IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0141

IN THE MATTER OF THE MENTAL HEALTH OF:

A.O.,

Respondent and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Amy Eddy, Presiding

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STATEMENT OF THE CASE

A.O.'s mental health issues relate to a bipolar diagnosis he received approximately 20 years ago. Over the years A.O.'s manic symptoms have required law enforcement to intervene on several occasions, with a petition being filed as recent as 2016. (Doc. 1.) After the 2016 petition was filed, A.O. was able to eventually stabilize, but the manic symptoms returned, and the State had to file another petition for involuntary treatment and commitment on January 11, 2019. (Doc. 7.)

The district court issued an order finding probable cause and set an initial appearance on January 14, 2019, and an adjudicatory hearing on January 17, 2019. (Doc. 9.) During the initial appearance, appearing via video, A.O. escalated and began screaming at his attorney and the judge. (Doc. 10.) Due to safety concerns, A.O.'s counsel, Emily Lamson (Lamson), waived the remainder of A.O.'s

presence. (*Id.*) On the attending psychiatrist's recommendation, with an agreement from Lamson, the State filed a motion for expedited adjudicatory hearing requesting the district court to set an adjudicatory hearing for the same day. (Doc. 13.) The district court set the adjudicatory hearing for that afternoon. (Doc. 14.) After the adjudication, the matter proceeded to disposition and all parties agreed to the mental health experts' recommendations.

Finding, in part, A.O.'s behaviors presented an imminent risk to himself and others, the district court committed A.O. to the Montana State Hospital (MSH) for 90 days, with authority to administer involuntary medication for transportation. (Doc. 17.) A.O's appeal followed.

STATEMENT OF FACTS

A.O. was diagnosed with bipolar disorder at age 20 and has since been "hospitalized over a dozen times" prior to the most recent incident necessitating State intervention. (Doc. 7, attached Emerg. Rep.) On January 9, 2019, law enforcement brought A.O. to the emergency room (ER) 2 times because of an ongoing manic episode, and corresponding threatening behavior. (*Id.*, Western Montana Mental Health Services (WMMHS) Emerg. Summ.) A.O. had a history of not taking his medications, and on the day in question, his brother-in-law saw

A.O. put his bipolar medication in the trash, and claim "Jesus is my therapist now," and that he was "not going to poison his body." (*Id.*)

On January 9, 2019, while at Costco, A.O. began making a scene which required an intervention from law enforcement. (Doc. 7, attached WMMHS Emerg. Summ.) Law enforcement brought A.O. to the E.R., but he was eventually released as he "did not meet criteria" for an involuntary hold at that time. (*Id.*) Later that day, law enforcement was contacted again after A.O. had an "argument with his girlfriend and got aggressive with his roommates." (*Id.*) A.O.'s brother-in-law predicted that, based off his history, A.O. was "going to get violent." (*Id.*) The brother-in-law added that A.O. responds well to medication when he is taking them. (*Id.*)

The Mental Health Professional (MHP), Patty Kennelly (Kennelly), reported A.O. escalated when he was informed that they were evaluating him for an involuntary hold. (*Id.*) A.O.'s height, which coupled with the agitation and aggression from his manic symptoms, presents an imposing figure and when A.O. escalated Kennelly ended the interview as she was fearful for her safety. (Doc. 7, attached Emerg. Rep.) A.O.'s history reflects that if his "acute manic episode" is left untreated it "will result in a violent outburst and patient blackout." (*Id.*)

A.O. was admitted to Pathways Treatment Center (PTC) on January 10, 2019. (Doc. 7, attached Mental Health Addendum.) While at PTC, A.O. displayed

"increasing paranoia" and "hyper-religiosity" and "without warning, became violent." (*Id.*) A.O. "started banging on the walls and the window at the nurse's station," and eventually broke the "window" and started to climb through. (*Id.*) A.O. made "threats to kill people" and security, along with the Kalispell Police Department (KPD), were called. (*Id.*) Dr. Todd Shumard (Dr. Shumard) reported A.O. "stated he was going to kill every last person he saw," and that he would "kill the first person through the door and he would die trying to kill everyone who touched him." (*Id.*) Five KPD officers, along with three PTC security personnel, had to use a taser to restrain A.O. (*Id.*)

Shortly thereafter, Dr. Shumard concluded A.O. was "unable to be safely held at [PTC]" and requested that A.O. be transported to a more secure facility at the Montana State Hospital (MSH) to be held pending the adjudicatory hearing. (Doc. 7, attached Mental Health Addendum.)

A.O. received a copy of the petition for commitment, along with a notice of rights. (Doc. 7.) A.O. appeared through video conference at the initial appearance on January 14, 2019. Not soon after it started, A.O.'s counsel, Lamson, was forced to leave the room "for safety" as A.O. "became very agitated and was screaming at the Judge—and [sic] Ms. Lamson." (1/14/19 Initial App. Tr. at 4.) This incident occurred during the advisement of rights. (*Id.*) The district court noted that A.O. was given a copy of the notice of rights when he was committed to PTC. (*Id.*)

The district court then asked Lamson if she waived the remainder of the initial appearance, to which she replied she "would, yes." (*Id.*) Prior to concluding the initial appearance, the court asked the State about the necessity of transporting A.O. to the MSH before the adjudication. (*Id.*) The State informed the court that Dr. Shumard was "very much in favor of transporting the Respondent to [the MSH] pending the adjudicatory hearing." (*Id.* at 4-5.) Lamson responded "[t]here is no objection." (*Id.*)

