IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0356

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT MARTIN ARTHUN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable John C. Brown, Presiding

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STATEMENT OF THE ISSUE

Whether the district court properly ordered Arthun to pay $11,420.13 in restitution after a jury convicted Arthun of felony criminal mischief for damaging the property of two people that resulted in a pecuniary loss in excess of $1,500, the State presented substantial evidence at sentencing supporting the restitution amount, and Arthun withdrew his objection regarding his ability to pay restitution.

STATEMENT OF THE CASE

The State of Montana charged Appellant, Robert Martin Arthun (Arthun), by Information with Criminal Mischief, a felony, in violation of Mont. Code Ann. § 45-6-101, on January 15, 2020. The Information alleged as follows:

> Count I, Criminal Mischief, a Felony, in violation of § 45-6-101, MCA, committed on or about March 18, 2019, when the defendant, Robert Arthun, knowingly or purposely injured, damaged, or destroyed property of another without consent, when he broke and damaged parts of vehicles belonging to Douglas and Keith Nelsen, and by such criminal mischief caused a pecuniary loss of more than $1,500.

(Doc. 3.) Specifically, the affidavit in support of the Information alleged that Arthun had damaged three vehicles owned by Doug Nelsen (Doug) and two vehicles owned by Keith Nelsen (Keith). (Doc. 1.)

The jury ultimately convicted Arthun of criminal mischief that resulted in a pecuniary loss in excess of $1,500. (Doc. 55.) Arthun now appeals the district court's order imposing restitution for the five damaged vehicles. (Doc. 63 at 6.)

STATEMENT OF THE FACTS

Around 10:30 p.m. on March 18, 2019, Doug was watching television in his apartment when he heard what sounded like "metal touching metal." (3/24/21 Tr. at 208-10.) At first, Doug thought that the noise was his next-door neighbor, who is a contractor, putting tools in the back of his pickup. (*Id*. at 210.) But, after the noise lasted for 10 to 15 minutes, Doug became suspicious and decided to check out the parking lot. (*Id*. at 210-11.) After Doug exited his apartment, turned on the outside light, and walked to the top of the stairs, he observed a person between Doug's Chevrolet Astro van and Ford Mustang. (*Id*. at 211, 218.)

Doug almost immediately recognized the person as Arthun. (*Id*. at 211-12.) Having gone to school together, Doug and Arthun had been friends for 30 to 35 years. (*Id*. At 213.) Doug helped Arthun earn employment with Avis, where Doug and his brother, Keith (collectively Nelsen brothers), also worked part-time. (*Id*. at 213; 3/25/21 Tr. at 7.) Because Arthun had stopped by Doug's apartment on occasion, Doug did not think much of Arthun being there that night. (3/24/21 Tr. at 217.)

After Doug saw Arthun, however, Arthun walked away from Doug's vehicles, returning to Arthun's motorhome, which was parked in the middle of the street with the engine running. (*Id*. at 214-15.) Arthun then traveled approximately two miles across Belgrade to the residence Keith shared with his mother. (3/25/21 Tr. at 9, 37.) Arthun's vehicle stopped running in front of Keith's house around 12:20 a.m. on March 19, 2019. (*Id*. at 37.)

Instead of asking Keith for assistance, Arthun called his brother, Paul Arthun (Paul), who at that time lived in Manhattan, MT. (*Id*. at 36-38) Around the time Arthun's vehicle stalled out, Keith heard "banging and clanging" noises outside his house. (*Id*. at 9.) Paul arrived to help Arthun around 1 a.m. (*Id*. at 40.) Paul did not see anyone else outside of Keith's house. (*Id*. at 46.)

Later that morning when Doug went outside to start his vehicle, he "noticed car parts strewn all over the parking lot." (3/24/21 Tr. at 217.) Both of the back tires on Doug's Astro van were flat preventing Doug from being able to drive to work that day. (*Id*.) Doug then noticed that the review mirrors on the Astro van had been broken, the wipers were bent, the gas cap was missing, the door handles had been ripped off, and the outside paint had been scratched. (*Id*. at 219.) Doug noticed similar damage to his Mustang. (*Id*.) There were also pry marks on the Astro van's front hood and snip marks on the fenders of Doug's Mustang. (*Id*.) No

other vehicles in the parking lot of the apartment complex were reported damaged. (*Id*. at 168.)

