IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0275

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RAFAEL BENJAMIN GRANA,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Mike Menahan, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Viewing the evidence from Appellant's bench trial in the light most favorable to the prosecution, is there sufficient evidence to support the district court's finding that Appellant committed felony indecent exposure?

2. Has Appellant met his burden on appeal of establishing that the district court erred in admitting Fed. R. Evid. 404(b) evidence when the record does not establish that the district court relied on 404(b) evidence to find Appellant guilty of felony indecent exposure, and the evidence was admissible in any event?

3. Should this Court conduct plain error review of Appellant's claim that he technically did not waive his right to a jury trial when the totality of the circumstances establishes that he strategically selected a bench trial?

STATEMENT OF THE CASE

Appellant Rafael Grana (Grana) pleaded not guilty at his arraignment on the State's Information on March 18, 2020. (Doc. 6.) The Information alleged that "on or about the 28th day of January, 2019 (sic), the above-named defendant committed the offense of INDECENT EXPOSURE (3rd offense), a felony, in that he knowingly or purposely exposed his penis to [] S.N., under circumstances to which the person knows the conduct is likely to cause affront or alarm in order to arouse or gratify his own sexual response or desire or the sexual response or desire

of any person, in violation of Section 45-5-504(1)(b), MCA." (Doc. 4.) The district court set a jury trial for August 10, 2020. (*Id.*)

At the omnibus hearing held on May 6, 2020, the district court noted that a jury trial was scheduled for August 10, 2020. (Doc. 9; 5/6/20 Tr. at 3.) Defense counsel subsequently moved to continue the final pretrial conference, jury draw, and jury trial. (Doc. 10.) In response, the district court on July 23, 2020, reset the final pretrial conference to November 18, 2020; the jury draw to November 30, 2020; and the jury trial to December 14, 2020. (Doc. 11.)

Defense counsel filed a Motion to Exclude Evidence of Prior Bad Acts on November 13, 2020. (Doc. 12.) Grana requested that the district court issue an order "to exclude evidence of any other crimes, wrongs, or acts allegedly committed by [Grana]," including, in pertinent part, "eight similar convictions or charges for Indecent Exposure in Missoula County, Montana in December of 1999 through January of 2000." (Docs. 12 at 1, 13 at 1.) The State did not formally respond to Grana's motion, but the pending motion was discussed at the final pretrial conference on November 18, 2020. (11/18/20 Tr. at 3.) The State explained that some of Grana's prior convictions are not relevant, but that there "is a set that are very specifically relevant to the present charges as they are similar in nature." (*Id.*) The State ultimately had "no objection" to excluding the evidence stated in Grana's motion unless Grana opened the door at trial. (*Id.*)

The State inquired of the district court as to whether the district court wished for the State to formally file a response to Grana's motion. (*Id*.) The district court stated that it "wouldn't ask the state to file a reply" as "404(b) evidence typically doesn't come in." (*Id*. at 4.) To the extent the State sought to admit 404(b) evidence, the district court would make a decision regarding the evidence's admissibility at the "time given." (*Id*.) The district court then confirmed the December 14, 2020, jury trial date and requested that the State provide jury instructions the Friday before trial. (*Id*. at 4-5.)

The district court convened on December 14, 2020. (Doc. 20.) Grana was present with his counsel. (Doc. 20; 12/14/20 Tr. (Trial Tr.) at 6.) The State informed the district court that it was ready to proceed with the bench trial. (Trial Tr. at 6-7.) None of the parties filed a written consent waiving Grana's right to a jury trial. Grana's counsel, in his opening statement, however, explained to the district court that "we chose a bench trial . . . because this is almost entirely a legal argument." (*Id*. at 9.) Grana's decision to proceed with a bench trial in lieu of a jury trial is further referenced in Grana's opening brief. (Appellant's Br. at 1, 20.)

The district court from the bench found Grana guilty beyond a reasonable doubt of indecent exposure after hearing testimony from the complaining witness, S.N., and from Silas Beebe, Grana's sole witness. (Trial Tr. at 61.) The district court explained that "[t]ypically in a bench trial I don't rule from the bench," but,

in this instance, the State clearly had satisfied all required elements of the offense of indecent exposure. (*Id*. at 60-61.) The district court accordingly "reject[ed] out of hand" all of defense's arguments to the contrary and convicted Grana of indecent exposure. (Doc. 21; Trial Tr. at 61.) The district court memorialized its oral findings in its Findings of Fact, Conclusions of Law and Order issued on December 17, 2020. (Doc. 21; Appellant's Br. App. A.) On March 10, 2020, the district court sentenced Grana to five years imprisonment and required Grana to register as Level 2 Sexual Offender. (Doc. 28.)