After the initial appearance, the State filed a motion to expedite the proceedings and hold the adjudicatory hearing that afternoon in agreement with Lamson. (Doc. 13.) In support of the motion, the State relied on Dr. Shumard's recommendation that A.O. be transported to MSH and that involuntary medication was required to transport A.O. safely. (*Id.*) A.O.'s counsel agreed, stating that it was not safe for A.O. "to remain at [PTC] pending hearing," which was originally set for January 17, 2019. (*Id.* at 2.) The State's motion included an addendum from Dr. Shumard, which expressed concern regarding A.O., stating "[h]e is a harm to others as evidenced by his threats and breaking the window as well as the frame" and that he "continues to threaten and staff has been unable to interact with him without security present." (Doc. 13, attached Mental Health Addendum.) Dr. Shumard also noted that, due to A.O.'s focus on "being connected with the divine," he was unable to have "insight into his situation," and that he still refused

medications. (*Id.*) The State's motion also included evaluation notes, which reported that A.O. was unable to be evaluated "face-to-face due to his level of aggression[.]" (Doc. 15, attached Second Rep., Services Note.) Additionally, the evaluation note reported A.O. was "not [sic] compliant with treatment recommendations, continues to be agitated and aggressive, has not agreed to take medications, has not been sleeping, and continues to express delusional or bizarre thoughts." (*Id.*) Finally, the MHP recommended a "direct transfer to [MSH] where [A.O.] will be able to receive treatment in order to prevent further decompensation to his mental health, and prevent any harm to himself or others." (*Id.*)

The adjudication proceeded on January 14, 2019, with the State calling Dr. Shumard and A.O.'s pre-adjudication evaluator, licensed clinical professional counselor (LCPC), Kimberly Olson (Olson), as witnesses. (1/14/19 Adj. Hr'g Tr. at 4, 15.) At the outset of the hearing, the district court stated the "[c]ourt, considering the exigent circumstances in this case, is going to proceed with an adjudicatory hearing here this afternoon." (*Id.* at 4.) There was no objection from Lamson.

Dr. Shumard testified that it had been somewhere between two and six months since A.O. had taken his medication. (*Id.* at 5.) Dr. Shumard further testified that he was unable to have a face to face evaluation with A.O., and that in

his other interactions with A.O., A.O. had been "very aggressive" and didn't want "to talk to people." (*Id.*) Shumard added that A.O. had "maybe three to four" hours of sleep "in the last 72 hours," and that his overall symptoms were consistent. (*Id.* at 8.)

Dr. Shumard testified that placement at the MSH is the only viable option, and he agreed with Lamson that A.O. shouldn't be physically present at the hearing for A.O.'s safety and "for the safety of everyone else involved." (*Id.* at 8-10; Doc. 13.) Dr. Shumard testified that for transportation to be done safely A.O. would need "Geodon and Ativan" to be administered so that he could "stay calm, sedated." (*Id.* at 10.) However, the sheriff's office "refused to transfer the Respondent without him being medicated." (Doc. 17 at 3.)

Dr. Shumard provided testimony that A.O.'s commitment was necessary and that it needed "to happen soon because of the need for medication, as he escalates and has done damage to the facilities, and I do not doubt will do damage to anyone else if he is able to lay [sic] hands on them." (1/14/19 Adj. Hr'g Tr. at 11.) Finally, Dr. Shumard testified that A.O. was treatable, but that given his "irritability" and "agitation" it would take "a month to six weeks" to stabilize and that if left untreated his condition would deteriorate. (*Id.* at 12-13.) There were no questions from Lamson on cross examination. (*Id.* at 14.)

The State called Olson, who, due to the safety concerns, was not able to meet with A.O. face to face but assessed him prior to the adjudication. (*Id.* at 15.) Olson assessed A.O. by consulting with Dr. Shumard and the nursing staff. (Doc. 15; 1/14/19 Adj. Hearing Tr. at 16.) Olson concurred with Dr. Shumard's diagnosis and recommendations. (*Id.*) Lamson asked Olson on cross if she agreed with A.O. "waiving his presence today" and Olson stated she did "based on the information" provided by nursing staff that "it would be unsafe for both Respondent as well as others involved." (1/14/20 Adj. Hr'g Tr. at 17.) Lamson provided no witnesses and the parties then agreed to go to disposition after a brief recess. (*Id.* at 18.)

At disposition, the State recommended that Respondent be transported to MSH for commitment. Lamson agreed, stating specifically she left disposition "up to [y]our Honor's discretion." (*Id.* at 18-19.)

The district court determined that A.O. suffered from a serious mental disorder, that he was unable to provide for his own needs, was an "imminent threat" to himself and others, and that his bipolar disorder "will predictably deteriorate if he does not receive adequate treatment." (*Id*. at 19) The district court agreed with Dr. Shumard, and the MHP, in waiving A.O.'s physical presence at the adjudicatory hearing and noted specifically that, by proceeding with the adjudicatory hearing, it was not in "compliance with 53-21-122(2)(a) that states

that the adjudicatory hearing 'may not be held on the same day as the initial appearance[.]'" (1/14/19 Adj. Hr'g Tr. at 21.) However, the court concluded that "with the [use] of the words 'may' instead of 'shall' there is some level of discretion for the Court to exercise, and," ultimately held the hearing under the exigent circumstances as it "[was] not safe either for the Respondent or for staff at Pathways for him to be continued to be held there until [sic] January 17th[.]" (*Id.*) Further, the district court concluded that transporting A.O., pending the adjudicatory hearing, was not possible as the "[c]ourt cannot order involuntary medication prior to adjudication and disposition[.]" (*Id.*)