Across town, Keith also went outside to start his Dodge Dakota before heading to work. (3/25/21 Tr. at 10.) When Keith went to activate his windshield wipers, he noticed that the "wiper was clear away from the windshield . . . bent clear in two." (*Id*.) Like Doug's Astro van, Keith's Dodge Dakota had two flat tires. (*Id*.) Keith also noticed that the driver's side door handle had been torn off, the fuel door was bent, there were scratches on the driver side rearview mirror, and the tailgate latch was broken. (*Id*. at 13-14.) Keith noticed similar damage to his Nissan. (*Id*. at 15.)

Doug's Pontiac Grand Prix, that was parked at Keith's residence, had also been damaged. (3/24/21 Tr. at 229.) Like Doug's other vehicles, Doug's Pontiac had been keyed, the rearview mirrors had been ripped off, two of the door handles were missing, the gas cap door had been bent, and the windshield had been broken. (*Id*. at 229-30.) Despite being parked near Doug's Pontiac and Keith's two vehicles, the Nelsen brothers' mother's vehicle was not damaged. (3/25/21 Tr. at 15-16.)

Within days of the Nelsen brothers' noticing and reporting the damage to law enforcement, Collision Center of Belgrade (CCB) provided the Nelsen brothers with preliminary repair estimates for the Pontiac, Mustang, Astro van, and Dodge Dakota. (3/25/21 Tr. at 76-77.) For the Pontiac, CCB estimated it would

cost $4,484.56 to repair the vehicle, which resulted in the vehicle being a "total loss" because the cost of repairs exceeded the vehicle's value. (*Id*. at 83-84.) Similarly, CCB noted that the Astro van was a "total loss" based on the estimated cost of repairs being $4,358.19. (*Id*. at 82-83.) CCB estimated it would cost $5,219.98 to repair Doug's Mustang and $489.50 to repair Keith's Dodge Dakota. (*Id*. at 83-85.)[1] None of the estimates included the cost of fixing each vehicle's paint damage. (*Id*.)

At trial, Doug testified that he believed Arthun damaged Doug's vehicles because he was upset with Doug stopping lending Arthun money. (3/24/21 Tr. at 238.) As for why Arthun damaged Keith's vehicle, Keith explained that, before Arthun damaged the vehicles, he had angered Arthun by suggesting that Arthun "buy a cheap car because [Keith] was tired of running [Arthun] around" everywhere. (3/25/21 Tr. at 20.)

At the close of the State's case, Arthun moved the district court "to reduce the charge to a misdemeanor, and remove any mention of the pecuniary loss from the jury instructions or the charges" based on "information provided is not sufficient to establish the value of any of the four vehicles." (*Id*. at 105.) The district court denied Arthun's motion. (*Id*. at 107-08.)

[1]By the time of trial, Keith had paid CCB $262.34 to repair some of the damage to his Dodge Dakota. (3/25/21 Tr. at 87.)

Later on, the parties settled jury instructions, with both parties in agreement that the district court should instruct the jury on the lesser included offense of misdemeanor criminal mischief. (*Id*. at 135-37.) The district court then instructed the jury, which, in relevant part, informed the jury that:

> The State accuses Mr. Arthun of Criminal Mischief. You may find Mr. Arthun guilty if the proof shows beyond a reasonable doubt the Defendant committed any one or more of such acts, but in order to find the Defendant guilty, all the jurors must agree that the Defendant committed the same act or acts. It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict.

(Doc. 53, Jury Instruction 13.)[2] Shortly thereafter, the jury returned a verdict finding Arthun guilty of criminal mischief that resulted in a pecuniary loss in excess of $1,500. (Doc. 55.)

The district court conducted a sentencing hearing on May 5, 2021. (Doc. 57.) After Keith testified that he had spent $1,222 in various repairs to his Dodge Dakota and Nissan, Arthun lodged three objections to the district court. (5/5/21 Tr. at 10.) First, Arthun objected to Keith's restitution request and the validity of Doug's affidavit requesting restitution. (*Id*. at 13.) Second, Arthun argued that he did not have the ability to pay restitution because he had no assets, was living with his ex-wife on discounted rent, and only had a take home monthly salary of $2,000. (*Id*. at 19.) Finally, Arthun argued that the district court could not

[2]Arthun proposed the continuous conduct instruction. (3/25/21 Tr. at 151.)

impose restitution for five vehicles because neither of the parties nor the district court knew "which acts or which vehicles damaged the jury actually came to a unanimous verdict upon" since the State charged the five criminal acts under one single count. (*Id*. at 20.)

