IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0143

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BENJAMIN EUGENE COLE JR.,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Robert L. Deschamps III, Presiding

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STATEMENT OF THE ISSUE

Whether this Court should exercise the sparingly used plain error doctrine to review the Appellant's unpreserved challenge to his misdemeanor conviction when he consented to a judge trial and the totality of the circumstances show he voluntarily, knowingly, and intelligently waived his right to a jury trial.

STATEMENT OF THE CASE

On February 2, 2022, the State charged the Appellant, Benjamin Eugene Cole, Jr. (Cole), in Missoula County Justice Court with misdemeanor partner or family member assault (PFMA), second offense, in violation of Mont. Code Ann. § 45-5-206. (Doc. 1 at 25-30.)[1] Cole pleaded not guilty and personally appeared at all pretrial hearings. (Docs. 1 at 23, 26 at 3-4, 14-15, 19-20.) During the initial omnibus hearing, Cole's counsel informed the district court that Cole intended to go to trial and requested more time to discuss with Cole whether he wanted "a judge or jury trial." (Disc 1, Track 3 at 00:25-00:45; Doc. 26 at 14-15.) During the continued omnibus on May 16, 2022, Cole's counsel informed the justice court

[1] On appeal to the district court, Cole filed the justice court record as Doc. 1 of the district court record. After Cole filed his notice of appeal, his appellate counsel requested additional justice court documents that were submitted as "Supplemental Justice Court Record" and noted as Doc. 26, which the State cites accordingly.

that Cole "would like to request a judge trial." (Disk 1, Track 4 at 00:20-01:00; Docs. 1 at 17-18, 26 at 19.)

The day before trial, Cole's counsel confirmed his client wanted a bench trial without objection from Cole. (Doc. 26 at 20.) After the trial on June 23, 2022, the judge convicted Cole of misdemeanor PFMA, second offense. (Docs. 1 at 9-11, 26 at 21-23.) On July 6, 2022, the judge imposed a 12-month deferred sentence. (Docs. 1 at 7-8, 26 at 3.)

Cole appealed to the district court and challenged his waiver of his right to a jury trial under the plain error doctrine. (Doc. 1 at 1-2, 5-6; Doc. 2.) The district court rejected Cole's request for plain error review. (Doc. 18.) The court explained that Cole had plenty of opportunities to object to the judge trial after he requested it, he did not do so, and the totality of the circumstances showed his waiver was voluntary, knowing, and intelligent. (*Id*.)

Cole appealed his conviction to this Court. (Doc. 20.)

STATEMENT OF THE FACTS

I. Pretrial proceedings

On February 2, 2022, the State charged Cole, in Missoula County Justice Court, with misdemeanor PFMA, second offense, in violation of Mont. Code Ann. § 45-5-206. (Doc. 1 at 25-30.)

During his initial appearance on February 2, 2022, the judge informed Cole of his rights, including the right to a trial by a jury or a judge. (Doc. 26 at 4; Disc 1, Track 1 at 2:45-5:00.)[2] The judge specified:

> And again, if there was a trial, either a judge or a jury would make the decision. If it's a jury, it's six people. All six of them have to agree that you committed the offense, that you committed the offense beyond a reasonable doubt before you could be convicted.

(*Id*. at 4:25-4:40.)[3] Cole confirmed that he understood his rights, he entered a not guilty plea, and the judge appointed Brian Yowell (Yowell) as counsel for Cole. (*Id*. at 4:35-5:05.) The judge released Cole on his own recognizance. (Doc. 26 at 4, 6.)

On April 6, 2022, Cole personally appeared for the initial hearing scheduled for an omnibus. (Doc. 26 at 14.) At the hearing, Yowell requested more time to discuss the case with Cole. (*Id*.; Disc 1, Track 2 at 00:20-01:00.)

On May 2, 2022, Cole personally appeared for the second hearing scheduled for an omnibus. (Doc. 26 at 15.) Yowell asked to continue the omnibus hearing to May 16, 2022. (*Id*.; Disc 1, Track 3 at 00:25-01:15.) Yowell informed the judge, "We are gonna set a trial. Mr. Cole and I need to figure out whether that's gonna

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[2] The justice court record includes audio recordings of the proceedings on three compact disks. The State cites to the disks accordingly and consistently with Cole's opening brief.

