IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0059

STATE OF MONTANA,

Plaintiff and Appellee,

v.

THOMAS RICHARD FERRIS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fifth Judicial District Court,
Beaverhead County, The Honorable Mike Salvagni, Presiding

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Whether the district court abused its discretion when it denied Ferris' motion to vacate its order granting the State leave to file the amended information and dismiss the amended information.

Whether this Court should invoke plain error review to consider whether the district court should have *sua sponte* provided an unanimity instruction for Count IV.

STATEMENT OF THE CASE

On April 16, 2019, the State charged Thomas Richard Ferris with the following offenses: Count I, felony assault on a peace officer; Count II, misdemeanor resisting arrest; Count III, misdemeanor failure of disorderly person to disperse; and Count IV, misdemeanor disorderly conduct. (Docs. 1-3.) Ferris' jury trial was set for the middle of October 2020. (Doc. 48.)

On July 17, 2020, the State moved to amend the information to amend Count IV, which the district court granted three days later. (Docs. 60-62, 64.) On August 18, 2020, Ferris filed a motion to dismiss the State's amended information. (Doc. 79.) After briefing was complete, the court denied Ferris' motion. (Docs. 82, 84, 101.)

The district court provided the jury with a general unanimity instruction to which Ferris made no objection and Ferris did not offer any specific unanimity instruction. (Docs. 181, 185 (JI No. 2.13); 10/16/20 through 10/22/20 Tr. at 1154-87.)[1] The jury found Ferris guilty of the three misdemeanor offenses and not guilty of assaulting a peace officer. (Docs. 181, 182.) At his December 2020 hearing in aggravation and mitigation of sentence, the district court deferred imposition of sentence for each misdemeanor conviction for a period of six months, to run concurrently. (Doc. 207; 12/7/20 Tr.) Ferris was ordered to pay a total of $600 in fines, $55 dollars in surcharges, and $150 in victim advocate fees. (*Id*.)

Ferris filed a notice of appeal on February 5, 2021. (Doc. 211.) On March 16, 2021, the State notified the district court that Ferris had satisfied his financial obligations. (Doc. 218.) The record on appeal was complete as of May 6, 2021. Ferris filed his Opening Brief on December 28, 2021.

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[1]The transcript for the five-day jury trial is paginated consecutively, so citations to the trial transcripts will appear as "Tr."

STATEMENT OF THE FACTS

On March 4, 2019, the Carroll College Saints played the University of Montana Western (UMW) Bulldogs in the Frontier Conference women's basketball championship game in Dillon. (Tr. at 71-96.) Dillion City Police Department (DCPD) Chief Don Guiberson attended the game to provide additional security and was wearing his police jacket, badge, hand belt, and gun. (*Id*.)

Ferris and his brother, Gary Ferris (Gary), were sitting behind some Carroll College fans when an argument broke out between Ferris and the Carroll fans. (Tr.) Ferris left his seat and gestured towards the Carroll fans to come with him. (*Id.*, *Id*. at 111-27, 442-43, 747-89, 820-30, 1117.) One witness stated Ferris yelled, "Come on! Let's fucking go!" at the fan, and others noted the older male Carroll fan held the younger fan back. (*Id*.) Ferris then returned to his seat. (*Id.*, *Id*. at 267-87.)

UMW Athletic Director, Bill Wilson, and Janelle Handlos, an associate professor, noticed the commotion and intervened. (Tr. at 153-90.) When Wilson told Ferris to calm down and watch the game, Ferris said he would "take care of this in the parking lot." (*Id*.) Chief Guiberson also noticed the altercation and walked up to the area to tell them all to calm down. (Tr. at 71-96.)

When the chief spoke to Ferris, Ferris said, "You're just a fucking gun and a badge," and said "Sit the fuck down. People behind can't see!" (Tr. at 71-96, 446,

1090, 1119.) Chief Guiberson did not ask Ferris to leave or disperse, but after moving up in the bleachers, he gestured to Gary, whom he knew, to calm Ferris down. (*Id*., *Id.* at 987.)

After talking to his brother, Ferris left the bleacher area and stood along the baseline on the west end of the court. (Tr. at 71-96, 446, 238-67.) Just before the game ended, Gary walked down to Ferris and tried to get him to leave because he did not want his brother to get into an altercation with the Carroll fans. (*Id*.) Ferris replied, "No, I want to talk to these guys," so Gary went to find Ferris' son to have him help get Ferris to leave. (*Id*.)

