the evidence was such that a jury could have reasonably found the defendant guilty of APC and not guilty of DUI.⁸³

After determining that an instruction on APC was proper, the court reasoned that Huber was on notice of a possible APC instruction.⁸⁴ APC was a lesser included offense and it was appropriate in the case.⁸⁵ Therefore, Huber's constitutional right to notice of the charges against him was satisfied.⁸⁶ The court then reviewed the jury instructions and found that the lower court failed to include proper APC jury instructions and verdict forms.⁸⁷ As such, the lower court erred in amending the jury instructions, and the first required finding for reversal was met.⁸⁸ Further, the lower court allowed the jury to use either the APC standard or the DUI standard to convict Huber of DUI.⁸⁹ The court held that instructions are not harmless error if they allow a defendant who only committed a lesser offense to be found guilty of a greater offense.⁹⁰ Accordingly, the second required finding for reversal of Huber's conviction was met.⁹¹ The court subsequently reversed Huber's conviction and remanded for a new trial.⁹²

81. *Id.* "Two witnesses testified Huber was not driving, and the deputy sheriff testified he was." *Id.*

82. *See id.* (implying that Huber likely had bodily restraint (APC) over a vehicle just by sitting in the driver's seat of a parked pickup). In a similar case, a defendant was convicted of APC after a police officer found her in the driver's seat of a car with the engine running. *See State v. Schuler*, 243 N.W.2d 367, 370 (N.D. 1976). Further, North Dakota courts have consistently held that a level of control lower than Huber apparently had will suffice for an APC conviction. *See Buck v. North Dakota State Highway Comm'r*, 425 N.W.2d 370, 372 (N.D. 1988) (finding an APC violation where the defendant was observed in a parked car with the keys in the ignition); *State v. Schwalk*, 430 N.W.2d 317, 319 (N.D. 1988) (holding that "a person may be in 'actual physical control' of a vehicle . . . even though they are asleep or unconscious when found by the arresting officer").

83. *Huber*, 555 N.W.2d at 796.

84. *Id.*

85. *Id.*

86. *Id.* The court noted that the Sixth Amendment gives the defendant the right "to be informed of the nature and cause of the accusation." *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 818 (1975)). Further, conviction for a crime not charged would violate due process. *Id.* (citing *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937)). However, "an offense charged in an Information inherently notifies the defendant that he or she may have to defend against lesser included offenses." *Id.* Therefore, the complaint notified Huber of the DUI charge and an APC charge. *Id.* at 797.

87. *Id.*

88. *Id.*

89. *Id.* The jury was instructed to return a guilty verdict on the DUI charge if it found that Huber had operated or been in actual physical control of the vehicle. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 797-98.

IV. IMPACT

By holding that APC is a lesser included offense of DUI, the North Dakota Supreme Court has theoretically given North Dakota prosecutors an advantage over defendants in most situations. Initially, a defendant charged with DUI is put on notice that he or she may have to defend against APC.⁹³ In many instances, prosecutors will not have to choose whether to try a defendant for APC or DUI.⁹⁴ The prosecutor may, in effect, subject the defendant to both offenses by charging the defendant with the greater offense.⁹⁵ As a result, if during the course of trial, a DUI conviction seems unlikely, the prosecutor could concentrate on APC or simply request proper jury instructions on APC.⁹⁶

In addition, the prosecutor could gain an advantage in plea bargaining. A prosecutor may frequently be permitted to 'risklessly' charge the defendant with DUI since a DUI charge notifies the defendant of possible APC conviction.⁹⁷ Conversely, the defendant risks conviction for either DUI or APC and therefore might be more likely to accept an APC conviction, even in cases where the prosecutor would have only charged APC if no lesser included offense existed.⁹⁸ On the other hand,

93. See *id.* at 796 (holding that APC is a lesser included offense of DUI); *State v. Vance*, 537 N.W.2d 537, 548 (N.D. 1995) (holding that a defendant is put on notice of all lesser included offenses when charged with a greater offense).

94. See *Huber*, 555 N.W.2d at 796 (implying that a prosecutor can try a defendant for DUI and proceed to get a conviction for either DUI or APC if a jury instruction on APC as a lesser included offense is appropriate).