[3] The quotations of statements made during the justice court proceedings are based on the State's own transcription of the audio recordings submitted with the justice court record.

be a judge or jury trial." (Disc 1, Track 3 at 00:25-00:45.) The judge noted that Yowell had not filed an omnibus form. (*Id*. at 00:25-01:00.) Yowell informed the judge that he would file an omnibus form on the date of the hearing as well. (*Id*.) The judge continued the hearing and said, "Let us know what kind of trial and an omni and what sort of issues we're gonna have." (*Id*. at 01:00-01:15.) Yowell responded, "Yes, sir." (*Id*.) The judge directly addressed Cole, "Mr. Cole, stay in touch with Mr. Yowell. It's important that the two of you talk, uh, between now and then." (*Id*. at 01:10-01:25.) Cole responded, "Absolutely, your honor." (*Id*.) On May 16, 2022, Cole personally appeared for the omnibus hearing. (Doc. 26 at 19.) The judge introduced Cole's case and had the initial exchange with Cole's counsel:

> COURT: Today is the time and place set for the omnibus hearing in this case. However, additionally, the parties let me know at the last hearing that this would likely be set for trial today.
>
> YOWELL: Yes judge, and we would like to request a judge trial.
>
> COURT: OK.

(Disk 1, Track 4 at 00:20-01:00.) The judge reviewed the omnibus form Yowell had provided, noted the justifiable use of force defense included in the omnibus form, and asked, "Is the state content with a judge trial as well?" (*Id*. at 01:00-01:35; Doc. 1 at 17-18.) The State responded, "We are your honor." (Disk 1, Track 4 at

01:30-01:35.) Yowell signed the omnibus form, but he left the trial section of the form incomplete. (Doc. 1 at 17-18.) Cole did not sign the omnibus form. (*Id*.) After the judge discussed scheduling with the parties, he proposed a trial date of June 23, 2022, at 10 a.m. (Disk 1, Track 4 at 02:45-03:00.) In the background, Cole can be heard mentioning "CFS" and "access to his son when they find her," referring to his wife. (*Id*. at 03:00-03:25.) Yowell had the following exchange with Cole:

YOWELL: Well, we can discuss that. Let's talk about the date.

COLE: Oh, yeah.

YOWELL: Does that date work for you?

COLE: Yeah, thank you.

YOWELL: That date works for us, judge.

(*Id*.)

The judge said, "All right, so there will be a bench trial, uh, Thursday, June 23, 10 a.m. and we'll do a confirmation hearing then the day before, June 22, 10 a.m." (*Id*. at 03:30-03:45.) The judge directly addressed Cole, who had continued to speak to Yowell in the background. (*Id*. at 03:30-03:50.) Yowell redirected Cole and said, "Let's listen to this." (*Id*. at 03:45-03:55.) The judge ordered Cole to be personally present for trial and personally present or on video for the pretrial hearing. (*Id*. at 03:50-04:10.) Cole responded, "I'll be here, your

honor." (*Id*. at 04:05-04:10.) Yowell briefly addressed the judge regarding Cole's concerns about his wife and child, but Yowell decided to discuss it further with Cole off the record. (*Id*. at 04:50-06:00.)

On June 22, 2022, Cole personally appeared for the confirmation hearing. (Doc. 26 at 19.) Both parties confirmed the bench trial. (Doc. 26 at 20; Disk 1, Track 5 at 00:01-01:45.) The judge introduced the case and had the following exchange with the parties:

> COURT: We are set tomorrow morning for a bench trial.
>
> YOWELL: We are confirming judge.
>
> COURT: All right, does the State also confirm for trial tomorrow?
>
> . . . .
>
> STATE: We are confirming for the bench trial as well.
>
> COURT: Any issues that I should be aware of prior to tomorrow morning?
>
> YOWELL: No judge.
>
> COURT: Ok. Then I'll see everybody right here in the same place.
>
> YOWELL: Thank you, sir.
>
> COLE: Thank you, your honor.

(Disk 1, Track 5 at 00:05-01:00.)

Cole personally appeared for the bench trial. (Doc. 26 at 21; Disk 1, Track 6 at 00:01-00:30.) The judge introduced the case, noted that Cole personally

appeared, and asked the parties if there was anything that needed to be addressed prior to the start of trial. (*Id*.) Both the State and Yowell replied there was not. (*Id*.) At no point during the trial did Cole object to the bench trial, inquire about a jury trial, or otherwise do anything to suggest he did not want a bench trial. (Disk 1, Track 6 at 00:01-53:39; Disk 2, Track 1 at 00:01-55:06.)