When the game ended, Chief Guiberson left the bleachers and walked towards the men's team's locker room on the northwest side of the gymnasium where the crowd was exiting. (Tr. at 71-96.) Ferris confronted the chief and said, "I didn't do anything fucking illegal" and "You're just a fucking badge and a gun." (*Id*., *Id.* at 401-12, 448-68, 1191, 1198.) Chief Guiberson noted an odor of alcohol on Ferris' breath and told Ferris he was being disorderly and needed to leave, to which Ferris repeated, "I didn't do anything fucking illegal." (*Id*. at 1124.) One witness heard Ferris say, "What are you going to do, fucking make me?" (*Id*. at 448.)

The chief repeatedly asked Ferris to leave, but Ferris refused. (Tr. at 71-96, 190-304, 448-68.) The chief then tried to guide Ferris out the door, but Ferris kept

yelling obscenities and pulled away. (*Id*., *Id.* at 267-325, 415-40.) When Ferris continued to ignore his directive to disperse, Chief Guiberson told Ferris he was under arrest. (*Id*.) Ferris continued to resist, so Chief Guiberson attempted to detain him by securing his wrist and trying to trip him to the ground, but Ferris spun around, put his arm around the chief's neck, and pushed his head into the hardwood floor. (*Id*., *Id.* at 474-504, 985.)

After they fell to the hardwood floor and Chief Guiberson hit his head, Ferris got up and backed away and put his hands up and said, "I didn't do anything." (Tr. at 292.) The chief got up and detained Ferris by placing him in a wristlock and called to DCPD Assistant Police Chief Ken Peterson to assist him and escort Ferris outside. (*Id*. at 71-96, 190-237, 378-91.) Chief Guiberson sustained a concussion from the altercation and had to go to the emergency room that night and continued to have medical issues weeks later. (Tr. at 96-105, 545-58.)

Chief Guiberson cited Ferris with the three misdemeanors the night of the incident because, at that time, he believed he had just hit his head when his tactical maneuver failed. (8/24/20 Tr. at 83, 96-105.) However, as he collected statements from witnesses, several people described seeing Ferris use his arm to slam the chief's head into the floor. (8/24/20 Tr. at 84-88, 146-47; Tr. at 96-105, 391-400.) After completing his investigation, Chief Guiberson forwarded his report to the

county attorney's office and on April 16, 2019, the State charged Ferris with felony assault on a peace officer and the three misdemeanors. (*Id*., Tr. at Docs. 1-3.) The city attorney's office dismissed the three misdemeanor citations. (8/24/20 Tr. at 49.)

Ferris' jury trial was set for October 2020 and in July 2020, the district court granted the State's motion to amend Count IV of the Information. (Docs. 48, 60-61.) Ferris filed several motions to dismiss, including a motion to dismiss the amended information. (Doc. 79.) Upon completion of briefing, the court denied Ferris' motion. (Docs. 82, 84, 101.)[2]

At trial, the State called Chief Guiberson, his treating physician, and 19 witnesses who attended the game. (Tr. at 71-559.) Ferris testified on his own behalf and called 18 witnesses from the game and recalled Chief Guiberson and the UMW Dean of Students. (Tr. at 608-1130.) Ferris refuted that he had consumed alcohol that night and argued that his exchange with the Carroll College fans occurred because he was defending older UMW fans. (*Id*. at 1072-1130.)

Ferris admitted that his brother tried to get him to leave after the game. (Tr. at 1093-1111, 1121-30.) Ferris testified that Chief Guiberson was standing near him on the baseline and admitted he leaned towards the chief and said, "You know that badge and that gun don't make you tough. Maybe Jim Pat needs to remind

[2]Additional facts relevant to the court's order are set forth below at Section I.B.

you of that again." (Tr. at 1093-1111, 1121-30.) According to Ferris, Jim Pat had injured Chief Guiberson in a fight that occurred 22 years ago when Guiberson was off duty. (*Id*.) Ferris testified that his comment angered Chief Guiberson and that is why he told Ferris to leave. (*Id*.) Ferris replied he did not have to leave because he had done nothing wrong and, as the matter escalated, Chief Guiberson told him he was under arrest. (*Id*.) Ferris testified he did not put his arm around Chief Guiberson's head and asserted the officer hit his head because he failed to properly execute his take-down maneuver. (*Id*.) Several of Ferris' witnesses testified that they did not see Ferris place the officer in a headlock. (*Id*. at 608-887.)