95. *Id.*

96. See *id.* (holding that where a jury instruction on a lesser included offense is appropriate, the jury instruction must be accurate and adequate). For example, when the prosecutor lacks evidence of driving, the prosecutor could fall back on the APC offense. The prosecutor could then simply point out that the defendant was in actual physical control of the vehicle when found by the law enforcement officer. See *State v. Schuler*, 243 N.W.2d 367, 370 (N.D. 1976) (finding the defendant guilty of APC where the officer found her in the driver's seat of a car with its engine running).

97. See *Huber*, 555 N.W.2d at 797. Even if the prosecutor's case for DUI is weak, the prosecutor could have the security of a possible conviction of APC as a lesser included offense. Admittedly, an instruction on APC as a lesser included offense will be inappropriate where "the evidence would [not] permit a jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater." See *id.* However, in those cases, if the prosecutor's case for DUI is weak, the prosecutor's case would necessarily be weak for APC. In such cases, evidence of the defendant's driving would likely be the only evidence of defendant being in actual physical control. See *State v. Jacobson*, 338 N.W.2d 648, 651 (N.D. 1983) (holding that regardless of whether APC qualified as a lesser included offense of DUI, instruction on APC as a lesser included offense was inappropriate since the jury could not reasonably acquit the defendant of DUI and convict him of APC).

98. See *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937) (holding that a defendant's constitutional right to notice is not violated when a jury convicts him of a lesser included offense). An example is where limited evidence of a defendant's driving exists but considerable evidence of defendant's being in actual physical control exists. If APC was not held to be a lesser included offense of DUI (pre-*Huber*), the prosecutor would have to choose either DUI or APC. The prosecutor would likely choose APC, the stronger case. However, if the prosecutor chose DUI in an effort to urge the defendant to accept an APC plea bargain, the defendant could "call his bluff" by rejecting the plea bargain. If the prosecutor later sought to amend the charge to APC, the defendant could allege

in some situations, the court's holding may benefit defendants. For example, jurors might be more apt to find reasonable doubt of DUI when they can convict a defendant of APC instead.⁹⁹

Some professionals feel that *Huber* will have only limited effects.¹⁰⁰ Bruce D. Quick, a criminal defense attorney, reports that despite the statutorily provided ability to suspend APC sentences, such sentences are rarely suspended.¹⁰¹ Since the criminal penalties for APC and DUI are, in practice, identical, the significance of APC as a lesser included offense of DUI will be minimal.¹⁰² Quick further notes that prosecutors are morally obligated not to overcharge and, thus, will likely benefit from *Huber* solely in cases where direct evidence of actual physical control exists but only significant circumstantial evidence of driving exists.¹⁰³ In those rare cases, a prosecutor would have probable cause to believe that the defendant committed DUI and an even stronger case against the defendant for APC.¹⁰⁴ The prosecutor could then ethically charge DUI and, consequently, benefit from having the security of APC as a lesser included offense.¹⁰⁵

Regardless of the preceding theoretical and practical views, the holding that APC is a lesser included offense of DUI will very likely play little or no factor in some DUI and APC cases.¹⁰⁶ In *Huber*, the court stated that a jury instruction on APC as a lesser included offense is only appropriate when a jury could rationally find a defendant guilty of the

prejudice under Rule 3(b) of the North Dakota Rules of Criminal Procedure. See N.D. R. CRIM. P. 3(b) (providing that an amendment of a complaint must not add a new offense or prejudice the defendant's substantive rights). Since APC is a lesser included offense of DUI, the prosecutor could frequently choose to charge the defendant with DUI. See *Huber*, 555 N.W.2d at 795 (N.D. 1996) (holding that APC is a lesser included offense of DUI). Further, the defendant frequently will be unable to call his bluff since the defendant can no longer risk a DUI conviction for the possibility of no conviction. See *id.* at 796 (providing that a defendant charged with DUI can be found guilty of the lesser included offense of APC).