II. Trial

During trial on June 23, 2022, both Amber and Cole testified that they had a physical altercation, which included Cole hitting Amber in the face. (Doc. 26 at 21-23; Disk 1, Track 6 at 01:55-03:00, 06:45-11:45; Disk 2, Track 1 at 19:30-24:05, 29:00-32:55.) Amber testified she was afraid of Cole during the incident and in pain, which was consistent with her statements to the deputy immediately after the incident. (Disk 1, Track 6 at 06:45-10:00; Disk 2, Track 1 at 08:45-09:00.) Deputies testified that Amber had red marks on her face and Cole did not have any noticeable injuries. (Disk 1, Track 6 at 35:00-37:30, 38:15-46:00 (State's Exhibit 1 (body camera video of the incident)), 49:15-53:20 (State's Exhibits 3-5 (pictures of Amber's injuries)); Disk 2, Track 1 at 05:45-07:20.) Amber was upset and had visibly been crying. (Disk 2, Track 1 at 05:45-07:20.)

Cole testified that Amber hit him first and knocked him onto a box on the floor of their kitchen. (*Id*. at 19:45-24:05, 29:00-32:55.) Cole said he did not hit

Amber until he got up and exchanged five or six slaps with her. (*Id*.) He said he felt threatened by Amber during the incident. (*Id*.) This testimony contradicted his statement to a deputy immediately following the incident that he had hit Amber and she hit him back. (Disk 1, Track 6 at 47:30-49:30 (State's Exhibit 2 (body camera video)).) Moreover, immediately following the incident, Cole affirmatively told a deputy that he was not afraid of Amber, and he did not say anything about Amber knocking him over. (*Id*. at 37:15-37:30; Disk 2, Track 1 at 31:15-33:00, 38:00-39:45.) Cole said he could not explain his failure to previously mention Amber's aggression or that he felt threatened by her. (Disk 2, Track 1 at 32:45-39:50.)

The judge found Cole guilty of PFMA. (*Id*. at 48:50-50:25; Doc. 1 at 9-11; Doc. 26 at 23.) He rejected Cole's justifiable use of force defense based on his inconsistent description of the events and his inability to explain his asserted memory difficulties. (Disk 2, Track 1 at 48:50-50:25.) The judge said:

> I find Mr. Cole's, uh, description of your memory to be remarkably self-serving. Um, you seem to have a perfect memory of all the things that you need to have a memory of and no memory whatsoever of the things that you don't want to have a memory of. And, I have to take that into account and discount pretty much everything you said based on the lack of credibility there.

(*Id*. at 49:10-49:45.)

On July 6, 2022, the justice court imposed a 12-month deferred sentence. (Docs. 1 at 7-8, 26 at 3; Disk 3, Track 1 at 16:00-16:30.)

III. Appeals

Cole appealed his conviction to the district court. (Doc. 1 at 1-2, 5-6; Doc. 2.) Cole asked that his conviction be reversed for plain error because he never signed a written waiver of his right to a jury trial, relying on Mont. Code Ann. § 46-16-110(3),[4] and the record did not support a voluntary, knowing, and intelligent waiver. (Doc. 12.) The district court rejected these arguments, based in part on Mont. Code Ann. § 46-16-201,[5] held Cole's waiver was valid, and affirmed his conviction. (Doc. 18.)

On March 1, 2023, Cole appealed to this Court. (Doc. 20.)

SUMMARY OF THE ARGUMENT

Cole has failed to meet his burden to firmly convince this Court that plain error review is necessary because the totality of the circumstances show his consent to a judge trial was a voluntary, knowing, and intelligent waiver of his right to a jury trial.

This Court should not hold the justice court in error based on Cole's unpreserved argument because his waiver of the right to a jury trial complied with

[4] The statute that applies to waivers of the right to a jury trial in a felony case.

[5] The statute that applies to waivers of the right to a jury trial in a misdemeanor case.

the applicable statutory procedure and the Montana and federal constitutions. Cole consented to a judge trial, as required by the statute that specifically applies to jury trial waivers in misdemeanor cases. The plain language of the statute does not require a written waiver. This Court should reject Cole's request to insert a writing requirement in a statute that plainly omits it.

Cole's waiver did not violate his right to a jury trial in the Montana or federal constitutions because the totality of the circumstances show he voluntarily, knowingly, and intelligently waived his right. The record shows the judge informed Cole of his right to either a judge or a jury trial, Cole discussed the case with his counsel, and stood by without objection when his counsel informed the judge that they would like to proceed with a judge trial. Cole personally appeared at all the proceedings without objection, including the judge trial that resulted in his conviction. Nothing in the record supports his argument to overturn his conviction after he actively participated in the alleged error that he challenged for the first time on appeal.

This Court should affirm Cole's conviction.