In response, the district court continued the sentencing hearing to May 24, 2021, to allow sufficient time for a restitution hearing. (*Id*. at 26.) At that setting, the State provided the district court with the preliminary repair estimates and the Kelly Blue Book valuations for three vehicles: the Pontiac Grand Prix, Chevrolet Astro van, and Ford Mustang. (5/24/21 Tr. at 5.) The State also provided an invoice documenting that Doug had paid $396 in temporary repairs to make the Mustang useable and a new preliminary estimate that stated it would cost $3,060.91 to repair the Mustang. (*Id*. at 5-6.) Arthun provided the district court with the NADA valuations for those same three vehicles. (*Id*. at 10.)

Before the district court heard argument regarding the restitution amounts, the district court addressed Arthun's objection to the State requesting restitution for the five damaged vehicles based on the jury's verdict not requiring the jury to state which vehicles it had unanimously found Arthun had damaged. (*Id*. at 10-11.) Ultimately, the district court overruled Arthun's objection explaining, that "there was testimony at trial about individual vehicles being damaged" and no special verdict form was requested requiring the jury to state which vehicles Arthun had

damaged, nor had the district court witnessed such a special verdict form being given in a criminal matter. (*Id*.)

After hearing evidence and argument, the district court then discussed Arthun's ability to pay. (*Id*. at 28-29.) The district court acknowledged that the State's proposed findings argue that "there's a prima facie showing, based on the information in the PSI, that [Arthun] does have the ability to pay restitution." (*Id*. at 29.) Arthun's attorney agreed, stating that after reviewing with Arthun his "bank records in some detail . . . he would certainly be able to afford some nominal fee. So we will drop that [objection]." (*Id*.)

Accordingly, the district court found "based on the argument made in [the State's] Proposed Findings, which are based upon the undisputed information contained in the [PSI], that [Arthun] does have the ability to pay restitution." (*Id*. at 49.) Arthun did not contest this finding either before or after the district court imposed restitution in the amount of $11,420.13, allocated as follows: the State's requested $1,222 for Keith's Dodge and Nissan, the State's requested $5,219.98 for Doug's Mustang, the NADA valuation of $1,850 for Doug's Astro van, the NADA valuation of $3,125 for Doug's Pontiac, and the unobjected to $105.15 for Doug's rental car. (*Id*. at 50.) Given the amount of restitution imposed, the district court waived Arthun's assigned counsel fees. (*Id*. at 54.)

SUMMARY OF THE ARGUMENT

A preponderance of the evidence supported the district court ordering Arthun to pay $11,420.13 in restitution for the damage he caused to three of Doug's vehicles and two of Keith's vehicles. That amount appropriately took into consideration Arthun's ability to pay restitution, to which he conceded before the district court imposed restitution. The district court's restitution award also included $5,219.98 for Doug's Mustang, which substantial evidence supported because that was the estimated cost of repairs at the time Arthun had damaged the vehicle.

Furthermore, the sufficiency of the Information and the verdict form do not undermine the legality of the district court's restitution order nor are the challenges to either appropriate for appellate review because Arthun did not timely object to either during the district court proceedings. Nor would deficiencies to either deprive the district court of its statutory requirement to impose restitution after a person has been convicted of felony criminal mischief. Accordingly, the district court did not err when it imposed $11,420.13 in restitution.

STANDARD OF REVIEW

This Court reviews for legality a criminal sentence. *State v. Lodahl*, 2021 MT 156, ¶ 11, 404 Mont. 362, 491 P.3d 661. Because restitution awards

present a mixed question of law and fact, this Court employs *de novo* review. *State v. Cleveland*, 2018 MT 199, ¶ 7, 392 Mont. 338, 423 P.3d 1074.

This Court reviews for correctness the appropriateness of a district court imposing restitution. *Id*. This Court reviews for clear error a district court's findings of fact regarding the amount of restitution. *Id*. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the lower court has misapprehended the effect of the evidence, or if this Court's review of the record leaves the Court with the firm conviction that a mistake has been made. *Id*. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance. *State v. Aragon*, 2014 MT 89, ¶ 9, 374 Mont. 391, 321 P.3d 841 (internal quotations and citation omitted).