STATEMENT OF THE FACTS

S.N., a devout catholic, started her day on January 28, 2020, like she started most days: S.N. dropped her children off at school; drove to the Carroll College campus; parked her Ford F-150 in one of the two reserved parking spots for Trinity Hall Chapel goers; and attended Adoration at the Trinity Hall Chapel. (Trial Tr. at 12-13.) The reserved parking spaces border "the main sidewalk going from most of the parking lots where the students park" and face the sidewalk utilized by people traveling from the parking lot to classes, the dorms, and the Trinity Hall Chapel. (*Id*. at 15.)

On that day, S.N. had left her Adoration practice at the Chapel early in response to others being distracting and returned to her vehicle to finish her

prayers. (*Id*. at 16-18.) At approximately 9:15 a.m., Grana, driving a Toyota RAV-4, parked to S.N.'s left in the other reserved Chapel parking space. (*Id*. at 16-17, 24.) S.N. immediately did not recognize Grana "as an adoration person." (*Id*. at 17.)

S.N. largely disregarded Grana at first as she observed Grana "digging deep in his pocket" for what S.N. suspected would have been "change or a pill or something small." (*Id*.) S.N. carried on praying for the next 10 minutes. (*Id*.) Grana had not left his vehicle during that time. (*Id*.) S.N. looked to her left at Grana again. (*Id*.) Grana had his pants down, was holding his cell phone with his right hand, and was "masturbating actively" his erect penis with his left hand. (*Id*. at 17, 19.) The foot traffic in front of the reserved Trinity Hall Chapel parking spot at that time was notable as it was class time. (*Id*. at 17.) Grana's vehicle "was very easy to see into" so it "absolutely" would have been possible for someone walking by to see Grana "adoring" himself in his vehicle. (*Id*. at 21.)

Grana made eye contact with S.N., pulled up his pants, and then drove in reverse "all the way out of the parking lot and around the corner." (*Id*. at 19-20.) S.N. exited her vehicle when Grana left to take pictures of Grana's license plate. (*Id*. at 21.) S.N. subsequently reported what she witnessed to law enforcement. (*Id*. at 22.)

Following January 28, 2020's events, S.N. had difficulty returning alone to her daily Adoration practice. (*Id*. at 23.) S.N. "felt attacked" and like she "had so blatantly been violated" sitting there in the parking lot that day. (*Id*. at 22.) S.N.'s husband had to accompany her for weeks and she had to consult with a priest before returning to the routine she had before January 28, 2020. (*Id*. at 23.)

Before closing arguments, the State moved for the district court to take judicial notice of Grana's previous convictions as the circumstances of those prior convictions supported Grana's "knowledge as to the circumstances" of the instant offense where he had "his pants removed and was in a public parking lot." (*Id*. at 47-48.) Defense counsel moved the district court to declare a mistrial in response. (*Id*. at 48.) The State reiterated the 404(b) discussion from the November 18, 2020, final pretrial conference in response to the district court's surprise that the State was now moving for the district court to take judicial notice of Grana's prior convictions. (*Id*.)

The State explained that it would like to rely on the prior convictions in its closing as they supported Grana's "knowledge as to whether or not he would be seen." (*Id*. at 48-49.) The district court stated that it was "not inclined to allow the state to introduce the other crimes to show conformity of his behavior here." (*Id*. at 49-50.) The State responded, "that's fair," and explained again that the State

sought to use the prior convictions "strictly for the purpose of knowledge." (*Id*. at 50.)

Defense, in closing, argued that the State's Information was deficient because it required the State to prove that Grana "knowingly or purposely exposed his genitalia to S.N.," but the testimony presented was that Grana was not aware at first that S.N. was sitting in her vehicle parked next to Grana. (Doc 4; Trial Tr. at 54.) In response, the district court explained that the State was required to prove only the elements of the offense, and that "[p]roving a particular victim to this crime is not an element of the offense that the state has to prove at trial." (Doc. 21 at 6; Trial Tr. at 60.) The district court ultimately found that evidence beyond a reasonable doubt supported convicting Grana of felony indecent exposure. (Trial Tr. at 61.)

SUMMARY OF THE ARGUMENT

Any rational trier of fact would have found that Grana committed the essential elements of indecent exposure beyond a reasonable doubt. S.N. observed Grana masturbating in his vehicle parked in a busy Carroll College parking lot on a Tuesday morning around 9:00 a.m. while classes were in session. The district court properly found that the State's Information did not prejudice Grana by adding in that Grana knowingly or purposely exposed his penis to S.N. when the State was

required to prove only that Grana knowingly or purposely exposed his genitalia. And the district court did not admit the evidence of Grana's previous convictions pursuant to Mont. R. Evid. 404(b).