ARGUMENT

I. Standard of review

When a party appeals a ruling issued by a justice court established as a court of record, a district court functions as an intermediate appellate court but is confined to review the record and questions of law. *State v. Luke*, 2014 MT 22, ¶ 9, 373 Mont. 398, 321 P.3d 70 (citing Mont. Code Ann. §§ 3-5-303 and 3-10-115(1)). When a party then appeals from the district court to this Court, it reviews the justice court's ruling as if the appeal originally had been filed in this Court without district court review. *State v. Maile*, 2017 MT 154, ¶ 7, 388 Mont. 33, 396 P.3d 1270. This Court undertakes an independent examination of the record, *Maile*, ¶ 7 (internal citation omitted), and "review[s] the [j]ustice [c]ourt's factual findings for clear error and its legal conclusions for correctness." *State v. Seaman*, 2005 MT 307, ¶ 10, 329 Mont. 429, 124 P.3d 1137 (internal citations omitted). This Court reviews questions of constitutional law de novo. *City of Missoula v. Cox*, 2008 MT 364, ¶ 5, 346 Mont. 422, 196 P.3d 452.

II. Cole has failed to meet his burden to convince this Court that plain error review of his claim is necessary.

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. "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 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." *State v. Reim*, 2014 MT 108, ¶ 29, 374 Mont. 487, 323 P.3d 880. 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*.

Cole has failed to meet his burden to support plain error review of his claim because the totality of the circumstances show Cole validly waived his right to a jury trial.

A. Relevant authority

Cole had both a state and federal right to a jury trial. Article II, § 24 of the Montana Constitution provides "[i]n all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury . . . ." Article II, § 26, provides:

> The right of trial by jury is secured to all and shall remain inviolate. But upon default of appearance or by consent of the parties expressed in such manner as the law may provide, all cases may be tried without a jury or before fewer than the number of jurors provided by law.

Likewise, the United States Constitution provides defendants with a right to a jury trial. U.S. Const. art. III, § 2, cl. 3, and Amend. VI. The federal right only applies to serious offenses, which the United States Supreme Court has defined as offenses that authorize imprisonment of more than six months. *See Baldwin v. New York*, 399 U.S. 66, 69 (1970) (federal right to a jury trial applies only to serious offenses); *Woirhaye v. Mont. Fourth Jud. Dist. Ct.*, 1998 MT 320, ¶ 10, 292 Mont. 185, 972 P.2d 800 (federal right to a jury trial applies to the states). Cole had a federal right to a jury trial because misdemeanor PFMA authorizes imprisonment of up to one year. *See Baldwin*, 399 U.S. at 69.

It is well established that both the state and federal rights to a jury trial are fundamental and may be waived. *See* Mont. Const. art. II, §§ 24, 26 (the Montana Constitution expressly allows waiver of a jury trial); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942) (explaining a defendant's ability to waive the federal right to a jury trial); *United States v. Cochran*, 770 F.2d 850, 851 (9th Cir. 1985) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)) (federal right to a jury trial is fundamental); *Reim*, ¶ 31 (State right to a jury trial is fundamental). Generally, "[a] criminal defendant must consent to waiving constitutionally-guaranteed fundamental rights and there is a reasonable presumption against such a waiver." *Reim*, ¶ 31.

Both the Montana and federal constitutions require a waiver to be voluntary, knowing, and intelligent based on the totality of the circumstances. *Id*.; *State v. Bird*, 2002 MT 2, ¶¶ 35-36, 308 Mont. 75, 48 P.3d 266; *United States v. Leja*, 448 F.3d 86, 93-95 (1st Cir. 2006); *United States v. Christensen*, 18 F.3d 822, 824 (9th Cir. 1994). As this Court explained in *State ex rel. Long v. Justice Court*, 2007 MT 3, ¶ 20, 355 Mont. 219, 156 P.3d 5, "the Legislature is empowered to define the procedural aspects of waiver, and how it may be expressed." *See also Ludwig v. Massachusetts*, 427 U.S. 618, 630 (1976) (the modes of exercising federal constitutional rights have traditionally been left to the states); *Singer v. United States*, 380 U.S. 24, 36 (1965) (acknowledging the expected outcome of states adopting "a variety of procedures relating to the waiver of jury trial in state criminal cases" with different requirements than Fed. R. Crim. P. 23(a)).

Under federal law, a written waiver is required in Fed. R. Crim. P. 23(a), but it merely creates a presumption that a waiver is voluntary, knowing and intelligent. *Cochran*, 770 F.2d at 851. The non-exhaustive list of relevant factors for this analysis 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; and the defendant's ability to understand the right to a jury trial. *See Leja*, 448 F.3d at 93-94 (collecting cases). Neither a written waiver, nor an oral colloquy, nor any other particular form of waiver is constitutionally

required for a valid waiver of the federal jury trial right. *See*, *e.g.*, *United States v. Robinson*, 8 F.3d 418, 422 (7th Cir. 1993) (neither written waiver nor oral colloquy is required); *Cochran*, 770 F.2d at 851 (oral colloquy not required). This Court has similarly acknowledged that the constitution does not require a colloquy to support a jury trial waiver and held "requiring the court to explain all of the nuances or effects of waiving the right to a jury trial is unnecessary." *State v. Walker*, 2008 MT 244, ¶¶ 33-34, 344 Mont. 477, 188 P.3d 1069 (citing *Cochran*, 770 F.2d at 851).