ARGUMENT

I. The district court properly imposed $11,420.13 in restitution after a jury convicted Arthun of felony criminal mischief based on evidence that Arthun had damaged five vehicles causing pecuniary loss in excess of $1,500.

When a person is convicted of criminal mischief, the district court must order restitution in an amount that takes into consideration the convicted person's ability to pay. Mont. Code Ann. § 45-6-101(2). Although restitution is an aspect of sentencing, imposed only once a defendant has been convicted, the purpose of

restitution is to "make victims whole, not to further punish offenders." *State v. Johnson*, 2018 MT 277, ¶¶ 28, 35, 393 Mont. 320, 430 P.3d 494 (citations omitted).

Essentially, "[r]estitution engrafts a civil remedy into a criminal proceeding and creates a procedural shortcut for crime victims who are entitled to a civil recovery against the offender." *State v. Dodge*, 2017 MT 318, ¶ 9, 390 Mont. 69, 408 P.3d 510 (citing *Aragon*, ¶ 16). Victims are "entitled to restitution for the full replacement cost of property taken, destroyed, harmed or otherwise devalued as a result of the offender's criminal conduct." *State v. Hill*, 2016 MT 219, ¶ 10, 384 Mont. 486, 380 P.3d 768 (internal quotations and citation omitted). Correspondingly, defendants are entitled to explain or rebut any information presented at the restitution hearing and may assert any defense available to the defendant "in a civil action for the loss for which the victim seeks compensation." *Aragon*, ¶ 16 (citations omitted).

On appeal, Arthun argues that it was illegal for the district court to impose restitution for all five vehicles because the jury's verdict did not indicate which vehicles the jury unanimously found Arthun had damaged, and alternatively substantial evidence did not support the district court imposing $5,219.98 in restitution for the damage Arthun caused to Doug's Mustang nor did the district court sufficiently take into consideration Arthun's ability to pay restitution.

A. The sufficiency of the Information or the verdict form do not undermine the district court's legal authority to impose restitution nor are challenges to either, under the guise of restitution, appropriate for appellate review.

Arthun argues that the district court could not legally impose restitution for the five vehicles a preponderance of the evidence supports Arthun damaged because of alleged deficiencies in the Information and verdict form, neither of which Arthun objected to below. (Appellant's Br. at 17-25.) "Failure to make a timely objection during trial constitutes a waiver of the objection . . . ." Mont. Code Ann. § 46-20-104(2). Here, Arthun had the ability to lodge a timely objection to the district court. and his failure to do so now precludes him from raising challenges to the verdict form and Information on appeal, even when veiled as challenges to the district court's restitution award. *See generally State v. Daniels*, 2019 MT 214, ¶ 24, 397 Mont. 204, 448 P.3d 511.

Nevertheless, if this Court determines that appellate review of Arthun's claim is appropriate, Arthun's arguments challenging the Information and verdict form, even if successful, do not equate to the district court committing legal error when it imposed $11,420.13 in restitution.

1. Information

As part of his argument on appeal, Arthun contends that because the Information failed to include the words "same transaction," the district court had

no authority to impose restitution for all five of the damaged vehicles. (Appellant's Br. at 23.)

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). This Court "read[s] the information, and the affidavit in support thereof, as a whole to determine the sufficiency of the charging documents." *State v. Wilson*, 2007 MT 327, ¶ 25, 340 Mont. 1919, 172 P.3d 1264 (citation omitted).

Here, although it did not use the specific words, the Information sufficiently informed Arthun that the offense was being charged as a "same transaction" crime. Additionally, in the affidavit filed in support of the motion for leave to file an information, the State alleged the specific facts supporting its theory that the damage caused to Doug's vehicles and then to Keith's vehicles in the same night were part of the same transaction. In other words, Arthun was reasonably apprised that the State, to establish a pecuniary loss in excess of $1,500, was aggregating the damage caused to Doug's vehicles and Keith's vehicles, which the State had the statutory authority to do. Arthun had more than enough time to prepare his defense to the charge as set forth in the Information and supporting documents. Accordingly, the Information not including the words "same transaction" did not prejudice Arthun's substantive rights. Nor does the absence of two words render meaningless the district court's statutory authority to impose restitution when at least a preponderance of the evidence supported the district court awarding restitution for the five damaged vehicles.