Grana has failed to meet his burden to show that this Court declining to exercise plain error review may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process. The failure of the parties to file a written jury trial waiver as required by Mont. Code Ann. § 46-16-110(3) does not undermine Grana's decision to voluntarily waive his right to a jury trial. Grana understood he possessed a right to a jury trial. No jurors were present during the December 14, 2020, bench trial that Grana was present at. Grana expressed no dissent or surprise to the district court presiding over the entire trial. And Grana, both in his brief and through his counsel's statements at the outset of trial, admits that he elected to forego a jury trial. Grana voluntarily, knowingly, and intelligently waived the right to a jury trial despite no written jury trial waiver being filed with the district court. The district court did not err when it convicted Grana of felony indecent exposure.

ARGUMENT

I. Viewing the evidence in the light most favorable to the State, the district court properly found that evidence beyond a reasonable doubt existed to convict Grana of indecent exposure.

A. Standard of review

This Court reviews de novo a district court's denial of a motion to dismiss for insufficient evidence. *State v. McAlister*, 2016 MT 14, ¶ 6, 382 Mont. 129, 365 P.3d 1062 (citation omitted). "A motion to dismiss for insufficient evidence is appropriate only if, viewing the evidence in the light most favorable to the prosecution, there is not sufficient evidence upon which a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *Id.*

B. The State presented evidence sufficient that any rational trier of fact could find that Grana committed the essential elements of the charge of indecent exposure beyond a reasonable doubt.

A person commits the offense of indecent exposure if the person (1) knowingly or purposely exposes the person's genitals, (2) under circumstances in which the person knows the conduct is likely to cause affront or alarm in order to, (3) abuse, humiliate, harass, or degrade another, or to arouse or gratify the person's own sexual response or the sexual response or desire of any person. Mont. Code Ann. § 45-5-504(1). With respect to conduct, a person acts knowingly if "the person is aware of the person's own conduct or that the circumstance exists." Mont. Code Ann. § 45-2-101(35). A person acts knowingly with respect to the

result of conduct "when the person is aware that it is highly probable that the result will be caused by the person's conduct." *Id*. A person acts purposely "if it is the person's conscious object to engage in that conduct or to cause that result." Mont. Code Ann. § 45-2-101(65).

Evidence that tends to establish a fact by proving another fact, that "does not of itself conclusively establish that fact but affords an inference or presumption of its existence," constitutes circumstantial evidence. Mont. Code Ann. § 26-1-102(1). Direct evidence rarely exists to establish a person's mental state. *State v. Ommundson*, 2008 MT 340, ¶ 19, 346 Mont. 263, 194 P.3d 672 (citation omitted). An accused's mental state, therefore, "may be inferred from the acts of the accused and the facts and circumstances connected with the offense." *Id.* (citing *State v. Krum*, 238 Mont. 359, 361, 777 P.2d 889, 890 (1989)).

Grana's contention that "[s]imply because Grana's penis was capable of being viewed does not mean he intended it" proves especially unconvincing considering this Court's decision in *Ommundson*. (Appellant's Br. at 12.) On a spring Saturday around 10 a.m., two women observed Ommundson lying nude next to a fully clothed woman approximately eight to ten feet from a public trail located on top of the "Rimrocks" in Billings that was frequented by various recreationalists. *Ommundson*, ¶¶ 4-5. Both women testified that they observed a "nude" man. *Id*. ¶ 7. And one of the women testified "I didn't see his genitals

because he was faced the other way, but I know he was nude because you could just see his buttocks and, you know, just kind of straight on down, so I say that I did see a naked man." *Id*. ¶ 17. A Billings police officer subsequently arrived on scene and observed Ommundson "lying on his back with his eyes closed, genitals fully exposed." *Id*. ¶ 6. Ommundson moved the district court to dismiss the action for insufficient evidence as no testimony had been presented that either woman had been exposed to Ommundson's genitals. *Id*. ¶ 8.

This Court affirmed the district court's denial of Ommundson's motion to dismiss for insufficient evidence. *Id*. ¶ 26. This Court reasoned that the direct evidence from the Billings police officer that Ommundson's genitals were exposed, coupled with Ommundson quibbling that the women did not directly observe his genitals, sufficiently supported the jury finding that Ommundson had exposed his genitals. *Id*. ¶ 15. This Court acknowledged that the jury would have had sufficient evidence to reach the same conclusion based on the women's testimony alone. *Id*. ¶ 16. Sufficient evidence further supported a rational trier of fact finding the remaining essential elements of indecent exposure beyond a reasonable doubt. By virtue of Ommundson's exposure occurring "in such a place and time that was sure to be viewed by a member of the public," Ommundson knew that his conduct was likely to cause affront or alarm. *Id*. ¶ 20. The jury could have similarly inferred from Ommundson's actions, and the circumstances

surrounding the time the exposure occurred, that Ommundson exposed himself to humiliate, harass, or degrade another. *Id*. ¶ 24.