99. The jury would likely have to find the defendant not guilty of DUI before turning to APC. See *State v. Daulton*, 518 N.W.2d 719, 721 (N.D. 1994) (holding that the acquittal-first jury instruction on a lesser included offense provided the best guidance to a jury). Under the acquittal-first jury instruction, the jury must acquit the defendant of the offense charged before considering a lesser included offense. See *id.* Still, some juries could likely see APC as a way to ensure that a "semi-culpable" defendant does not get off "scot-free."

100. Interview with Bruce D. Quick, criminal defense attorney for the Vogel Law Firm of Fargo, N.D., in Grand Forks, N.D. (Jan. 28, 1998).

101. *Id.*

102. *Id.*

103. *Id.*; telephonic interview with Dave Jones, Assistant State's Attorney, Grand Forks County, N.D. (Jan. 17, 1998). For example, a police officer may find a defendant alone in his parked car on a secluded road. A warm engine or fresh tire tracks in snow or dirt could provide additional evidence of the defendant's driving. Another possibility might be where an officer finds the lone defendant changing the tire on his car on a secluded road. In such cases, one could reasonably believe that the defendant drove his car to the parked position.

104. Quick, *supra* note 100.

105. *Id.*

106. See *State v. Huber*, 555 N.W.2d 791, 796 (N.D. 1996) (noting that an instruction on APC as a lesser included offense will not always be appropriate).

lesser offense but not the greater offense.¹⁰⁷ Therefore, in cases where APC instruction is inappropriate, *Huber* is unlikely to control.¹⁰⁸ Such cases might include situations in which a driver crashed a vehicle and was exited or was thrown from the car, where a driver was injured so severely that he or she could not possibly drive, where a vehicle was wrecked, and thus, inoperable, or where a driver was pinned beneath a car.¹⁰⁹

V. CONCLUSION

In *Huber*, the North Dakota Supreme Court held that actual physical control of a motor vehicle while under the influence of alcohol (APC) was a lesser included offense of driving a motor vehicle while under the influence of alcohol (DUI). In many instances, the prosecutor's ethical obligations to not overcharge a defendant, the seemingly identical punishments for DUI and APC offenses, and the court's requirement that the situation be such that a jury could rationally convict the defendant of APC but acquit the defendant of DUI, will likely limit the applicability of *Huber*.¹¹⁰ However, in cases where a jury could rationally find the defendant guilty of APC but not guilty of DUI, and the prosecutor could ethically charge a defendant with DUI, *Huber* will likely provide the prosecutor with the security of a lesser included offense to fall back on.¹¹¹

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107. *Id.* Such circumstances are likely similar to, or the same as, situations where a prosecutor has probable cause to believe that the defendant committed DUI and may establish an even stronger case against the defendant for APC. See Quick, *supra* note 100. As such, in a situation where a prosecutor could ethically charge either DUI or APC, a jury instruction on APC would likely be appropriate. See *id.*

108. *Huber*'s "secondary" holding, that an APC instruction as a lesser included offense should be given only when appropriate, would control. See *Huber*, 555 N.W.2d at 796 (noting that an APC instruction as a lesser included offense must be appropriate under the circumstances).

109. *State v. Schuh* might also be an example of where APC is inappropriate. See 496 N.W.2d 41, 41-46 (N.D. 1993) (suggesting a possible issue of whether the defendant, when found, was in actual physical control of the vehicle). In *Schuh*, the officer found the defendant in a "stranded" car. *Id.* at 42. Thus, one might argue that a stranded car is an inoperable car over which one could not exert actual physical control. See *id.* But see *State v. Saul*, 434 N.W.2d 572, 576 (N.D. 1989) (rejecting the defendant's argument that the "high-centered" position of his car precluded a finding of actual physical control).

110. See Quick, *supra* note 100 (discussing the prosecutor's obligation not to overcharge, and the practical similarity of APC and DUI sentences); *Huber*, 555 N.W.2d at 796 (noting that an APC instruction as a lesser included offense must be appropriate under the circumstances).

111. See *Huber*, 555 N.W.2d at 796 (asserting that an APC instruction as a lesser included offense must be appropriate under the circumstances); Quick, *supra* note 100 (discussing the prosecutor's obligation to not overcharge).