2. Verdict form

On appeal, Arthun contends that the district court would only have been able to impose restitution for the five vehicles if the jury's verdict stated it unanimously found that Arthun had damaged all five vehicles. (Appellant's Br. at 21-22, 25.) Not only does Arthun's contention impermissibly raise the burden of proving

restitution by a preponderance of the evidence to beyond a reasonable doubt, but it also disregards that the jury is not legally required to state which criminal acts it unanimously finds a defendant committed. Furthermore, if Arthun believed an unanimity instruction was necessary then he should have offered one. Assuming he had done so, and the district court refused, a successful appeal would have required a remand for retrial not for a new restitution hearing as Arthun requests.

To convict Arthun of felony criminal mischief, the State was required to prove, and the jury was required to find beyond a reasonable doubt, that Arthun had committed the elements of criminal mischief and that it resulted in a pecuniary loss in excess of $1,500. The statutes, and this Court's case law, do not require the jury to make additional findings. In fact, the jury instruction for continuous conduct, which Arthun proposed to the district court, and was provided to the jury, specifically informs the jury they do not have to state the acts that they agreed upon in their verdict. It only requires that they unanimously agree upon the act or acts that constitute criminal mischief. *See generally State v. Weaver*, 1998 MT 167, ¶ 39, 290 Mont. 58, 964 P.3d 713.

Furthermore, Arthun did not present his own special verdict form, nor did he object to the State's proposed verdict form. Because Arthun acquiesced to the alleged error he now challenges on appeal, this Court should not find that the district court erred as a matter of law when it imposed restitution for the five

damaged vehicles. *See generally State v. Reim*, 2014 MT 108, ¶ 28, 374 Mont. 487, 323 P.3d 880; Mont. Code Ann. § 1-3-207.

Arthun arguing on appeal that because the State had the burden of proving that Arthun committed criminal mischief, the State had the burden of presenting a special verdict form requiring the jury to make findings that the law does not require, does not negate that Arthun could have proposed his own verdict form or objected to the State's proposed verdict form. Nor does it deprive the district court of its authority to impose restitution where a preponderance of the evidence supports that a person's criminal conduct resulted in a pecuniary loss, which Montana law entitles a victim to be made whole for.

Finally, and despite Arthun's contention otherwise, this Court's decision in *In re B.W.*, 2014 MT 27, 373 Mont. 409, 318 P.3d 682, does not establish the district court, here, committed legal error by imposing restitution for all five vehicles. (Appellant's Br. at 24.) In *B.W.*, the State initiated youth court proceedings against several youths, including B.W., based on 200 reports of vandalism that occurred between December 22, 2011 and January 1, 2012. *B.W.*, ¶¶ 4-5. B.W. subsequently admitted to committing criminal mischief, a common scheme, but stated that he was only involved in vandalism acts that occurred on December 22 and 29. *Id*. ¶ 5. The district court then ordered B.W. to pay restitution in the amount of $78,702.09. *Id*. ¶ 8.

On appeal, B.W., in relevant part, challenged the district court's restitution order, arguing that he cannot be held jointly and severally liable for the full amount of restitution because he only admitted liability for two nights of the vandalism spree. *B.W.*, ¶¶ 12-13. This Court reversed, explaining that the State did not prove beyond a reasonable doubt that B.W. had committed the other acts of criminal mischief on the dates that were not December 22 or 29. *Id*. ¶¶ 21, 23, 31. Because there was no evidence presented that B.W. committed vandalism on the remaining nights, this Court found that the district court could not impose restitution for those nights. *Id*. ¶¶ 21, 27.

Arthun contends that his case is similar to *B.W.* because he did not admit guilt to vandalizing the five vehicles just as B.W. only admitted he participated in the vandalism that occurred on two nights. Notably, however, B.W. pled guilty, and in his factual admission, which was accepted by the State, he admitted criminal liability for only two nights, December 22 and 29. Furthermore, the district court in *B.W.* had found B.W. jointly and severally liable for the restitution along with his codefendants despite the State not establishing beyond a reasonable doubt B.W.'s involvement in the vandalism on the remaining dates. Arthun, on the other hand, went to trial where the State presented evidence establishing that Arthun, alone, had vandalized five vehicles as part of one count of criminal mischief occurring on one night within a short time span.