Similarly, the record here fails to support Grana's contention that he did not act with the intent to expose his penis because the steering console in his private vehicle "concealed" his genitals. (Appellant's Br. at 13.) S.N., like the Billings police officer in *Ommundson*, directly observed Grana's penis. S.N. had a clear, unobstructed view of Grana the entire time he sat in his parked car. Grana was not wearing pants or underwear. Grana held his phone with his right hand. Grana actively masturbated his visible penis with his left hand. Grana, by visibly masturbating in a parked car on a college campus, was aware that he was exposing his genitalia. *See Ommundson*, ¶ 20; Mont. Code Ann. 45-2-101(35). Grana acted knowingly. Grana also acted purposely. Grana consciously engaged in a manner of behavior that resulted in his penis being exposed to another. *See* Mont. Code Ann. § 45-2-101(65). Sufficient evidence accordingly existed for any rational trier of fact to find that Grana knowingly or purposely exposed his penis.

Further, Grana intentionally elected to expose his penis "in such a place and time" that it was certain another would be able to view it. *Ommundson*, ¶ 20. S.N. did not happen upon Grana in a secluded setting. Grana parked his vehicle in a reserved Trinity Hall Chapel parking spot next to another parked vehicle in a busy parking lot on the Carroll College campus on a Tuesday morning around 9 a.m.

while classes were in session. Two sidewalks frequented by others on campus bordered where Grana had parked his vehicle. The foot traffic observed by S.N. in front of her and Grana's respective vehicles "was great" at the time the offense occurred with several people observed walking to and from class. (Trial Tr. at 17.) Under the circumstances, Grana cannot possibly claim to be surprised that, when he masturbated in a highly visible public setting, a member of the public saw him do so. Sufficient evidence existed to support any rational trier of fact finding that Grana knew that it was highly probable that his conduct on January 28, 2020, would cause affront or alarm. *See* Mont. Code Ann. 45-2-101(35); *Ommundson*, ¶ 20.

Finally, any rational trier of fact would have found that Grana exposed himself to "abuse, humiliate, harass, or degrade another" or to "arouse or gratify" his own sexual desire. Mont. Code Ann. § 45-5-504(1). Grana actively was masturbating in his parked vehicle. S.N. felt so blatantly violated by witnessing Grana masturbating that she had a difficult time returning to her daily Adoration practice. Grana clearly exposed himself to arouse or gratify his own sexual desire. And a rational trier of fact could further infer from Grana's conduct, and the circumstances in which the conduct occurred, that he acted to humiliate, harass, or degrade another.

To the extent that Grana implies that the State unfairly amended its information, his assertion is without merit. A criminal charge must contain a "plain, concise, and definite statement of the offense charged, including the name of the offense, whether the offense is a misdemeanor or felony, the name of the person charged, and the time and place of the offense as definitely as can be determined." Mont. Code Ann. § 46-11-401(1). An information must also include the "names of the witnesses for the prosecution, if known." Mont. Code Ann. § 46-11-401(2). "[T]he purpose of an information is to reasonably apprise the person of the charges against him so that he may have an opportunity to prepare his defense." *State v. Matt*, 245 Mont. 208, 213, 799 P.2d 1085, 1088 (1990) (citing *State v. Matson*, 227 Mont. 36, 736 P.2d 971 (1987)). An information proves sufficient if a "person of common understanding would know what was charged." *Matt*, 245 Mont. at 213, 799 P.2d at 1088 (citing *State v. Longneck*, 196 Mont. 151, 640 P.2d 436 (1981)).

A district court remains precluded from dismissing a charge that contains a "formal defect that does not tend to prejudice a substantial right of the defendant." Mont. Code Ann. § 46-11-401(6). A trial court "may permit an information to be amended as to form at any time before a verdict or finding is issued if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced." Mont. Code Ann. § 46-11-205(3). When the change to the information

leaves unaltered "the [] crime [] charged, the elements of the crime and the proof required," and the defendant remains informed of the charges against him," then the amendment constitutes one of form. *State v. Hardground*, 2019 MT 14, ¶ 10, 394 Mont. 104, 433 P.3d 711 (citing *City of Red Lodge v. Kennedy*, 2002 MT 89, ¶ 11, 309 Mont. 330, 46 P.3d 602; *State v. Sor-Lokken*, 247 Mont. 343, 349, 805 P.2d 1367, 1371 (1991)).