Ferris presented testimony from a medical doctor about the effects of concussions, a former police officer about arrest techniques, and a kinesiologist professor who believed Chief Guiberson fell to the ground and hit his head because he did not properly execute a take-down maneuver. (Tr. at 608-1130.)

In his closing argument, Ferris argued that the UMW Dean of Students lied about what she observed to frame Ferris. (Tr. at 1226-36.) Ferris further argued that Chief Guiberson came after him because he brought up the 22-year-old incident and asserted that after he failed to take Ferris to the ground, Chief Guiberson was embarrassed and took it out on Ferris. (*Id*.)

The jury found Ferris guilty of disorderly conduct, failure to disperse, and resisting arrest and not guilty of assault on a peace officer. (Tr. at 1268.)

STANDARD OF REVIEW

This Court applies an abuse of discretion standard when reviewing a trial court's ruling on a motion to amend the information. *State v. LaFournaise*, 2022 MT 36, ¶ 15, 407 Mont. 399, ___ P.3d ___. "A district court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *LaFournaise*, ¶ 15.

When a defendant requests this Court to review an unpreserved issue through plain error, the review is discretionary and should be applied "sparingly on a case-by-case basis." *State v. Stutzman*, 2017 MT 169, ¶ 23, 388 Mont. 133, 398 P.3d 265. Plain error may be invoked if the appellant carries "the heavy burden of firmly convincing this Court" that the alleged error implicates a fundamental right and that failing to review the alleged 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." *LaFournaise*, ¶ 17.

SUMMARY OF THE ARGUMENT

Ferris cannot establish that he was denied fundamentally fair procedures throughout this case. The court correctly applied Mont. Code Ann. § 46-11-205 when it granted the State's motion to amend the information three months before trial which was based on the same facts originally alleged. The court correctly determined that probable cause supported all four counts, Ferris' arraignment on the amended information was not unreasonably delayed, and Ferris was not denied a reasonable opportunity to prepare for trial.

When the State sought to amend the information three months before trial, it did so after further review of its case and determination that the facts presented in its original information supported additional applicable legal theories. There is absolutely no evidence that the State sought to amend its information for any nefarious purpose and Ferris' accusation of prosecutorial vindictiveness is wholly unsupported. Ferris offers no legal authority for his claim that the civil principles of equity—estoppel and wavier—apply in criminal proceedings to preclude the State from amending its original charging document. Nor has Ferris pointed to any legal authority that "pre-arraignment delay" is an appropriate factor to consider when evaluating the State's motion to amend its information.

Ferris has not carried his heavy burden to firmly convince this Court that plain error is warranted to consider the district court's failure to *sua sponte* provide

the jury with a specific unanimity instruction for Count IV. While Ferris' claim implicates a fundamental right to a unanimous verdict, he cannot establish that if this Court fails to consider his unpreserved claim that it will result in a manifest miscarriage of justice, leave unsettled a question of fundamental fairness, or compromise the integrity of the judicial process.

Ferris was not entitled to an unanimity instruction for the alternative differing means of establishing disturbing the peace (*e.g.*, quarrelling/fighting or threatening/offensive/profane language) because they are not separate crimes. Instead, they establish a common element and "reasonably reflect notions of equivalent blameworthiness or culpability." Moreover, the events associated with Count IV, disorderly conduct, occurred so closely in time and physical proximity and involved the same players and issues, that they essentially merged into a continuing course of conduct. Under the circumstances of this case, Ferris has failed to establish that plain error review is warranted to consider the lack of a specific unanimity instruction for Count IV.

ARGUMENT

I. The district court correctly denied Ferris' motion to dismiss the amended information.

A. Additional relevant facts and procedure

On July 17, 2020, the State filed a motion to amend the information. (Doc. 60.) The proposed changes expanded the alleged means by which Ferris disturbed the peace to include quarrelling/fighting. (*Id*.) The court granted the State's motion to amend the information on July 20, 2020. (Doc. 61.)