At the conclusion of disposition, A.O. was committed to MSH for a period not longer than 90 days. (*Id.*)

STANDARD OF REVIEW

This Court reviews a district court's civil commitment order "to determine whether the court's findings of fact are clearly erroneous and its conclusions of law are correct." *In re of L.K.-S.*, 2011 MT 21, ¶ 14, 359 Mont. 191, 247 P.3d 1100. Issues of due process in an involuntary commitment proceeding are subject to plenary review. *In re M.K.S.*, 2015 MT 146, ¶ 10, 379 Mont. 293, 350 P.3d 27; *see also In re L.K.*, 2009 MT 366, ¶ 11, 353 Mont. 246, 219 P.3d 1263.

This Court uses plain error review sparingly and on a case by case basis. *In re D.K.D.*, 2011 MT 74, ¶ 16, 360 Mont. 76, 250 P.3d 856. This Court may use the plain error doctrine "in situations that implicate a [respondent's] fundamental constitutional rights, and where 'failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.'" *State v. Lawrence*, 2016 MT 346, ¶ 9, 386 Mont. 86, 385 P.3d 968 (citations omitted).

An appeal of an "involuntary commitment is not moot despite the expiration of [a] 90-day commitment period, because the time period is too short to allow litigation of the appeal, and there is a reasonable possibility that [a respondent] could be subject to the same action again." *In re B.H.*, 2018 MT 282, ¶ 10, 393 Mont. 352, 430 P.3d 1006. "Appeals from involuntary commitments thus fall into an exception to the mootness doctrine for issues that are 'capable of repetition, yet evading review.'" *Id.* (citing *M.K.S.*, ¶ 11).

SUMMARY OF ARGUMENT

There was no objection to the waiver of A.O.'s presence at the initial appearance or adjudication, and as such it should be deemed waived on appeal. Further, A.O.'s waiver of appearance was valid under Mont. Code Ann.

§ 53-21-119(1). In the absence of an appointed friend, A.O.'s attorney agreed to a waiver of A.O.'s presence at the initial appearance, and at the adjudication. In support, the record reflects A.O. lacked the capability to make an intentional and knowing decision. A.O. was aggressive, threatening, not wanting to talk to people, sleep deprived, had hyper-religious speech, and was paranoid. A.O.'s assertion that his right to appear was not waived was based on Mont. Code Ann. § 53-21-119(2); however, under Mont. Code Ann. § 53-21-119(1) there was a valid waiver as the court ultimately reached the correct result. The legislative changes to Mont. Code Ann. § 53-21-119(1) in 2013 demonstrate that, upon a showing of A.O.'s incapability and the absence of an appointed friend, Lamson's waiver was valid. A.O.'s right to receive humane treatment, suited to his specific needs, was preserved by the parties and the court. Mont. Code Ann. § 53-21-101(1).

Next, A.O. fails to meet the burden warranting plain error review for his complaints under Mont. Code Ann. § 53-21-122(2)(a). A.O. has not demonstrated the district court's oversight caused a manifest miscarriage of justice, left unsettled the question of the fundamental fairness of the trial or proceedings, or compromised the integrity of the judicial process. A.O. was unable to proceed and his attorney agreed to the adjudication that followed, yet A.O. argues there was a miscarriage of justice. A.O. questions the fundamental fairness of the trial, but does not provide any specifically relevant avenue, or desire, for contesting the parties'

agreement to hold the adjudication on the same day as the initial appearance. In effect, A.O.'s claims amount to a mere summary assertion requesting reversal. The impact of holding the adjudication hearing was *de minimis*, especially without any identifiable defense, witnesses, or evidence. The integrity of the judicial process was not compromised where all parties concurred in a course of treatment which was tailored to A.O.'s specific needs, and which avoided substantial injury to A.O., and the MHPs. In proceeding as the matter did, A.O. received humane and dignified treatment by avoiding further escalation of his threatening and violent manic symptoms.

ARGUMENT

I. A.O.'s presence was validly waived in the absence of an appointed friend.

A. Applicable law

This Court "will not review issues raised for the first time on appeal[.]" *M.K.S.*, ¶ 13; *see also State v. West*, 2008 MT 338, ¶ 16, 346 Mont. 244, 194 P.3d 683 (As a general rule, a party may raise on direct appeal only those issues and claims that were properly preserved.). To properly preserve an issue or claim for appeal, it is necessary that the issue or claim be timely raised in the first instance in the trial court. *West*, ¶ 16; *see, eg.*, Mont. Code Ann. § 46-20-104(2). An issue must be raised first in the trial court for the purposes of judicial economy—so that actual

error can be prevented or corrected at the first opportunity—and because it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. *West*, ¶¶ 16-17.