Grana contends that the State substantially prejudiced his defense by alleging that Grana purposely or knowingly exposed his penis to a specific person, S.N. (Appellant's Br. at 5.) The State's Information alleged that "on or about the 28th day of January, 2019 (sic), the above-named defendant committed the offense of INDECENT EXPOSURE (3rd offense), a felony, in that he knowingly or purposely exposed his penis to [] S.N., under circumstances to which the person knows the conduct is likely to cause affront or alarm in order to arouse or gratify his own sexual response or desire or the sexual response or desire of any person, in violation of Section 45-5-504(1)(b), MCA." (Doc. 4.) The State reasonably apprised Grana that he was charged with indecent exposure, what the charge of indecent exposure entails, the date the offense was committed, and that the offense was charged as a felony. *See* Mont. Code Ann. § 46-11-401(1). The inclusion of S.N. in the body of the Information did not deprive Grana of the opportunity to

prepare an adequate defense to any of the elements of the offense, including as to whether Grana knowingly or purposely exposed his genitalia.

Furthermore, the district court specifically found that the State was not required to amend its Information as the district court found meritless Grana's argument that the State was required to prove that Grana purposely or knowingly exposed his penis *to S.N.* (Doc. 21 at 6-7). The offense of indecent exposure does not require the State to prove that the defendant acted with the intent to expose the defendant's genitalia to a specific person. *See Hardground*, ¶ 17. The State's perceived elimination of S.N. from the Information, or inclusion of additional persons, did not alter the alleged offense, did not alter the elements or the proof required for the crime, and did not leave Grana uninformed of the charge against him. *See id*. ¶ 10. And the perceived amendment to the Information would have timely occurred before the district court rendered its verdict. Therefore, to the extent that this Court finds that the State sought, and the district court allowed, the State to amend its Information on the first element, the State timely amended the Information as the amendment constitutes one of form. Mont. Code Ann. § 46-11-205(3).

II. The district court did not rely on Grana's previous convictions to support its finding that Grana committed the offense of indecent exposure.

A. Standard of review

This Court reviews a district court's evidentiary rulings for abuse of discretion. *State v. McGhee*, 2021 MT 193, ¶ 10, 405 Mont. 121, 492 P.3d 518 (citations omitted). A district court possesses broad discretion in determining the admissibility of evidence. *Id.* (citations omitted). "An abuse of discretion occurs if a court exercises granted discretion based on a clearly erroneous finding of fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *Id.* (citation omitted).

B. The record fails to support that the district court relied on inadmissible Rule 404(b) evidence to convict Grana of felony indecent exposure.

Montana Rule of Evidence 404(b) provides that admission of "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Mont. R. Evid. 404(b). The purpose of Rule 404(b) "is to preclude an impermissible jury inference, based on evidence of other uncharged bad acts or allegations, that an accused is a person of bad character, and thus likely guilty of the charged offense based on common experience or belief that persons of bad character are predisposed or have a

tendency or propensity to subsequently act in conformance therewith." *McGhee*, ¶ 14. Rule 404(b) thus "bars admission of or reference to other acts for the purpose of supporting an inference of guilt based on conformance with prior bad character." *Id*.

Evidence of prior bad acts, however, is admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accidence." Mont. R. Evid. 404(b). "The distinction between admissible and inadmissible Rule 404(b) evidence turns on the intended purpose of the evidence, not its substance." *State v. Madplume*, 2017 MT 40, ¶ 23, 386 Mont. 368, 390 P.3d 142. "Mere reference to a permissible purpose is insufficient for admission of other acts evidence under Rule 404(b)." *Id*. A district court must ensure that Rule 404(b) evidence proves clearly justified and is carefully limited "[t]o prevent the permissible uses from swallowing the general rule barring propensity evidence." *Id*. (citations omitted). The proponent, therefore, must articulate clearly a chain of logical inferences that cannot include any inference of the propensity of the defendant to commit the alleged crime. *Id.*

As noted in Grana's brief, the district court did not explicitly admit, nor did the district court state in its written findings, the 404(b) evidence referenced by the State. (Appellant's Br. at 18.) The State moved for the district court to take judicial notice of Grana's previous convictions based on similar circumstances between

Grana's previous convictions and the instant offense as further evidence of his mental state at the time of the offense. The district court initially responded that it had "assume[d] the motion [to exclude 404(b) evidence] was well-taken" as the State never responded to Grana's motion to exclude 404(b) evidence. (Trial Tr. at 48.) The State explained that, at the November 18, 2020, final pretrial conference, the district court stated that any 404(b) issues, should they arise, would be addressed at trial. The State then reiterated that the previous convictions would be used "strictly for the purpose of knowledge." (Trial Tr. at 50.)

