
STATE OF MONTANA,

Plaintiff and Appellee,

v.

ANDRE JAMES ANTHONY,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana 22nd Judicial District Court,
Big Horn County, the Honorable Matthew J. Wald, Presiding

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STATEMENT OF THE ISSUES

Issue one: The federal and Montana constitutions require any waiver of a defendant's right to testify at trial to be voluntary, unequivocal, and knowing and intelligent, with every reasonable presumption against a waiver. Did the Hardin City Court err when prior to trial, it granted Andre's motion to appear for his misdemeanor trial by Zoom without qualification, but then after the City rested its case, went back and said it meant for its previous permission to mean Andre could watch his trial but could not testify?

Issue two: The law in Montana is well-settled that mere presence at the scene of a crime, even with knowledge and approval of the criminal intent or acts of others, is not a crime and is insufficient alone to establish criminal accountability for a crime committed by another. As to Count I and Count III, the City argued Andre was legally accountable for gift cards others' shoplifted because he didn't yell out, "hey stop that!" and his body language made it look like he knew what they were about to do. Was this evidence insufficient?

Issue three: Did the Hardin City Court abuse its discretion when it sentenced Andre, who had no prior criminal history, to a 135-day active jail sentence?

STATEMENT OF THE CASE AND FACTS

Andre Anthony is a 21-year-old Black man who lives in Flint, Michigan; in September 2022 he visited Hardin, Montana.

On September 8, 2022, the City of Hardin cited Anthony with shoplifting, a violation of Hardin City Code §6-1-16, after video surveillance shows three Black men enter a Hardin Family Dollar store, two of whom are recorded manipulating the cash register on three occasions while the store clerk was distracted, allowing them to leave the store with three unpaid-for gift cards. (State's Exhibit E, Admitted Tr. Min. 47:00-47:30).

It is undisputed that Andre went into the Family Dollar store and, that he was not either of these two men. Andre was the third man, mostly unengaged and on his phone, who never touched the till.

I. Andre is arrested and charged by mistake.

The City of Hardin readily admits that Andre was arrested and charged by mistake. ((December 8, 2022 Trial Audio Recording Minute,

“Tr. Min.” 1:06:00-1:07:00; Tr. Disk 2, Min. 20:00.) Upon the arrest of all three Black men in Colombus, Montana the Family Dollar store clerk, Shawna Zimmerman, misidentified Andre as the man in the surveillance video wearing a white t-shirt, who engaged with her at the till. (Tr. Min. 36:25- 37:10, 51:33.) Timothy Smells, a Hardin police officer, responded to the store. After watching the surveillance video, Smells wrote shoplifting citations for just one of the men, the one wearing the white-t-shirt who first “swipes and dips” a card in the register, who Smells believed to be Andre. (Tr. Disk 2, Min. 24:45.) Smells testified that from the video, the three men all “looked pretty similar” to him. (Tr. Min. 39:30.)

Smells cited Andre for shoplifting by mistake, based on Shawna’s misidentification. He later learned Andre was not the man in the white t-shirt from the surveillance video, Andre was the person in the video wearing a blue-and-black long-sleeved shirt standing farther back, who didn’t steal anything. (Tr. Min. 39:25, 51:00-54:00.) But by that time only Andre remained in custody, while the other two men were both released the same day and never charged. (Tr. Min. 1:07:00; Tr. Disk 2, Min. 21:30.)

II. Rather than dismiss, the City amends the charges to accountability.

Rather than dismiss the charges against Andre, on September 16, 2022, the City filed an amended complaint, now alleging three counts of misuse of a computer by accountability. In its amended information, without specifying the conduct alleged to comprise each count, the City claimed Andre was legally accountable for the other men stealing the gift cards, each valued at \$500, because he helped them distract the cashier and was generally in on the scheme to defraud the Family Dollar. The affidavit specifically alleged Andre's acts of distraction, captured by the video surveillance, were that Andre could be seen "observing the other suspect's behavior by leaning in to watch his actions," and failing to "warn" the cashier about the theft in progress. The City additionally stated Andre at one point had the cashier scan his own phone, although this was not alleged to be one of the three gift card transactions. (C.C. Doc. 32, Amended Complaint.)