Montana has enacted statutory procedures for waiver based on the nature of the offense. Mont. Code Ann. §§ 46-16-110(3), 46-17-201(2). For felony cases, Mont. Code Ann. § 46-16-110(3) provides "Upon written consent of the parties, a trial by jury may be waived." For misdemeanor cases, Mont. Code Ann. § 46-17-201(2) provides "Upon consent of the parties, a trial by jury may be waived." This Court has had few occasions to consider the misdemeanor statute, but the plain language of it does not require a written waiver. *See id*. This Court has, however, on multiple occasions, considered the felony waiver statute.

In *State v. McCartney*, 179 Mont. 49, 585 P.2d 1321 (1978), this Court reviewed McCartney's challenge that his jury waiver did not comply with Mont. Code Ann. § 46-16-110(3)'s predecessor, Mont. Rev. Codes § 95-1901(d) (1947), 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*. The totality of the circumstances showed 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.

In *State v. Dahlin*, 1998 MT 113, ¶¶ 5, 23, 289 Mont. 182, 961 P.2d 1247, this Court invoked the plain error doctrine to reverse Dahlin's felony conviction after a bench trial. In that felony case, Mont. Code Ann. § 46-16-110(3) required both parties to consent to a waiver in writing. *Id*. ¶ 21. However, the only reference in the record to the waiver was a minute entry that said the defendant's attorney "states Defendant has waived the right to Jury Trial and is ready to proceed with a Non-Jury Trial at this time." *Id*. ¶ 5. This Court explained, "In the absence of written consent, the statute does not allow this Court to review the totality of the

circumstances to determine whether a defendant has knowingly and voluntarily waived his right to a jury trial." *Id*. ¶ 22. This Court overruled *McCartney* to the extent "that a criminal defendant may waive his right to a jury trial without written consent signed by both parties," as required by Mont. Code Ann. § 46-16-110(3). *Id*. ¶ 23.

Subsequently in *Reim*, ¶¶ 21, 28-34, this Court rejected a plain error challenge to a conviction based in part on a motion to vacate the jury trial signed only by the defendant's attorney. This Court distinguished *Dahlin* and held that the attorney's written motion met the statutory writing requirement in Mont. Code Ann. § 46-16-110(3) and the totality of the circumstances showed the defendant's waiver was voluntary, knowing, and intelligent. *Id*. ¶¶ 33-34. This Court reasoned that unlike the record in *Dahlin*, Reim's case included a written document that supported the waiver of his right to a jury trial. *Id*. ¶ 33. The State waived its right to a jury trial in the 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 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*. ¶ 34. In doing so, this Court acknowledged that its holding in *Dahlin* did not preclude the consideration of the totality of the circumstances that support a defendant's voluntary, knowing, and intelligent waiver of the right to a jury trial if the statutory writing requirement in felony cases is met. *See id*.

B. The plain language of the misdemeanor statute does not require a written waiver.

Cole asks this Court to impose a requirement that a jury trial in a misdemeanor case be in writing. But this Court cannot ignore the plain language of Mont. Code Ann. § 46-17-201. The statute expressly addresses juries in misdemeanor cases and provides "Upon consent of the parties, a trial by jury may be waived." Mont. Code Ann. § 46-17-201(2). The statute does not require a written waiver. *Id*. As the district court explained, "if the Commission and the Legislature intended that jury trails [sic] in misdemeanor cases could only be waived by the Defendant's *written* waiver it would have said so as it did in the statute for felonies." (Doc. 18 at 5 (emphasis in original).) This conclusion is consistent with this Court's rules of statutory interpretation.