To preserve an objection for appeal, a party must state grounds for the objection that are sufficiently specific. *In re B.I. & N.G.*, 2009 MT 350, ¶ 16, 353 Mont. 183, 218 P.3d 1235 (citing *State v. Benson*, 1999 MT 324, ¶ 19, 297 Mont. 321, 992 P.2d 831). This Court will not fault a district court where it was not given an opportunity to correct itself, and a general objection to an alleged error is not sufficient to provide such an opportunity. *Id.*

This Court has held that "if a constitutional or substantial right is at issue, we may review such a claim under the plain error doctrine." *In re J.S.W.*, 2013 MT 34, ¶ 15, 369 Mont. 12, 303 P.3d 741 (citing *State v. Gunderson*, 2010 MT 166, ¶ 99, 357 Mont. 142, 237 P.3d 74). "The decision to invoke plain error review is discretionary and used sparingly and under specific criteria that are not met here." *In re C.B.*, 2017 MT 83, ¶ 16, 387 Mont. 231, 392 P.3d 598 (*see* "[w]hen an individual raises the plain error doctrine to request review of issues that were not objected to at the district court level, our review is discretionary." *J.S.W.*, ¶ 16). *See also C.B.*, ¶ 16 (the Court would not invoke plain error review when respondent did not offer an objection in the lower court **nor requested plain error review**.) (emphasis added).

B. A.O. did not object to the waiver of his presence or request plain error review and the issue is not properly preserved on appeal.

A.O.'s argument regarding waiver was not objected to in the district court, instead, Lamson specifically agreed to waive A.O.'s appearance. (1/14/19 Initial App. Tr. at 4.) Now on appeal A.O. asserts that his rights were violated despite his attorney's agreement to waive the remainder of the hearing. A.O. does not argue that plain error review applies to this argument. To obtain plain error review this Court "require[s] the assertion of plain error to be raised and argued on appeal." *B.H.*, ¶ 15 (citing *In re B.O.T.*, 2015 MT 40, ¶ 22, 378 Mont. 198, 342 P.3d 981). A.O. has not done so here and this issue should be deemed waived on appeal.

C. A.O.'s right to appear was validly waived through his counsel.

However, if the court does decide to consider this issue, then the State asserts that A.O.'s waiver was proper under Mont. Code Ann. § 53-21-119(1), as opposed to subsection (2), as proposed by A.O. The record reflects that A.O. was not capable of making a knowing and intentional waiver, and that Lamson 's waiver on his behalf was appropriate.

As an initial consideration, the court's reliance on subsection (2) was misplaced due, in part, to the limitation of the standardized form on which the findings and conclusions were issued. The record reflects that the district court checked the only box relating to waiver on a partially completed standardized

commitment form. The form only offered one option to indicate an alternative waiver occurred:

> 9. Respondent's physical presence at the hearing:
>
> Respondent was physically present;
>
> Respondent waived physical presence;
>
> Respondent appeared via video conferencing or
>
> **Respondent's physical presence was waived by counsel, the Friend, and the Mental Health Professional, and concurred with by the Court after the Court found, consistent with Mont. Code Ann. § 53-21-119(2), the presence of the Respondent at the hearing would be likely to seriously adversely affect the Respondent's mental condition; and an alternative location for the hearing in surroundings familiar to the respondent would not prevent the adverse effects on the Respondent's mental condition.**

(Doc. 17 at 3.) (Emphasis added.)

The form the court used did not offer an alternative waiver option or the space to write in an answer. The court's oversight was most likely due to the standardized form, not an erroneous determination that a friend had been appointed. (Appellant Br. at 25.) The State's initial petition clearly stated that "[t]he County Attorney has been unable to identify an appropriate person to serve as a Friend of the Respondent." (Doc. 7.) Consistent with the State's petition, the district court correctly noted on the first page of the order for commitment that the "Respondent **was not** personally present with his court appointed friend. (Doc. 17.) (Emphasis added).

Under Mont. Code Ann. § 53-21-119, there are two ways in which a respondent may waive their right to appear: subsection (1) and subsection (2). *In re P.A.C.*, 2013 MT 84, ¶ 10, 369 Mont. 407, 298 P.3d 1166 ("Thus this case presents a situation covered by the first clause of § 53-21-119(1), MCA, which allows the person who is the subject of a petition for involuntary commitment to waive her rights, including the right to be present at the commitment hearing.") Here, despite the district court's oversight, the ultimate result was the correct one, as there was a valid waiver under Mont. Code Ann. § 53-21-119(1). *State v. Betterman*, 2015 MT 39, ¶ 11, 378 Mont. 182, 342 P.3d 971; *see also In re J.J.*, 2018 MT 84, ¶¶ 27-28, 392 Mont. 192, 422 P.3d 699 (Shea, specially concurring). A review of the statutory changes to Mont. Code Ann. §§ 53-21-119 and -122 demonstrates that a valid waiver occurred.

A.O. states that the legislative changes to Mont. Code Ann. § 53-21-119(1) in 2013 establish that a valid waiver may be obtained by the attorney without an appointed friend. (Appellant's Br. at 24.) ("The 2013 legislative change supports that, prior to it, a friend continued to be required to obtain a valid third-party waiver under either Mont. Code Ann. § 53-21-119(1) or (2).") Further, A.O. supports this, stating that "[t]he Court presumes that 'when the Legislature changes a statute, it means to change the law.'" (*Id.* (citing *City of Missoula v. Zerbst*, 2020 MT 108, ¶ 18, __ Mont. __, __ P.3d __.)

The State agrees that the changes added in 2013 reflect the intent to change the law. In 2011, Mont. Code Ann. § 53-21-119(1) read as follows:

> A person may waive the person's rights, or if the person is not capable of making an intentional and knowing decision, these rights may be waived by the person's counsel and friend of respondent acting together if a record is made of the reasons for the waiver. The right to counsel may not be waived. The right to treatment provided for in this part may not be waived.