The court's order noted that under Mont. Code Ann. § 46-11-205, an information may be amended in matters of substance at any time, but not less than five days prior to trial. (Doc. 61.) The court determined that the facts alleged in the original motion and motion to amend constituted probable cause for the four charges alleged. (*Id*.) The court sought input from defense counsel on setting an arraignment on the amended information and granted Ferris leave to file a supplemental brief in support of his June 23, 2020 motion to dismiss Count IV. (*Id*., Doc. 64.) The court arraigned Ferris on the amended information on August 17, 2020. (Docs. 74.)

Two days later, Ferris filed a Motion to Dismiss State's Amended Information and Vacate Order Granting Leave. (Doc. 79.) Ferris faulted the court for granting the State's motion to amend without giving Ferris the opportunity to respond and asserted the court abused its discretion by granting the motion. (*Id*.) Ferris

characterized the State's decision to amend Count IV as creating "pre-arraignment delay." (*Id*.) Next, relying upon the doctrines of waiver and estoppel, Ferris argued that the State could not be permitted to file a motion to amend the information because the State had indicated it had no pretrial motions on the omnibus form. (*Id*.) Finally, Ferris asserted that the State's motion to amend constituted vindictive prosecution in retaliation for Ferris' constitutional challenge to Count IV. (*Id*.)[3]

The State opposed Ferris' motion, noting that it was filed three months before trial, was based on the same alleged facts as in the original motion to file an information, and sought only to add "quarrelling, fighting, or offering to fight" (*e.g*., subsection (1)(a)(i) of the disorderly conduct charge) to Count IV as an alternative means to establish disturbing the peace. (Doc. 82.) The State explained that while preparing for trial and responding to Ferris' various motions, it "became aware of the incongruity of the Disorderly Conduct allegation as charged" and the alleged facts. (*Id*. at 2.) The State disagreed that estoppel applied or that "pre-arraignment delay" was relevant to whether the court properly granted the State's motion to amend the information. (*Id*.)

[3]On June 23, 2020, Ferris had filed a motion to dismiss Count IV, arguing that the disorderly conduct statute was an unconstitutional restriction on his right to free speech and was also facially overbroad and vague. (Doc. 38.) The State responded and defended the constitutionality of the statute and, on September 14, 2020, the court denied Ferris' motion to dismiss Count IV on constitutional grounds. (Docs. 56, 88.)

In his reply brief, Ferris maintained his original arguments and stated that since the State did not address his estoppel argument and "pre-arraignment delay," those arguments were well-taken. (Doc. 84.)

On September 21, 2020, the district court entered its order denying Ferris' motion to dismiss the amended information and vacate order granting leave to file the amended information. (Doc. 101.)[4] First, relying on *United States v. Goodwin*, 457 U.S. 368, 378 (1982), the court rejected Ferris' claim that the State's decision to amend the information constituted presumptive vindictive prosecution. (*Id*. at 5-7.) The court noted further that, even if a presumption of vindictiveness was present, the State had overcome the presumption with objective information explaining why it chose to amend the information. (*Id*.)

Second, the court addressed Ferris' complaint that he was not granted the opportunity to respond to the State's motion to amend the information, noting that Ferris cited no authority to support his argument. (Doc. 101 at 7-9.) The court applied Mont. Code Ann. § 46-11-205, pointing out that Ferris did not dispute the court's finding of probable cause or claim that his arraignment was not brought

[4]A week earlier, the district court issued the following orders on Ferris' pretrial motions: order denying motion to dismiss Count IV based on constitutional challenge to disorderly conduct statute; order denying motion to dismiss based on alleged vindictive prosecution; denied motion to dismiss Counts I, II and III for lack of probable cause; denied motion in limine to preclude State from referring to evidence that Ferris had consumed alcohol on the night of March 4, 2019. (Docs. 88, 89, 90, 93.)

"without unreasonable delay." (*Id*.) Regarding Ferris' apparent claim that he was not given reasonable time to prepare a defense, the court again noted that Ferris failed to assert any supporting authority that requires the court to consider possible prejudice when granting the State leave to file an amended information three months before trial. (*Id*.)

Third, the court considered Ferris' claim of "pre-arraignment delay," again noting the lack of any authority requiring the court to consider such a factor when applying Mont. Code Ann. § 46-11-205. (Doc. 101 at 9-12.) After detailing that Ferris was arraigned on the amended information pursuant to defense counsel's request, the court concluded there was no unreasonable delay. (*Id*.)