'"The legislative intent is to be ascertained, in the first instance, from the plain meaning of the words used.'" *State v. Heath*, 2004 MT 126, ¶ 25, 321 Mont. 280, 90 P.3d 426 (quoting *Western Energy Co. v. Department of Revenue*, 1999 MT 289, ¶ 11, 297 Mont. 55, 990 P.2d 767). If the statutory language is "clear and

unambiguous, no further interpretation is required." *Infinity Ins. Co. v. Dodson*, 2000 MT 287, ¶ 46, 302 Mont. 209, 14 P.3d 487. The 1991 commission comment provides no support for Cole's argument because the plain language of the statute is not ambiguous. *See Heath*, ¶ 25; *Infinity Ins. Co.*, ¶ 46. A written waiver is not required in misdemeanor cases. *See id*.; Mont. Code Ann. § 46-17-201. This Court cannot insert a writing requirement that has been omitted by the legislature. *See City of Missoula v. Pope*, 2021 MT 4, ¶ 9, 402 Mont. 416, 478 P.3d 815 (quoting Mont. Code Ann. § 1-2-101) ("When interpreting a statute, 'the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.'").

Moreover, the 1991 commission comments do not inform the statute as it is currently constructed. The statute has been amended three times since the 1991 amendments. *See* Mont. Code Ann. § 46-17-201. The 1991 commission comment refers to a version of the law that this Court found unconstitutional in *Long*, ¶¶ 20-21. The comment specifies:

> Subsection (2) deletes the requirement for both parties' approval before a jury trial may be waived. The statute permits such a waiver upon the defendant's written request. The change recognizes that waiver of the jury trial is an exclusive right of the defendant.

Mont. Code Ann. § 46-17-201 (1991 commission comment). In *Long*, ¶¶ 20-21, this Court rejected the Legislature's attempt to make waiver of the jury trial right the exclusive right of the defendant. As this Court explained, the Legislature could

not allocate the right to a jury trial to either party because the right is granted to "all" in the constitution. *Id*.; Mont. Const. art. II, § 26. As the statute now requires, both parties are entitled to the right, so both parties must consent to waive it. Mont. Code Ann. § 46-17-201(2). The 1991 Commission Comment is legally incorrect and provides no support for the requirement of a written waiver. *See Long*, ¶¶ 20-21.

The legislature is, however, able to define the parameters of waiver, *Long*, ¶ 20, which it has done for misdemeanor cases in Mont. Code Ann. § 46-17-201. The statute plainly omits any requirement that a waiver be in writing in misdemeanor cases. *Id*. As the district court held, Cole has failed to meet his burden to justify plain error review of Cole's argument that his waiver was invalid for not being in writing because the legislature has specified that a written waiver is not required. *See* Mont. Code Ann. § 46-17-201.

C. The totality of the circumstances show Cole voluntarily, knowingly, and intelligently waived his right to a jury trial as required by both the Montana and federal constitutions.

Cole agrees the Montana and federal constitutional protections require a jury trial waiver to be voluntary, knowing, and intelligent based on the totality of the circumstances. (Appellant's Brief (Br.) at 16-19.) Cole cannot meet his burden to prove plain error review is warranted because both parties consented to waive a jury trial, as required by Mont. Code Ann. § 46-17-201(2), and the record supports

the conclusion that Cole waived his jury trial right voluntarily, knowingly, and intelligently.

The totality of the circumstances show that Cole knew he had the right to a trial with a judge or a jury because the judge specifically explained this to Cole during his initial appearance. The judge explained that "if there was a trial, either a judge or a jury would make the decision. If it's a jury, it's six people. All six of them have to agree that you committed the offense, that you committed the offense beyond a reasonable doubt before you could be convicted." (Disc 1, Track 1 at 4:25-4:40.) Cole confirmed he understood his rights, entered a not guilty plea, and requested the appointment of counsel. (*Id*. at 4:35-5:05.) Cole cannot claim, for the first time on appeal, that the judge's provision of the right was inadequate when he confirmed he understood his right to a jury trial during the trial court proceedings.

Cole personally appeared at all pretrial hearings. Cole's counsel specifically continued the omnibus hearing twice to discuss the case with Cole. During the second scheduled omnibus hearing, Cole's counsel informed the judge, "We are gonna set a trial. Mr. Cole and I need to figure out whether that's gonna be a judge or jury trial." (Disc 1, Track 3 at 00:25-00:45.) This supports the conclusion that Cole had discussed the case with his counsel and decided to proceed to trial. In response, the judge directly addressed Cole to ensure he understood the importance of continuing to discuss his case with his counsel. "Mr. Cole, stay in touch with

Mr. Yowell. It's important that the two of you talk, uh, between now and then." (*Id*. at 01:10-01:25.) Cole affirmed that he understood, "Absolutely, your honor." (*Id*.)

At the outset of the second continued omnibus hearing, the judge reminded Cole that the previous hearing ended with an anticipated decision regarding how Cole desired to proceed. Cole's counsel informed the judge that, "we would like to request a judge trial." (Disk 1, Track 4 at 00:20-01:00.) Cole did not object or inquire further, and the totality of the circumstances wholly support his voluntary, knowing, and intelligent waiver. All these facts support the conclusion that Cole discussed options with his counsel, chose to proceed with a judge trial, and consented to a judge trial. Cole has provided nothing to undermine that conclusion.