The current version of Mont. Code Ann. § 53-21-119(1) , as modified in 2013, reads as:

> A person may waive the person's rights, or if the person is not capable of making an intentional and knowing decision**, these rights may be waived by the person's counsel and friend of respondent, if a friend of respondent is appointed,** acting together if a record is made of the reasons for the waiver. The right to counsel may not be waived. The right to treatment provided for in this part may not be waived.

(Emphasis added.)

Montana Code Annotated § 53-21-122(2)(b) "mandates appointment of a friend only when the court has determined that an appropriate person is willing to perform that function; it does not obligate the court to seek out, investigate, or offer a friend when, as here, none was presented." *In re C.R.*, 2012 MT 258, ¶ 22, 367 Mont. 1, 289 P.3d 125.

A statute must be construed "as a whole to avoid an absurd result," and additionally, inconsistencies within the statutory scheme have previously warranted further review from this Court. *In re E.T.*, 2008 MT 299, ¶ 13,

345 Mont. 497, 191 P.3d 470 (citing *Infinity Ins. Co. v. Dodson*, 2000 MT 287, ¶ 46, 302 Mont. 209, 14 P.3d 487). Montana Code Annotated § 53-21-119 provides two avenues for a waiver: subsection (1) and subsection (2). Reading these sections as requiring a friend for a waiver results in an inconsistency with other statutes regarding the appointment of a friend, namely, Mont. Code Ann. § 53-21-122(2)(a), which no longer requires a friend to be appointed.

Subsection (1) of Mont. Code Ann. § 53-21-119 differs from subsection (2), in that under subsection (1), as modified in 2013, an attorney and friend are authorized to waive a respondent's presence, unless there is no appointed friend, thus leaving the attorney as the only person left available for a waiver, which would then still depend on the record showing the respondent was not capable. Under subsection (2), the friend is necessary, but not sufficient, for a waiver of appearance. However, the changes to Mont. Code Ann. § 53-21-122(2) in 2009, made it no longer mandatory for a friend to be appointed. (Appellant's Br. at 23-24.) Logically then, as reflected by the change to subsection (1), the legislature did not intend to make the appointed friend necessary for a waiver under subsections (1) and (2), when the appointment of a friend is not requested, or even always possible.

The changes identified within Mont. Code Ann. § 53-21-119(1) reflect the intent of the legislature meant to "change the law" such that it is consistent with the

changes to Mont. Code Ann. § 53-21-122(2) from 2009, and no longer required an appointed friend if respondent has not provided one. (Appellant's Br. at 24 (citing *Zerbst*, ¶ 18).)

An alternative interpretation, which would require a friend under both Mont. Code Ann. §§ 53-21-119(1) and (2), results in the respondent being forced to attend a hearing when there was no appointed or appointed friend, which, as in this situation, would be substantially detrimental to the respondent's safety and mental health as demonstrated by A.O.'s initial appearance through video. Such an interpretation would go directly against the legislative purpose of the treatment of the mentally ill statutes, which is to "secure for each person who may be suffering from a mental disorder and requiring commitment the care and treatment suited to the needs of the person and to ensure that the care and treatment are **skillfully and humanely administered with full respect for the person's dignity and personal integrity**." Mont. Code Ann. § 53-21-101(1) (emphasis added). The legislature clearly did not intend to force a respondent's appearance in situations where a friend was not offered by the respondent and appointed by the court, especially when doing so would likely cause substantial harm to the respondent or others.

As acknowledged by A.O., "[t]he 2013 legislative change supports that, **prior to it**, a friend continued to be required to obtain a valid third-party waiver

under either Mont. Code Ann. § 53-21-119(1) or (2)." (Appellant's Br. at 24.) (Emphasis added.)

Further, if the Court still interprets Mont. Code Ann. § 53-21-119 as requiring a friend to waive an appearance under subsection (1), then the requirement was met based upon the definition of Mont. Code Ann. § 53-21-102 (8). A.O. has not requested plain error review of this issue, however, if the Court does decide to so review, then the record demonstrates that, despite the lack of an overt appointment of a friend, the role of an appointed friend was sufficiently satisfied through several concurring mental health professionals who uniformly recommended waiver of A.O.'s appearance. The definition of an appointed friend under Title 53, Chapter 21, supports this position.

A friend is defined as "any person willing and able to assist a person suffering from a mental disorder and requiring commitment or a person alleged to be suffering from a mental disorder and requiring commitment in dealing with legal proceedings, including consultation with legal counsel and others." Mont. Code Ann. § 53-21-102(8). Under this definition Dr. Shumard, LCPC Kennelly, and LCPC Olson, meet the requirements of fulfilling the role of a friend. Each of these providers concurred regarding the legal proceedings, along with Lamson, as well as provided direct assistance to A.O., sufficient to meet the statutory definition. This interpretation is further supported by Mont. Code Ann.

§ 53-21-122(2)(b), which states "[t]he friend of respondent may be the next of kin, the person's conservator or legal guardian, if any, a representative of a charitable or religious organization, or **any other person appointed by the court.**" The fact that the court did not appoint a friend is not dispositive here, as under a plain error review the cumulative effect of not having an appointed friend was *de minimis*, as the treating professionals fulfilled the role.