Additionally, the State's exercise of its discretion in charging only one count of felony criminal mischief, and the jury not being legally required to state which vehicles Arthun had damaged in its verdict, does not preclude the district court from imposing restitution to make whole the victims in this case. *See generally Wilson*, ¶ 39 (finding that although the State could have framed charges more specifically, charging separate counts for each act, it was not required to do so). And, in electing to charge only one count of criminal mischief, the State extended a favor to Arthun. If charged separately, evidence, the sufficiency of which Arthun does not challenge on appeal, would have supported the jury convicting Arthun of three counts of felony criminal mischief and two misdemeanor counts. Essentially, Arthun benefited from the State's charging discretion and now is attempting to use that benefit to the victims' detriment.

B. A preponderance of the evidence supported the district court ordering Arthun to pay $5,219.98 in restitution for the damage he caused to Doug's Mustang.

In support of its request for the district court to award restitution for Doug's Mustang, the State provided the district court with the preliminary estimate, that was prepared near the time the offense occurred, and indicated it would cost $5,219.98 to repair. (Ex. 3.) The State also provided an invoice from an auto body shop showing that Doug had paid $396 in repairs, that the State explained were "temporary" and "partial" in order to make the Mustang useable. (5/24/21 Tr. at 7,

16; Ex. 5.) And the State provided the updated preliminary estimate for the Mustang prepared after Doug had paid for the repairs that indicated it would cost $3,060.91. (Ex. 5.)

Based on the evidence, the State advocated that it was appropriate for the district court to impose restitution based on the initial estimate prepared within days of Arthun damaging Doug's Mustang. (5/24/21 Tr. at 22.) Arthun countered, arguing that the district court imposed restitution in the amount of $3,456.91, the amount indicated in the updated estimate plus the cost Doug spent on repairs. (*Id.* at 27.)

On appeal, Arthun contends that a preponderance of the evidence did not support the district court ordering Arthun to pay $5,219.98 in restitution for the damage caused to Doug's Mustang.[3] When "[p]resented with differing estimates, the court [is] required to make a determination as to what amount of restitution [is] supported by a preponderance of the evidence." *Aragon*, ¶ 16.

The district court did not misapprehend the effect of the evidence when it imposed $5,219.98, instead of $3,456.91, to make Doug whole for the damage Arthun caused to Doug's Mustang. Within days of Arthun committing the offense, Doug had a repair estimate created for his Mustang. That preliminary report

[3]Arthun does not challenge the sufficiency of the evidence supporting the restitution amounts ordered by the district court for the four other vehicles and Doug's rental car.

estimated that it would cost $5,219.98 to repair Doug's Mustang. Accordingly, a preponderance of evidence supports that, at the time the offense occurred, Doug was entitled to $5,219.98—the full replacement value of the Mustang—in restitution.

However, because two years lapsed between the date of the offense and the date the district court imposed restitution, Doug had to pay for the Mustang to be temporarily repaired. As a result of those repairs, the new estimate indicated that it would cost only $3,060.91 to completely repair the Mustang. The fact that Doug made temporary repairs to make the Mustang useable and those repairs resulted in a later repair estimate being lower than the initial one does not negate that a preponderance of the evidence supported that Doug would be made whole for his Mustang by the district court awarding restitution in the amount stated at the time the Mustang was damaged. The district court did not err when it imposed $5,219.98, instead of $3,456.91 in restitution for the Mustang. *See Aragon*, ¶ 9.

C. Because Arthun admitted that he had the ability to pay the restitution, this Court should not invoke plain error.

On appeal, Arthun contends that this Court should invoke plain error to review whether the district court sufficiently consider Arthun's ability to pay when it imposed $11,420.13 in restitution. (Appellant's Br. at 31-41.) In support of his argument, Arthun argues that Mont. Code Ann. § 45-6-101(2), which requires the district court consider a defendant's ability to pay, controls over the general

restitution statutes that requires the district court impose full restitution. (Appellant's Br. at 34-35.)

Montana Code Annotated § 45-6-101(2), however, does not preclude the district court from imposing full restitution so long as the convicted person has the ability to pay restitution. Because Arthun conceded he had the ability to pay, Arthun acquiesced to the error he complains of now on appeal, rendering plain error review inappropriate. However, even if this Court does review Arthun's claim, the district court conducted a sufficient inquiry into Arthun's ability to pay restitution.

Although at the first setting of the sentencing hearing, Arthun's counsel did object to restitution based on Arthun's ability to pay, by the second setting, Arthun's counsel withdrew his objection, explaining that after reviewing Arthun's bank records, Arthun had the ability to pay a nominal fee. This Court "will not put a district court in error for an action in which the appealing party acquiesced or actively participated." *Reim*, ¶ 28. "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.