Cole argues he was distracted during the hearing when his counsel informed the judge that they wanted to proceed with a judge trial. But Cole did not make any comments in the background during the waiver exchange. After Cole consented to a judge trial, the judge reviewed the omnibus form with the parties and the State confirmed a "judge" trial. (Disk 1, Track 4 at 01:00-01:35.) Cole did not make any comments during that discussion. After the judge reviewed the omnibus form, he asked the parties about a proposed trial date, and Cole can be partially heard making comments to his counsel. Cole's counsel successfully redirected him to address the judge, and Cole confirmed the proposed trial date. This secondary

conversation does not undermine every other fact in the record, which wholly support his voluntary, knowing, and intelligent waiver.

Cole argues the incomplete omnibus form undermines his waiver. But it was not necessary to check the box for a bench trial in this misdemeanor case. The judge addressed the type of trial immediately with the parties, so there was no need to review it again as part of the omnibus form. The omnibus form is a tool to accomplish the purpose of the omnibus hearing, which is '"to expedite the procedures leading up to the trial of the defendant.'" *State v. Clary*, 2012 MT 26, ¶ 16, 364 Mont. 53, 270 P.3d 88 (quoting Mont. Code Ann. § 46-13-110(2)). The judge accomplished that purpose without completing the form, and a written waiver is not required. *See* Mont. Code Ann. § 46-17-201(2) (misdemeanor jury waiver). The record shows both parties consented to a judge trial, and Cole did not object to the incomplete form below. He cannot rely on it now to obtain plain error review when the totality of the circumstances show he voluntarily, knowingly, and intelligently waived a jury trial.

The record does not support Cole's argument that "[t]here is no evidence" that he understood the difference between a jury trial and a judge or bench trial. (Br. at 24-25.) Cole ignores that he confirmed his understanding of this distinction during his initial appearance after the judge informed him of his right to a jury trial and explained how a jury trial would work. Cole's argument conveys a stated

preference that a court do a more thorough colloquy with a defendant prior to accepting a waiver of the right to a jury trial. But this Court has expressly held that that is not legally required. *Walker*, ¶¶ 29-34 (it is unnecessary "to explain all of the nuances or effects of waiving the right to a jury trial").

Cole's argument that he did not understand his rights based on the various definitions of "bench" is equally unpersuasive based on the totality of the circumstances. (Br. at 25.) The judge used the term "judge" trial when he informed Cole of his rights during the initial appearance, and both the judge and Cole's counsel referred to a "judge" trial during the subsequent hearings leading up to and including Cole's waiver. Cole's counsel said, "we would like to request a judge trial." (Disk 1, Track 4 at 00:20-01:00.) The judge later referred to a "bench" trial when he scheduled the trial date and during the confirmation hearing. But Cole does not provide any fact that shows the definition of "bench" caused him any confusion or that he did not understand his choice to proceed with a judge trial as represented by his counsel.

The only conclusion supported by the record is that Cole, along with the judge and the State, left the final omnibus hearing with the understanding that both parties consented to a judge trial. This met both the statutory and constitutional waiver requirements and the remainder of the record supports that conclusion. During the final pretrial conference, the judge said, "We are set tomorrow morning

for a bench trial," and attorneys for both parties confirmed. (Disk 1, Track 5 at 00:05-01:00.) Personally present, Cole did not object. As scheduled, Cole personally appeared the next morning for the bench trial. At no point during trial did Cole make any comment or provide any fact to support his argument that he wanted a jury trial rather than a judge trial. He first raised his complaint in his request to the district court for plain error review. The district court correctly rejected that request, and this Court should as well because the authority supports that conclusion.

Cole incorrectly argues that *McCartney* and *Reim* are inapplicable. Both apply and support the correct constitutional analysis that Cole forwards in his brief—the totality of the circumstances must show that Cole's waiver is voluntary, knowing, and intelligent. To the extent these cases are distinguishable, it is only because the cases involved felony offenses, which required a written waiver in addition to the constitutional requirements. *See* Mont. Code Ann. § 46-16-110(3). The misdemeanor statute that applied to Cole's case, Mont. Code Ann. § 46-17-201, did not require a written waiver. As Cole correctly argues, the statutory procedures apply in addition to the constitutional requirements that a waiver be voluntary, knowing, and intelligent based on the totality of the circumstances.