Notably, after testimony, and through the MHPs' reports, all parties acknowledged that a waiver was necessary. On the stand, Lamson asked Olson if she "agree[d] with [A.O.] waiving his presence today?" (1/14/19 Adj. Tr. at 17.) Olson responded, "I do based on the information I was told by nursing staff, that they felt like it would be unsafe for both Respondent as well as others involved." (*Id.*) Further, Dr. Shumard testified that A.O. was not capable of meeting his daily needs, "such as food, clothing, shelter, health and safety[,]" that A.O. presents "a risk of injury to both himself and others[,]" and that "physically bringing him to the courthouse today," would "seriously effect his current mental state and/or safety." (1/14/19 Adj. Tr. at 10, 12-13.)

There is no requirement that an actual friend, as it is understood in the traditional sense, be appointed. While that may be one possible option, if available, involuntary commitment cases have demonstrated that a mental health professional is sufficient to meet that need. In *C.R.C.*, 2009 MT 125, ¶ 6,

350 Mont. 211, 207 P.3d 289, the district court appointed "a case worker at Western Montana Mental Health Center who had previously worked with C.R.C." In effect, the appointment of the case worker in *C.R.C.* mimics the role of the MHPs here. Specifically, Olson, as she and the case worker in *C.R.C.* both had to review other health care worker's information in making their recommendations to waive the respondent's rights. *C.R.C.*, ¶ 9; (1/14/19 Adj. Tr. at 17). To require A.O. to appear would likely expose him to further deterioration as by all accounts A.O. would "do something that will lead to him to being injured" or injure others. (1/14/19 Adj. Tr. at 9-10.) The record clearly demonstrates A.O.'s anger was "addressed to other people trying to get him to do what he doesn't want to do." (*Id.*). Ultimately, given the facts, an alternate finding here would result in an elevation of "form over substance" to the significant detriment of the respondent who had been continually decompensating "since January 10th[.]" (1/14/19 Adj. Tr. at 13.)

Finally, it is a maximum of jurisprudence that no one can take advantage of his or her own wrong. Mont. Code Ann. § 1-3-208. When the court inquired whether A.O.'s counsel "waive[d] the balance of this initial appearance," A.O.'s counsel stated, "I would, yes." (1/14/19 Initial App. Tr. at 4.) A.O.'s counsel did not only agree the waiver, but also did not offer an appropriate friend, only to now

argue that the waiver was invalid for that exact reason. A reversal is not warranted on this claim as there was a valid waiver on A.O.'s behalf.

D. A.O. was not capable of making a knowing and intentional waiver of his right to appear.

The record implicitly, but clearly establishes that A.O. was not capable of making a waiver on his own. *L.K.-S.*, ¶ 25 (citing *State v. Wooster*, 2001 MT 4, ¶ 18, 304 Mont. 56, 16 P.3d 409 (citations omitted)). Dr. Shumard reported that, due to A.O.'s focus on "being connected with the divine," he was unable to have "insight into his situation" and that he still refused medications. (Doc. 13 at 1.) Additionally, Dr. Shumard's evaluation note reported A.O. was "not [sic] compliant with treatment recommendations, continues to be agitated and aggressive, has not agreed to take medications, has not been sleeping, and continues to express delusional or bizarre thoughts." (Doc. 15, attached MHP Services Note.) Notably, the record clearly demonstrates that interacting with A.O. was effectively impossible as his "increasing paranoia" and "hyper-religiosity" would quickly turn to violence. (Doc. 7, Kalispell Regional Healthcare Addendum.)

A.O. minimizes his manic symptoms, stating he was merely angry and needed time to calm down, but the record reflects this was not the case. (Appellant's Br. at 21, 38.) A.O.'s aggressive and paranoid manic symptoms were pervasive from January 9, 2019 until, at least, the proceedings on January 14,

2019. In the rare times A.O. did present as calm his focus was on "extreme religiosity" and those symptoms continued to increase since he was admitted to PTC. (Doc. 7, attached WMMHS Emerg. Summ. at 3; Mental Health Addendum.) Any mention of legal proceedings, or an evaluation for an involuntary hold continually escalated A.O. (Doc. 7, attached WMMHS Emerg. Summ. at 3.) At the adjudication Dr. Shumard testified that, given his manic state, A.O. did not have the capability of providing for his own daily living, such as food, clothing, shelter, or health and safety. (1/14/19 Adj.Tr. at 12.) Further, Dr. Shumard testified it would take "a month to six weeks" to see any improvement. (*Id.*) By all accounts this was a situation where A.O. was medically incapable of calming down to the point where he could have a rational discussion with his attorney regarding his legal rights.

Lamson agreed to the waiver of appearance as A.O. was not in a mental state to even discuss the matter and that waiver was valid.

II. A.O. has not met the burden to warrant plain error review of the district court's alleged error under Mont. Code Ann. § 53-21-122.

The district court was presented with an unenviable task to decide whether to delay the adjudication, despite the risk it presented to A.O. and others, or to

continue with the adjudication based upon the mental health experts' safety and treatment recommendations.

Lamson did not object to the court's decision to proceed to adjudication and instead opted to agree with the court, stating "I leave it up to [y]our Honor's discretion." (1/14/19 Adj. Tr. at 18-19.) On appeal, A.O. asserts that he was left with a "mere two hours to assert his rights to defend against the petition." (Appellant's Br. at 26.) In support, A.O. states that "no witnesses were called on his behalf, virtually no cross-examination by his counsel took place, and no arguments were made on his behalf." (*Id.*) The record reflects that A.O. had all relevant evidence, notice of witnesses, and sufficient opportunity to contest the charges had it been feasible to do so. A.O. has failed to carry his burden under plain error review.