Fourth, the court addressed Ferris' complaint about the elapsed time between the date of the incident (March 4, 2019) and the amended information being filed (July 20, 2020) and his claim that the delay violated his due process rights (ability to present a defense). (Doc. 101 at 9-12.) The court noted that the amended charge was based on the same information and reports that existed at the time of the original information. (*Id*.) The court concluded Ferris was provided a reasonable period of time to prepare for trial, which was three months away, and declined to consider Ferris' passing reference to a speedy trial violation. (*Id*.)

Finally, the court concluded that Ferris offered no authority for his claim that the principles of estoppel apply to criminal procedure or that an omnibus hearing

order would supersede the State's statutory authority to file a motion to amend an information. (Doc. 101 at 12.)

B. The district court did not abuse its discretion when it denied Ferris' motion to vacate the order granting the State leave to file an amended information and dismiss the amended information.

Just as in the district court proceedings, Ferris again fails to provide relevant legal authority for his claims that the court erred by not vacating its order granting the State leave to file an amended information and dismissing the amended information. (Opening Brief (Br.) at 10-11.) This Court has "repeatedly held that it is not this Court's obligation to conduct legal research on behalf of a party or to develop legal analysis that might support a party's position." *State v. Cybulski*, 2009 MT 70, ¶ 13, 349 Mont. 429, 204 P.3d 7; Mont. R. App. P. 12(1)(f). Ferris includes no legal authority for applying alleged "pre-arraignment delay" or how civil law principles usurp Montana's criminal procedure statutes.

All the cases Ferris cites to are civil cases, and he offers no authority to justify applying civil law principles in Montana criminal cases. (Br. at 11-13.) While Ferris cites a few cases concerning estoppel and waiver, none of those cases apply to the circumstances presented. The waiver cases cited by Ferris concern waiver of attorney-client privilege, and Ferris offers no legal authority that the State waives its statutory right to file a motion to amend the information if it had not anticipated needing to do so at the omnibus hearing. The estoppel case

Ferris cites was also a civil case controlled by the principles of equity under judicial estoppel.

Just as the district court noted, Ferris fails to advance any authority that the omnibus hearing order supersedes the State's specific statutory authority to amend an information pursuant to Mont. Code Ann. § 46-11-205. Contrary to Ferris' claim, the State did not "gain a litigation advantage" (Br. at 13) by amending the information to reflect the alternative means by which Ferris disturbed the peace that had always been present in the alleged facts.

Finally, the district court correctly applied the principles of alleged vindictive prosecution. If the State subjects a defendant to more serious charges arising from the same facts in response to a defendant exercising his statutory or constitutional rights, there is an appearance of prosecutorial vindictiveness, but not necessarily vindictiveness in fact. *State v. Knowles*, 2010 MT 186, ¶¶ 31-35, 357 Mont. 272, 239 P.3d 129 (after noting parties were not in a "standard 'pretrial' plea bargaining situation" given the mistrial and no new facts surfaced following mistrial, Court found there was an "appearance and reasonable likelihood of prosecutorial vindictiveness" when State amended information to more serious offense); *State v. Ridge*, 2014 MT 288, ¶ 12, 376 Mont. 534, 337 P.3d 80 (held, prosecution not vindictive when State charged defendant with two counts of bail

jumping for his failure to attend proceedings related to other charges after plea negotiations broke down).

Contrary to Ferris' argument, this situation is nothing like *Knowles*. After Knowles' first trial on assault on a minor ended in a hung jury, the State advised Knowles that if he did not plead guilty to that offense, it would amend the charge to assault with a weapon. *Knowles*, ¶¶ 31-37. First, this Court determined there was an appearance of prosecutorial vindictiveness given the procedural posture (after first trial). *Id*. Next, this Court determined there had been no new information or facts to inform the State's charging decision so there was a reasonable likelihood that the State increased the charge in an effort to deter Knowles from exercising his right to a second trial. *Id*. Accordingly, this Court reversed Knowles' conviction based on the "reasonable likelihood of a vindictive prosecution." *Id*. ¶ 36

The facts presented here do not align with *Knowles* in any way and Ferris offers only unsupported accusations that the State sought to amend in retaliation of his motion to dismiss on constitutional grounds. The State sought to amend the information three months before the trial based on its assessment of the facts and appropriate legal theories. The circumstances presented here were addressed by the United State Supreme Court in *Goodwin*:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins--and certainly by the time a conviction has been obtained--it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

Goodwin, 457 U.S. at 380-81.