Cole challenges the district court's reliance on *McCartney*. (Br. at 33-39.) This Court is not reviewing the district court's decision. *See Maile*, ¶ 7 (this Court

reviews the justice court's ruling as if the appeal originally had been filed in this Court). But the district court correctly relied on *McCartney* for the application of the totality of the circumstances test to a jury trial waiver in addition to the statutory procedures. In *Dahlin*, ¶ 23, this Court overruled *McCartney* to clarify that a court could not rely on the totality of the circumstances test to the exclusion of the written waiver requirement in felony cases, as required in Mont. Code Ann. § 46-16-110(3). This Court in *Dahlin*, ¶ 23, only addressed the issue presented to it, and the statutory-specific holding does not extend to the misdemeanor waiver statute—Mont. Code Ann. § 46-17-201(2).

Neither *Dahlin* nor any of the other Montana cases that Cole relies on undermine the application of the totality of the circumstances test in this misdemeanor case.[6] *See Reim*, ¶¶ 30-32; *Dahlin*, ¶¶ 11-24; *McCartney*, 179 Mont. at 55-56, 585 P.2d at 1325 (applying a predecessor statute to Mont. Code Ann. § 46-16-110(3)). Cole's request for this Court to overrule *Reim* contradicts his argument. (*See* Br. at 26.) While Cole has acknowledged the constitutional

[6] Cole's reliance on cases from other states is misplaced. (Br. at 21, 27-30, 38.) Those cases considered different state constitutions or interpreted the federal constitutional requirement. Montana's constitution is not to be interpreted based on that of another state, and federal law guides the federal constitutional analysis, not other state courts interpreting federal law. As Cole has acknowledged, the Idaho constitution includes the requirement that a waiver be "expressed in open court." (Br. at 30 n. 4.) Neither the Montana nor federal constitutions include this requirement. U.S. Const. art. III, § 2, cl. 3, and Amend. VI; Mont. Const. art. II, §§ 24, 26.

requirement to consider the totality of the circumstances to determine the validity of a waiver, he has also asked this Court to ignore it. This Court cannot ignore its well-established precedent that requires a waiver of any fundamental right to be voluntary, knowing, and intelligent. *See, e.g.*, *Bird*, ¶¶ 35-36. This standard applies to the waiver of the right to a jury trial in addition to the statutory waiver procedure for misdemeanor cases—"Upon consent of the parties, a trial by jury may be waived." Mont. Code Ann. § 46-17-201(2). This Court's holding in *Reim*, ¶¶ 33-34, confirms the necessity of both tests.

Like this Court explained in *Reim*, ¶ 34, Cole actively participated in the alleged error he now contests, which wholly undermines his unpreserved argument. Cole stood by his counsel during the omnibus hearing when he informed the judge that Cole chose to proceed with a "judge" trial. (Disk 1, Track 4 at 00:20-01:00.) Cole stood by his counsel during the final pretrial conference when both his counsel and the State confirmed a bench trial. The record leaves no question that all those involved expected a judge trial, and it provides no indication that anyone, including Cole, was surprised when no jury appeared on the day of trial. Cole did not object to the conspicuously absent jury, and the totality of the circumstances show Cole voluntarily, knowingly, and intelligently waived his right to a jury trial.

Like the defendant in *Reim*, ¶ 34, Cole's silence throughout the proceedings ratified the express waiver provided by his counsel. This Court "will not put a district court in error for an action in which the appealing party acquiesced or actively participated." *Id*. ¶ 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. Cole's acquiescence undermines any argument he has made to hold the trial court in error in these circumstances, and he has failed to meet his burden to convince this Court that plain error review is necessary. *See Reim*, ¶ 29.

Cole attempts to mask his burden to meet the demanding plain error standard by citing to authority that requires the State to prove a defendant's voluntary, knowing, and intelligent waiver on de novo review. (Br. at 19, 36.) Cole relies on *Salsgiver*, ¶ 17 (citing *State v. Gittens*, 2008 MT 55, ¶ 14, 341 Mont. 450, 178 P.3d 91), where this Court applied de novo review to a preserved challenge to a jury trial waiver. But the other two cases that Cole cites do not reference his asserted burden of proof. *See Reim*, ¶ 31 (generally explaining the voluntary, knowing, and intelligent waiver standard); *Walker*, ¶ 18 (same). Rather, this Court in *Reim*, ¶ 29, specifically explained that the appellant bears the burden of convincing this Court that plain error review is necessary to address an unpreserved challenge to a jury trial waiver.

Cole cannot shift his burden to the State, and he has failed to meet the demanding plain error standard. This Court should not exercise plain error review because Cole has failed to show 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.*

CONCLUSION

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

Respectfully submitted this 26th day of August, 2024.

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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 7,078 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, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-26-2024:

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