A. The district court's alleged error

As an initial matter, the State acknowledges that this Court has previously discussed Mont. Code Ann. § 53-21-122(2) and the legislature's intent to afford ample time to present a defense in *E.T.*, ¶ 21 (holding that under Mont. Code Ann. § 53-21-122 the "[l]egislature [sic] expressed a clear intent that courts should not reach the merits of the petition on the same day that the person appears before the court for the first time."). Accordingly, the State agrees that the error could impact the ability to defend the State's petition. However, where counsel proceeded,

despite having the opportunity to object to the district court's interpretation of Mont. Code Ann. § 53-21-122(2)(a), and where there has been no assertion of any possible specific and relevant defense, A.O. did not suffer substantial prejudice and the error was *de minimis*.

B. A.O. failed to carry his burden under plain error review.

Under plain error review, A.O. carries the burden "of establishing that: '(1) the alleged error implicates a fundamental right; and (2) failure to review the alleged error would result in' a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *B.H.*, ¶ 16 (citing *M.K.S.*, ¶ 10). Further, "when a procedural error results in no substantial prejudice to a party, the error is de minimis and does not affect an individual's liberty interest." *B.H.*, ¶ 17 (citing *M.K.S.*, ¶ 18) (citing *In re O.R.B.*, 2008 MT 301, ¶ 30, 345 Mont. 516, 191 P.3d 482); *see also A.S.B.*, ¶ 36).)

A.O.'s claims amount to a generic assertion of a constitutional right and ultimately results in the failure to carry his burden. A.O. affords no argument or information suggesting that A.O. was able to decide to contest the commitment, nor does A.O. establish specific information about how or why such a defense may have been presented. Ultimately, A.O. asserts that the error warrants reversal

simply because it was an error. This is insufficient to carry the burden under plain error review.

First, it is worth briefly reviewing the proceedings and the limited options available to Lamson. A.O. was unable to proceed due to the violent and paranoid manifestation of his manic symptoms. Lamson had knowledge of, and access to, all relevant witnesses and any relevant evidence well in advance of the adjudication, despite A.O.'s claims to the contrary. For instance, the initial petition contained evaluations from two MHPs, including Dr. Shumard. (Doc. 7.)

A.O. asserts the fact that Lamson did not request another evaluation demonstrates that A.O. did not have an opportunity to contest the commitment. (Appellant's Br. at 38.) However, given the multiple reports regarding A.O.'s escalation during the evaluations, to recommend another evaluation for the sake of contesting the matter was not only not required, but would more likely cause A.O. additional harm. A.O.'s position effectively argues that a baseless request for another evaluation is required in civil commitments. The facts of the case demonstrated that this course of action was not necessary or prudent. A.O.'s argument mimics that of an ineffective assistance claim, which is not at issue here. The fact that Lamson did not pursue an additional evaluation does not mean that Lamson did not have a fair opportunity to defend against commitment, especially

where the evidence and witnesses were known before the adjudication. Lamson purposefully chose to proceed in a manner consistent with the facts at hand.

A.O. had a long-standing documented history of struggles with his bipolar disorder. (Doc. 7, attached Emerg. Rep. at 3.) Prior to the adjudication A.O. had been evaluated three times, and all the evaluating MHPs made similar recommendations. Ultimately, Lamson proceeded in a manner that was "in accord with the law and in the face of overwhelming evidence, that, as a result of mental illness, [A.O.] was a danger" to himself and others. *C.R.C.*, ¶ 24.

This Court dealt with a similar situation in *M.K.S.*, where the respondent claimed that a procedural error affected her ability to defend against the State's commitment petition. *M.K.S.*, ¶ 18. In *M.K.S.*, the respondent argued that "because the statutory requirement for filing a written report was not satisfied, her procedural due process rights were violated, and the judgment of commitment should be vacated." *M.K.S.*, ¶ 15. More specifically, M.K.S. asserted "that the written report was essential to her ability to defend against the State's petition, and to the District Court's ability to be adequately informed about" the mental health professional's recommendation to commit M.K.S. to the MSH, as opposed to a less restrictive treatment center. *Id.* The State countered that, because the expert testified, the parties had "ample time to hear his findings and recommendation" and that there was no prejudice or impact to M.K.S.'s liberty interest. *Id.*

M.K.S.'s argument was more persuasive than A.O.'s claims here on appeal. M.K.S. had an issue with a specific piece of evidence that she deemed essential to her defense. A.O., however, summarily asserts that his rights were violated by holding the hearing the same day as the initial appearance. A.O. speculates that holding the hearing "fundamentally compromised A.O.'s opportunity to meaningfully exercise the panoply of rights he had under Montana Law." (Appellant's Br. at 35.) A.O.'s argument amounts to a vague "assertion that failure to review the claimed error may result in a manifest miscarriage of justice." *B.H.*, ¶ 16.

Prior to the date of the hearing, A.O. had the State's petition, a copy of his rights, the emergency report from Kennelly, the WMMHS emergency consultation summary, two mental health addendums from Dr. Shumard, and Olson's evaluation report, which was admittedly, only obtained a few hours prior to the adjudication. However, Olson's evaluation report did not provide any new information to Lamson as, due to A.O.'s agitated state and aggressive behavior, Olson was unable to meet directly with A.O. and, as a result, she had to rely on PTC staff who had been attending to A.O. since he was admitted on January 10, 2019, to complete her evaluation. (Doc. 15.) This was information already available to Lamson, and had she wished to request more time to review, despite the likely harm it would have caused A.O. or his caretakers, she could have done

so. Instead, she strategically chose the path the proceedings followed, as it represented the best option for A.O. under the facts and circumstances. The district court provided an objection for Lamson, but, in the face of the overwhelming evidence warranting treatment, she did not object. (1/14/19 Adj. Tr. at 21.) If she had wished to make arguments for more time, or another evaluation, then she had the opportunity. She strategically chose not to. A.O. makes no arguments regarding counsel's effectiveness, and Lamson's approach was within the confines of the law.