Unlike *Knowles*, where, following a mistrial, the State charged a more serious offense that quadrupled the penalty after the defendant declined to plead guilty on the original offense, here, the State simply amended Count IV of the information to coincide with the facts it had alleged all along; the State did not "up the ante."

In *Knowles*, this Court concluded that the State improperly increased the charge in an effort to deter Knowles from exercising his right to a second jury trial. Here, Ferris' claim that the State amended the information in retaliation for his motion to dismiss Count IV is wholly speculative. Moreover, as the district court noted, the State provided a rational explanation for seeking to amend the

Information. *See Goodwin*, 457 U.S. at 382 (the original information "may not reflect the extent to which an individual is legitimately subject to prosecution").

The district court correctly applied the relevant law when it determined that the State had not engaged in prosecutorial vindictiveness when it amended Count IV. The district court also correctly applied Mont. Code Ann. § 46-11-205 when it denied Ferris' motion to vacate that order. Ferris had not established that its order granting leave to file an amended information was issued incorrectly because probable cause supported the amended information, Ferris was arraigned without unreasonable delay, and Ferris was afforded a reasonable time to prepare a defense.

Ferris has not established that the district court "act[ed] arbitrarily without the employment of conscientious judgment or exceed[ed] the bounds of reason" when it denied his motion to vacate the order granting the State leave to file the amended information or that he suffered a "substantial injustice" as a result. *LaFournaise*, ¶ 15.

II. Ferris has not established that plain error review is warranted to consider the lack of a specific unanimity instruction for Count IV.

When settling the jury instructions, the district court agreed that the State's proposed instruction Nos. 17 and 18 properly stated the law for the disorderly conduct charge and refused Ferris' proposed instruction Nos. 12 and 16 because

they included additional elements not charged by the State. (Docs. 185-88; Tr. at 1154-87.) Thus, the jury was instructed that the offense of disorderly conduct occurs when someone "knowingly disturbs the peace by[:] quarrelling, challenging to fight, or fighting; or by using threatening, profane, or abusive language." (Doc. 185, JI Nos. 19-20.) Ferris does not challenge Jury Instruction Nos. 19 and 20 or that the court erred in rejecting his offered instructions.

In its general instructions, the court instructed the jury as follows:

> Each count charges a distinct offense. You must decide each count separately. The Defendant may be found guilty or not guilty of any or all of the offenses charged. Your finding as to each count must be stated in a separate verdict.
>
> As to each count, the law requires the jury verdict to be unanimous. Thus, all 12 of you must agree in order to reach a verdict on each count whether the verdict be guilty or not guilty.

(Doc. 185, JI No. 2.13.) Ferris did not propose an unanimity jury instruction and did not raise any objection to the lack of a specific unanimity instruction for Count IV. (Tr. at 1154-87.)

Since Ferris failed to preserve this issue for appeal, Ferris requests this Court invoke the doctrine of plain error review to consider his jury instruction claim. *State v. Gallagher*, 2005 MT 336, ¶ 13, 330 Mont. 65, 125 P.3d 1141 (when no objection made to jury instruction at issue, Court must first decide if exercising plain error review is appropriate). If application of the plain error doctrine is unwarranted, this Court "need not address the merits of the alleged error."

Stutzman, ¶ 23. Ferris' arguments to this Court failed to meet his heavy "burden of firmly convincing this Court" that plain error review is warranted. *LaFournaise*, ¶ 17.

The State agrees that Ferris has met the first prong of plain error review by asserting the issue implicates a fundamental right; a defendant's right to a unanimous verdict is explicit in the Declaration of Rights in Montana's Constitution. Mont. Const. art. II, sec. 26. However, under the circumstances of this case, Ferris has not carried his heavy burden to demonstrate that failing to review the alleged 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." *LaFournaise*, ¶ 17.

Ferris was charged with disorderly conduct under Mont. Code Ann. § 45-8-101(1)(a) for "knowingly disturb[ing] the peace." That statute sets out nine alternative means by which a person "disturbs the peace," the common, or principle, element of disorderly conduct subsection (1)(a). Mont. Code Ann. §§ 45-8-101(1)(a)(i) through (ix). Alternative means of satisfying the common element of an offense do not require a specific unanimity instruction. *See Kills on Top v. State*, 273 Mont. 32, 55-56, 901 P.2d 1368, 1383-84 (1995) (held, no unanimity instruction required for the alternatives which establish the common element of restraint in aggravated kidnapping charge).