Because Arthun withdrew his objection on ability to pay grounds, this Court should decline to review Arthun's claim on appeal. Furthermore, when Arthun did object originally on his ability to pay, Arthun still did not dispute the financial

information contained in the PSI. Nor did Arthun present any new information or explanation indicating he would be unable to pay the restitution at the second restitution hearing. Instead, Arthun dropped his earlier objection, explaining that, after review of his bank records, he could afford a nominal fee without alerting the district court as to what a nominal fee would entail. And, because Arthun did not lodge an objection that he would be unable to pay the $11,420.13 in restitution after the district court imposed it, common sense seemingly supports that Arthun considered that amount to fall within the fee range he conveyed to the district court he had the ability to pay.

Even if this Court finds that Arthun did not acquiesce to the error he now challenges on appeal, plain error review still is not appropriate. This Court 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, 396 Mont. 57, 443 P.3d 504. This Court, however, will sparingly invoke, on a case-by-case basis, 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*.

Arthun contends that plain error review is appropriate because the district court "unlawfully imposing a restitution obligation that Mr. Arthun was, in fact, unable to pay during the period of state supervision" implicates his fundamental rights under the Fourteenth Amendment and article II, section 17 of the Montana Constitution. (Appellant's Br. at 40.) And that this Court's failure to invoke plain error "could result in a manifest miscarriage of justice if he were to suffer punishment due to nothing more than poverty" and "would result in unfair, disparate results based on nothing more than Mr. Arthun's age, which could call into question the fundamental fairness of his sentencing." (*Id*. at 40-41.)

Because Arthun has not satisfied his burden, this Court should decline to invoke plain error review. Arthun's counsel dropped his objection to Arthun's ability to pay restitution after reviewing Arthun's bank records with him. In imposing its sentence, the district court found that Arthun resided with his ex-wife, he had no child support obligations for any dependent children, and he was currently employed. (5/24/21 Tr. at 46.) The district court then stated that "based on the argument made in [the State's] Proposed Findings, which are based upon the undisputed information contained in the [PSI], that Mr. Arthun does have the ability to pay restitution." (*Id*. at 49.) The record indicates that Arthun had $900 in debt, lived with his ex-wife for minimal rent, and had a monthly income of $2,000. (Doc. 58.) The district court, after imposing restitution, further waived the assigned

counsel fee based on the restitution obligation. (5/24/21 Tr. at 54.) The record accordingly does not support that the district court treated Arthun in a fundamentally unfair or arbitrary manner based on his financial circumstances as reported in the PSI, and agreed to by Arthun.

Nor does the record support that this Court affirming the district court's restitution award will result in disparate results because of Arthun's age. In support of this allegation, Arthun cites to this Court's decision in *In re K.E.G.*, 2013 MT 82, 369 Mont. 374, 298 P.3d 1151. The facts in *K.E.G.*, however, are entirely distinguishable from the facts of the instant matter. First, unlike here, imposing restitution in a youth court case permits the district court to consider the youth's age. *K.E.G.*, ¶ 12 (citations omitted). Second, the restitution amount imposed in *K.E.G.* was $78,702.09. *Id.* ¶ 11. Based on those circumstances, this Court reversed the district court's restitution order for failing to fully consider K.E.G.'s ability to pay. Because the record does not establish that Arthun will suffer a miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or may compromise the integrity of the judicial process, Arthun cannot establish that plain error review is appropriate.

Even if this Court does invoke plain error review, the district court appropriately considered Arthun's ability to pay when it imposed restitution. The district court reviewed Arthun's uncontroverted financial information before it

imposed restitution. Furthermore, the district court carefully considered the evidence and the applicable law when it imposed restitution for each of the vehicles that at least a preponderance of the evidence supported Arthun had damaged. And the district court acknowledged the significance of the restitution amount by waiving Arthun's appointed counsel fee. Finally, Arthun challenging the district court imposing restitution that makes whole each victim does not equate that the district court did not consider Arthun's ability to pay. The district court, therefore, did not err when it concluded that the record supported that Arthun had the ability to pay $11,420.13 in restitution.

CONCLUSION

The State respectfully requests that this Court affirm Arthun's conviction and sentence.

Respectfully submitted this 16th day of March, 2023.

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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 5,909 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, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-16-2023:

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