The district court then ultimately ruled that it was not "inclined to allow the state to introduce the other crimes to show conformity of his behavior here." (Trial Tr. at 50.) Grana accordingly was not prejudiced by the State moving for the district court to take judicial notice of his previous convictions as the district court did not admit any physical exhibits, or otherwise rely on, Grana's previous convictions. Even assuming, however, that the district court did take judicial notice of Grana's previous convictions, those convictions were properly admissible to prove that Grana acted with knowledge. *See* Mont. R. Evid. 404(b).

Finally, the perceived "admission" of Grana's previous convictions did not violate Grana's guarantee against double jeopardy. (Appellant's Br. at 16-17.) The bar on double jeopardy protects "an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *State v.*

Brooks, 2010 MT 226, ¶ 14, 358 Mont. 51, 243 P.3d 405. The use of previous convictions generally does not trigger double jeopardy protections as this Court has "recognized recidivism as a generally legitimate basis for enhanced punishment." *Id*. (citing *Witte v. United States*, 515 U.S. 389 (1995)). This rationale similarly supports that the use of previous convictions for the proper purpose of proving a defendant's mental state does not constitute impermissible double punishment. Grana's claim that the district court violated double jeopardy by entertaining argument about the admissibility of his previous conviction lacks merit.

III. The parties' failure to file a written jury trial waiver does not negate that Grana voluntarily, knowingly, and intelligently waived his right to a jury trial.

A. This Court should refuse to exercise plain error review as Grana has failed to show that the failure to file a written jury trial waiver may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.

Grana's contention that this Court should review and reverse his conviction based on the district court convicting him absent a filed, written jury trial waiver fails to account for Grana's active participation in the alleged constitutional violation. This Court's review of constitutional issues is plenary. *State v. Tome*, 2021 MT 229, ¶ 17. This Court, however, generally "does not address issues raised for the first time on appeal." *State v. Taylor*, 2010 MT 94, ¶ 12, 356 Mont. 167,

231 P.3d 79; *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 33. "Failure to make a timely objection during trial constitutes a waiver of the objection" for purposes of appeal. Mont. Code Ann. § 46-20-104(2).

This Court "will not put a district court in error for an action in which the appealing party acquiesced or actively participated." *State v. Reim*, 2014 MT 108, ¶ 28, 374 Mont. 487, 323 P.3d 880. "Acquiescence in error takes away the right of objecting to it." Mont. Code Ann. § 1-3-207; *see also State v. Jackson*, 2009 MT 427, 354 Mont. 63, 221 P.3d 1213. Grana's counsel stated at the outset of the bench trial that "we chose a bench trial . . . because this is almost entirely a legal argument." (Trial Tr. at 9.) Grana, through his silence during the trial, including during his counsel's opening statement, acquiesced to the bench trial being conducted absent his written jury trial waiver. *See Reim*, ¶ 34.

This Court will sparingly invoke on a case-by-case basis, however, the plain error doctrine to review "unpreserved claims alleging violation of fundamental constitutional rights, under the common law." *Reim*, ¶ 29. The appellant bears the burden of convincing this Court that "failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *Id*.

Grana contends that "[r]egardless of any oral representation by defense counsel or the prosecution, the district court did not require a written waiver of Grana's right to a jury trial to be filed in the record before convicting him in bench trial." (Appellant's Br. at 20.) Grana cannot establish a violation of a fundamental constitutional right because, although Grana possesses a constitutional right to a jury trial, he does not have a constitutional right to waive his jury trial in writing. Furthermore, Grana, in his three-paragraph argument, does not present any evidence that a manifest miscarriage of justice would result if this Court does not review the alleged constitutional violation. Nor does Grana present evidence that this Court declining to review whether he waived his jury trial right would leave unsettled the question of fundamental fairness of the trial or proceedings. And Grana further presented no evidence that failure of this Court to review his claim would compromise the integrity of the judicial process. This Court should accordingly decline to exercise plain error review and should affirm Grana's conviction.

Because the record establishes that Grana believed a bench trial to be in his best interests, Grana cannot meet his burden of proving that plain error review is warranted. But, even if this Court reviews Grana's unpreserved claim, Grana cannot prevail because the totality of the circumstances supports that Grana knowingly, voluntarily, and intelligently waived his right to a jury trial.

B. The district court did not err in conducting a bench trial and convicting Grana as Grana's constitutional right to a jury trial was not violated.