As this Court has explained, it is erroneous to presume that each alternative listed in a statute represents a separate element to independent offenses, recognizing that law makers "frequently enumerate alternative means of committing a crime without intending to define separate elements of separate crimes." *State v. Weldy*, 273 Mont. 68, 77, 902 P.2d 1, 6 (1995) (citing *Schad v. Arizona*, 501 U.S. 624, 635-36 (1991). In *Schad*, the Supreme Court held that a jury does not need to be instructed "on which of the alternatives it has based the defendant's guilt, . . . even where there is no indication that the statute seeks to create separate crimes," explaining that unanimity instruction not required where alternatives "reasonably reflect notions of equivalent blameworthiness or culpability." *Schad*, 501 U.S. at 635-36, 643.

This Court applied *Schad* in *Kills on Top* when it determined that in the aggravated kidnapping offense the legislature identified two alternative means of satisfying the common element of restraining another person: secreting or holding the person in isolation; or use or threatening to use physical force. *Kills on Top*, 273 Mont. at 55-56, 901 P.2d at 1383-85. This Court held that Kills on Top had not "demonstrate[d] that the alternatives are so morally disparate as to represent inherently separate offenses," and thus, his counsel was not ineffective for failing to seek unanimity instruction for each alternative. *Id*. The same is true here. Ferris has not demonstrated that the nine alternatives for establishing

disturbing the peace "are so morally disparate as to represent inherently separate offenses."

Ferris relies upon various federal cases. (Br. at 18-21.) However, those cases are distinguishable and not persuasive authority. First, the standard of review applied in *United States v. Holley*, 942 F.2d 916 (5th Cir. 1991), was abuse of discretion, not plain error review and concerned alleged perjury statements in two different depositions. In the other federal cases cited by Ferris, the courts focused on concerns with a genuine possibility of jury confusion when the facts could permit multiple ways of satisfying not only a single element of a charged crime, but could permit finding entirely separate offenses directed at different victims. *See, e.g., United States v. Payseno*, 782 F.2d 832, 837 (9th Cir. 1986) (specific instruction required where evidence indicated three acts of extortion directed at separate victims, occurring at different times and locations and involving different methods of communicating threats); *United States v. Echeverry*, 698 F.2d 375, 377 (9th Cir. 1983) as modified, 719 F.2d 974 (9th Cir. 1983) (specific instruction required because evidence of two separate conspiracies separated by several months).

Those federal cases also concerned principle or common element of the charged offenses, not alternative means for establishing the common element as

this Court discussed in *Kills on Top*. *See, United States v. Jerome*, 942 F.2d 1328 (9th Cir. 1991) (conspiracy charge required government to establish defendant worked with five different people as element of offense; on appeal, government conceded five of alleged conspirators could not count among alleged people defendant organized; held, lack of unanimity instruction created genuine possibility of jury confusion); *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988) (held, plain error review warranted because of several factors including pretrial motions that pointed out issue, jury's question during deliberation established juror confusion, and fact one count of falsifying tax documents alleged multiple statements that could constitute element of offense). Ferris' reliance upon these federal cases is not persuasive.

Ferris' reliance upon *Weldy* is also not compelling. Unlike *Kills on Top*, in *Weldy* this Court addressed two separate offenses defined within felony assault under Mont. Code Ann. § 45-5-202(2) (1995): person commits felony assault if that person causes either (a) bodily injury with a weapon or (b) reasonable apprehension of bodily injury with a weapon. *Weldy*, 273 Mont. at 77-79, 902 P.2d 7-8. This Court reversed Weldy's conviction for one count of felony assault when the trial court failed to include an unanimity instruction where the State had alleged Weldy violated "§ 45-5-202(2)(a) and (b), MCA," since subsections (a) and (b) were independent common elements of felony assault and it

was impossible to determine if the jury unanimously agreed on which element of felony assault on which it determined guilt. *Id.*

The situation presented here aligns with this Court's analysis in *Kills on Top*, not *Weldy*. Unlike *Weldy*, where two separate elements of felony assault were at issue, here the subsections at issue, (1)(a)(i) and (iii), were not the principle, common elements of disturbing the peace. Rather, just as this Court recognized the two alternatives for establishing the *element* of restraint in aggravated kidnapping in *Kills on Top*, here subsections (1)(a)(i) and (iii) are alternative means for establishing a common element, disturbance of the peace.