Notably, on appeal, aside from a generic assertion that another evaluation was somehow warranted, A.O. provides no specific witnesses, evidence, or defense which A.O. might have utilized. In *M.K.S.*, this Court was unwilling to reverse the commitment, noting that "[i]f M.K.S.'s counsel believed the failure to file a written report inhibited her defense or preparation, counsel could have objected to the lack of a report and the defect could have been remedied." *M.K.S.*, ¶ 20. In that matter the asserted error was specific in nature, i.e., that the report was essential to the respondent because it would have informed the court why the psychologist "believed it appropriate to recommend commitment to MSH when, in the past, commitment to a community program had been sufficient." *M.K.S.*, ¶ 15. Here, A.O.'s claims merely assert A.O.'s constitutional rights were implicated and that failure to review the error would result in an injustice. Consequently, "[a] mere

assertion that a constitutional right is 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. *M.K.S.*, ¶ 14.

Additional time would not have provided a benefit to A.O. or his defense. Rather, additional delay would have only exacerbated A.O.'s increasingly significant mental health issues. The MHPs' reports and evaluations were uniform in their recommendations and identified the best course of action. Lamson was forced to proceed with a client who was not capable of contributing to his own defense. Given A.O.'s condition which, according to Dr. Shumard was "consistent" since the "10th [of January]," requesting additional time would not have been beneficial. (1/14/19 Adj. Tr. at 8.) As the respondent's counsel dealt with in *C.R.C.*, A.O.'s implicit inability "to participate in any stage of the proceedings seriously undermined counsel's efforts to advocate on [his] behalf." *C.R.C.*, ¶ 24. Lamson could have asked for another evaluation, but given the danger that option presented, in addition to the uniform recommendations in the other evaluations, such a choice was objectively unwarranted and, in all probability, would have been harmful for A.O.

The record reflects why urgency was essential. A.O.'s manic symptoms were extremely volatile, threatening, and violent. Dr. Shumard testified that there are not any placements "here in the valley because of his agitation and

unwillingness to take any medications," and "[t]he violence risk" makes him unable to be placed "in the community." (1/14/19 Adj. Tr. at 9.) Further, Dr. Shumard testified that A.O. should not be present "for the safety of everyone else involved" and that commitment "needs to happen soon because of the need for medication, as he escalates and has done damage to the facilities, and I do not doubt will do damage to anyone else if he is able to lay hands on them." (*Id.* at 9, 11.) A.O.'s appeal essentially second guesses Lamson's approach, stating that "no defense was offered" and "no witnesses were called[.]" (Appellant's Br. at 38.) Yet, A.O. does not offer any insight into what would have been a better course of action based off the facts.

A.O. asserts that he should have been afforded a "meaningful amount of time to calm down and possibly consult with his attorney," but ignores the fact that A.O.'s violent and threatening behavior had been persistent since January 9, 2019, when law enforcement initially intervened. (Appellant's Br. at 38; Doc. 7.) The record clearly demonstrates that this was not a situation where A.O. was going to calm down. Notably, Dr. Shumard evaluated A.O. the morning of the proceedings and noticed that A.O. was upset with the legal proceedings and that "it was not safe to go back there" for further evaluation. (1/14/19 Adj. Tr. at 6.) Later that same day, Olson attempted to meet with A.O., but "was unable to evaluate him

face-to-face due to his level of aggression, as it was seen as a safety risk." (Doc. 15, attached MHP Services Note.) A.O. was not able to calm down.

Analysis of the second prong of the plain error test requires "weigh[ing] the risk of depriving an individual's liberty against the probable value of the procedure in question," in this case, holding an adjudication on the same day as the initial appearance. *M.K.S.*, ¶ 18 (citing *In re N.A.*, 2013 MT 255, ¶ 23, 371 Mont. 531, 309 P.3d 27) (internal citations omitted).

A.O. fails to demonstrate how holding the adjudication three days later held any value. Arguably, doing so would have jeopardized A.O. further, along with the treating professionals and staff. The effective probable value of the adjudicatory hearing was to afford A.O. additional time to prepare a defense to the State's petition. However, A.O. has not demonstrated any way in which the defense would have been different had his attorney objected. A.O. does not list any witnesses, evidence, or testimony which could have been offered to rebut the State's petition. Instead, A.O. makes a blanket assertion that the right to have the hearing on another day was violated, and as such A.O. is entitled to a reversal. A.O. was represented by counsel, who agreed to the exact procedure that the commitment followed. A.O.'s claims are insufficient to demonstrate there was a manifest miscarriage of justice, or an unsettled question of fundamental fairness,

and that the integrity of the judicial process was compromised. A.O. has not carried the burden under plain error review.

CONCLUSION

The State respectfully requests this Court affirm A.O.'s commitment for involuntary treatment.

Respectfully submitted this 26th day of October, 2020.

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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 7,912 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, W. R. Damon Martin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-26-2020:

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