Both the United States Constitution and the Montana Constitution secure an accused's right to a jury trial. *See* U.S. Const. art. III, § 3, cl. 3, and amend. VI; Mont. Const. art. II, §§ 24, 26. An accused "may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court." *Singer v. United States*, 380 U.S. 24, 34 (1965) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942)). "A criminal defendant must consent to waiving constitutionally-guaranteed fundamental rights and there is a reasonable presumption against such a waiver." *Reim*, ¶ 31 (citations omitted). For a defendant to waive a fundamental constitutional right, the defendant "must waive a known right knowingly, intelligently and voluntarily." *Id.* ¶ 31 (citing *Walker*, ¶ 18).

Neither the United States Constitution nor the Montana Constitution, requires a written jury trial waiver for a defendant to waive their right to a jury trial. *See* U.S. Const. art. III, § 3, cl. 3, and amend. VI; Mont. Const. art. II, §§ 24, 26. Rather, the written jury trial waiver is required, in federal court, by Fed. R. Crim. P. 23, which provides in part: "If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the

government consents; and (3) the court approves." And, a written waiver in Montana courts, is required by Mont. Code Ann. § 46-16-110(3), which provides "[u]pon written consent of the parties, a trial by jury may be waived."

Compliance with Fed. R. Crim. P. 23(a) in federal court supports, but does not usurp, the legal requirements to waive a constitutional right. *See United States v. Cochran*, 770 F.2d 850, 851 (9th Cir. 1985) ("Compliance with the requirements of Fed. R. Crim. P. 23(a) creates a presumption that the waiver is a voluntary, knowing and intelligent one."). And federal courts, in instances in which a written jury trial waiver is has not been obtained, will examine the totality of the circumstances to determine whether the defendant knowingly, voluntarily, and intelligently waived the right to a jury trial. *See United States v. Leja*, 448 F.3d 86, 93-94 (1st Cir. 2006). The non-exhaustive list of factors includes whether defense counsel made any representations to the trial court concerning the defendant's waiver; the defendant's reactions, if any, when waiver is discussed in the defendant's presence; and the defendant's ability to understand the right to a jury trial. *See id*. (collected cases).

This Court has also previously employed a totality of the circumstances test to review the voluntariness of a defendant's jury trial waiver in instances in which the parties did not file a written jury trial waiver. *See generally State v. McCartney*, 179 Mont. 49, 585 P.2d 1321 (1978). In *McCartney*, this Court reviewed

McCartney's challenge that his jury waiver did not comply with Mont. Code Ann. § 46-16-110(3)'s predecessor, Rev. Codes Mont. 1947 § 95-1901(d), which provided "[u]pon written consent of the parties a trial by jury may be waived." *McCartney*, 179 Mont. at 55, 585 P.2d at 1325. This Court explained that it could not "conclude that section 95-1901(d) is such a mandate that failure to comply with its provisions rendered the trial a nullity." *Id*. McCartney "knew that such a waiver was available to him and he knowingly undertook to exercise it." *Id*. McCartney raised no objection when the bench trial began with a vacant jury box. *Id*. Nor did McCartney, at any point during the trial, "complain of the absence of a jury." *Id*. McCartney chose to have a trial with the district court acting as the trier of fact. *Id*. This Court remained adamant that it would not permit McCartney, after an adverse verdict, to try to assert a violation of his trial by jury right based on "an irregularity occasioned as much by his own noncompliance with the governing statute as by any failure on the part of the state." *Id*. at 56.

This Court subsequently invoked the plain error doctrine in *State v. Dahlin*, 1998 MT 113, ¶¶ 5, 23, 289 Mont. 182, 961 P.2d 1247, to reverse Dahlin's conviction after a bench trial was conducted with an oral, and not a written, jury trial waiver. This Court refused to review the totality of the circumstances to determine whether Dahlin knowingly and voluntarily waived his right to a jury trial. *Dahlin*, ¶¶ 22-23. Instead, this Court found that the language of Mont. Code

Ann. § 46-16-110(3) was clear and unambiguous necessitating this Court to look only at the plain meaning of the statute. *Id*. ¶¶ 19, 22. This Court thus held that "for a criminal defendant to waive his right to jury trial, that waiver must be in writing with the consent of both parties and filed with the district court." *Id*. ¶ 23.

This Court, in *Reim*, subsequently retreated from its decision in *Dahlin* back to its decision in *McCartney*. *Reim*, ¶¶ 33-34. In *Reim*, this Court again invoked plain error to review whether Reim had waived his right to a jury trial. *Id*. ¶ 30. Unlike in *Dahlin*, however, this Court found that Reim did voluntarily and knowingly waive his right to a jury trial, despite no formal written waiver being filed with the district court. *Id.* ¶ 34.