Ferris was not entitled to an unanimity instruction for Count IV. Thus, he cannot establish that the court's failure to *sua sponte* give an unanimity instruction for Count IV resulted in a manifest miscarriage of justice or called into question the fundamental fairness of his trial. Moreover, the specific facts of this case, particularly the nature of the events, which occurred in close physical and chronological proximity, further support that plain error is unwarranted.

When determining whether "multiple acts or material facts alleged under a single count require a specific unanimity instruction, the key inquiry is 'whether the acts are so closely related in time, location, and nature that they form part of the same transaction or course of conduct, rather than completely independent

occurrences.'" *State v. Wells*, 2021 MT 103, ¶ 22, 404 Mont. 105, 485 P.3d 1220 (in DUI case, unanimity instruction not required when acts of driving truck until it stalled and sitting behind wheel trying to restart truck "merged into a single 'continuous running offense'"). *See also, State v. Harris*, 2001 MT 231, ¶ 15, 306 Mont. 525, 36 P.3d 372, *overruled on other grounds* by *Robinson v. State*, 2010 MT 108, 356 Mont. 282, 232 P.3d 403 (determining that "persistent illegal acts" of incest over an eight-year period "were so frequently perpetuated and so closely connected as to be properly viewed as a single, continuous, running offense"); *State v. Dahlin*, 1998 MT 299, ¶¶ 26, 30, 292 Mont. 49, 971 P.2d 763 (declining to extend plain error review over specific unanimity argument where the state supported a perjury charge by alleging defendant had made two false statements on the same day, at the same trial); *State v. Clark*, 2005 MT 330, 330 Mont. 8, 125 P.3d 1099 (Mont. Code Ann. § 45-2-101(67) (2001) allowed for two alternate means of satisfying the sexual contact element of sexual assault under Mont. Code Ann. § 45-5-502(1); held, the statute did not articulate two separate offenses, so plain error not invoked to consider if unanimity instruction should have been given). *But see, State v. Weaver*, 1998 MT 167, ¶¶ 34-35, 290 Mont. 58, 964 P.2d 713 (reversed convictions on sexual assault based on vague series of alleged illicit acts spread over a lengthy period of time that lacked description of a specific incident).

The situation presented does not align with *Weaver* and is more akin to *Dahlin, Clark,* and *Wells*. Unlike *Weaver*, the facts supporting Count IV were specific in place, time, and manner; Ferris quarreled with and directed profane language at Chief Guiberson in both the stands and on the court within a matter of minutes. Ferris' conduct constituted a "continuous, running offense." Ferris cannot establish how a manifest miscarriage of justice will occur if this Court does not consider the court's failure to *sua sponte* offer an unanimity instruction for Count IV through the sparingly-used doctrine of plain error review.

This Court has declined to exercise plain error review in cases where specific unanimity instructions were not given. *See Gallagher, supra; Dahlin*, *supra*; *Clark*, *supra*; *State v. Wilson*, 2007 MT 327, 340 Mont. 191, 172 P.3d 1264; *State v. Auld*, 2006 MT 189, 333 Mont. 125, 142 P.3d 753, *overruled on other grounds by Whitlow v. State*, 2008 MT 140, 343 Mont. 90, 183 P.3d 861; *State v. Gray*, 2004 MT 347, 324 Mont. 334, 102 P.3d 1255; *State v. Harris*, 1999 MT 115, 294 Mont. 397, 983 P.2d 881 (lack of unanimity instruction for incest count not exceptional case warranting plain error review; no risk of genuine possibility of jury confusion); *State v. Chilinski*, 2014 MT 206, ¶ 19, 376 Mont. 122, 330 P.3d 1169; *State v. Hanna*, 2014 MT 346, 377 Mont. 418, 424 P.3d 629 (failure to give unanimity instruction for methods of committing robbery did not compromise integrity of proceedings).

Just as in those cases, Ferris was not denied a fundamentally fair trial. Ferris cannot demonstrate that failure to consider the lack of a specific unanimity instruction for the two alternative means to establish the common element of disturbing the peace would result in manifest injustice. Ferris has not met his burden to "firmly convince this Court" that plain error review is necessary to consider the jury instructions. *LaFournaise*, ¶ 17.

CONCLUSION

This Court should affirm Ferris' three misdemeanor convictions.

Respectfully submitted this 29th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,429 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-29-2022:

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