This Court reasoned that unlike in *Dahlin*, the court record in Reim's case included documentation of Reim's waiver of his right to a jury trial. *Id*. ¶ 33. The State waived its right to jury trial in the filed Omnibus Hearing Memorandum. *Id*. Reim's attorney had signed and filed a motion to vacate the jury trial. *Id*. The district court judge, on the day the bench trial commenced, "stated in Reim's presence that Reim had waived his right to a jury trial," and neither Reim nor his attorney objected. *Id*. This Court found that the foregoing circumstances supported "that Reim made an intelligent and voluntary jury trial waiver." *Id.* ¶ 34.

Furthermore, like in its reasoning in *McCartney*, this Court in *Reim* emphasized Reim's acquiescence in electing to proceed with a bench trial in the

Court's voluntarily and knowingly analysis of Reim's waiver. *Id*. This Court explained that it would not put the district court in error as "[t]here has been a written waiver of the right to a jury trial by both parties, ratified by the defendant through his failure to object and his acquiescence to the trial being conducted, from beginning to end, by the judge." *Id*. In doing so, this Court acknowledged that instances exist in which conducting a bench trial absent a filed, written jury trial waiver as contemplated by Mont. Code Ann. § 46-16-110(3) does not equate to automatic reversal of the defendant's conviction. Rather, a necessary flexibility can exist when determining whether a defendant has voluntarily, knowingly, and intelligently waived the right to a trial by jury.

The district court did not violate Grana's right to a jury trial by convicting him absent a written jury trial waiver. Even though neither the State nor Grana filed a written jury trial waiver in advance of the December 13, 2020, bench trial, as Mont. Code Ann. § 46-16-110(1) requires, this oversight does not equate to a violation of Grana's constitutional right to a jury trial. And the record supports that Grana knowingly, voluntarily, and intelligently waived the jury trial right.

Grana possesses a heightened level of understanding of the judicial process. The State charged Grana with felony indecent exposure, indicating it was at least Grana's third instance of being charged with indecent exposure. And Grana's previous convictions were referenced both by Grana in his Rule 404(b) motion and

by the State at trial. The district court also advised Grana of his rights, including his right to a jury trial, at Grana's arraignment on March 18, 2020. Grana knew he had the ability to waive his right to a jury trial and knowingly exercised it. *See McCartney*, 179 Mont. at 55.

Grana chose to have a trial with the district court acting as the trier of fact. *See id*. The district court set a jury trial for August 10, 2020, at Grana's arraignment. The district court confirmed the August 10, 2020, jury trial date at the omnibus hearing held on May 6, 2020. The district court reset the jury trial for December 14, 2020, in response to Grana's motion to continue. The district court confirmed the jury trial was set for December 14, 2020. The parties indicated that they were prepared to proceed with, and asked questions regarding, a jury trial at the final pretrial conference. The district court then conducted a bench trial on December 14, 2020. Grana appeared at his arraignment, at the final pretrial conference, and at the bench trial. Grana remained aware that a jury trial had been set, continued, and then subsequently changed to a bench trial.

Furthermore, Grana did not express surprise or object to the district court conducting a bench trial. Rather, Grana's counsel advised the district court: "The reason that we chose a bench trial in this, your Honor, is because this is almost entirely a legal argument, in that we have the facts pretty much locked in or we can anticipate exactly what will be said because we have a fairly detailed interview

with the victim in this case." (Trial Tr. at 9.) Nothing in the record suggests that Grana did not concur with his counsel's statements. Nothing in the record suggests that Grana expressed any dissent or surprise at the jury box remaining empty throughout the entirety of the bench trial.

No practical reason exists for finding that Grana did not knowingly, intelligently, or voluntarily waive the jury trial right simply because Mont. Code Ann. § 46-16-110(3)'s writing requirement had not been met. And, to the extent that this Court finds that § 46-16-110(3)'s writing requirement negates the voluntariness analysis required to determine whether an accused waived a constitutional right, Grana and his and counsel actively participated in the error of which he now complains. *See McCartney*, 179 Mont. at 56; *Reim*, ¶ 34. Grana's counsel's statements explained the basis for the request to change from a jury trial to a bench trial. Grana acknowledges in his brief that his counsel and the State orally agreed to a bench trial. And, Grana, in his brief, requests that this Court remand this action for a jury trial or a bench trial. Grana, like the defendant in *McCartney*, is seeking to challenge an adverse verdict by raising a claim that is a product of his own making, and not just the State's noncompliance with Mont. Code Ann. § 46-16-110(3). This Court should not find the district court erred under these circumstances.

CONCLUSION

The State respectfully requests that Grana's conviction and sentence be affirmed.

Respectfully submitted this 30th day of December, 2021.

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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 7,195 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Cori Losing
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CERTIFICATE OF SERVICE

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-30-2021:

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