Andre filed a motion to dismiss for lack of probable cause, arguing that the sum of the City's affidavit alleged Andre was merely present

and aware that a crime was being committed, which was not enough to make him legally accountable under the law. (C.C. Doc. 18.)

III. Andre cannot afford to travel to Hardin from Michigan for repeated court appearances.

After spending seven days in jail in Hardin, Andre posted bond. He was now at risk of losing his job back in Michigan, so he filed a motion to amend his release conditions to be able to travel home. (C.C. Doc. 28.)

Through counsel, Andre requested to appear by Zoom for his September 21 arraignment on the amended charges, which the court allowed. (C.C. Doc. 27.) Andre moved to appear remotely for the November 2 omnibus hearing, this motion was denied. The court issued a warrant upon his failure to appear in person and included a notice that his driver's license would be suspended. (C.C. Doc. 22, 23.)

On December 2, 2022, the City Court held a hearing on Andre's motion to dismiss. Andre appeared by video. After hearing, the court denied the motion. (December 2, 2022 Audio Transcript.)

The City Court scheduled a change of plea hearing for December 8, 2022, after Andre agreed to plead guilty to a single count of

misdemeanor misuse of a computer by accountability, pursuant to a plea agreement. (C.C. Doc. 14; Tr. Min 00:00-2:00.)

IV. Andre is not permitted to plea because he can't afford to appear in person.

Andre wasn't able to get enough hours at work to come up with the money to travel from Michigan to Hardin to change his plea, and the help he hoped for from family fell through. (Tr. Min. 5:50-7:00.) By written motion, Andre moved to allow his appearance for the change of plea hearing by two-way audio-visual communication, which the City opposed. (C.C. Doc. 14.) Andre still hoped to plead guilty to one of the three misdemeanor counts lodged in Hardin City Court, but the City insisted that without Andre's in-person presence it would withdraw its offer. (Tr. Min. 3:00-6:00.) The court denied Andre's written motion. (C.C. Doc 14; Tr. Min. 3:10.)

Upon its denial of Andre's motion to enter a plea by Zoom, the court determined it would proceed, right then, to a bench trial. Andre's counsel then made an oral motion to allow Andre to appear remotely for trial. (Tr. Min. 3:00-6:00.)

V. The City Court grants Andre's motion to appear for trial by Zoom.

The City objected to Andre's remote appearance at every stage, except for trial. The City indicated it had no objection to Andre's appearing by Zoom, saying, "...certainly I am not going to step in the way of him wanting to participate...um... by video. I think everybody should have every opportunity they can to defend themselves in court. It's a little unorthodox, certainly, but if he wants to log on that's fine for the trial. I guess maybe in hindsight I am ok with that." (Tr. Min. 4:30-5:10.)

The City continued, distinguishing "...as far as plea agreement, I am not ok with participating in a plea agreement by video because there were additional conditions of participating with law enforcement that he needed to be here in person. If he wants to plead to all three, straight up plead, that's another option. As far as plea agreement, we are withdrawing our offer because he is not here in person." (Tr. Min. 4:00-5:33.)

The City Court then ruled that for trial, Andre "can certainly make his appearance by video." (Tr. Min. 6:20-6:30.) Andre was ready and available by Zoom.

The court paused to allow counsel to connect Andre with the courtroom, instructing counsel to place the computer in a location such that both parties were satisfied. (Tr. Min. 7:00-8:00.)

The court then called the case, confirming the parties were present and ready to proceed. (Tr. Min. 9:00-9:30.) The court addressed Andre directly:

Court: Mr. Andre Anthony, are you appearing by video?

Andre: Yes, your honor. (Tr. Min. 9:30).

The court paused to ask if defense counsel could place a microphone in front of the computer so both the court and Andre could better hear. (Tr. Min. 9:25-9:35.) Once the microphone was placed, the court went on to ask Andre whether he was aware he had the right to appear in person, to which Andre responded he did. (Tr. Min. 9:50.) The court moved on:

Court: And you are satisfied that we're going to go to trial today?

Andre: Yes, your honor.

Court: It's a little unorthodox, but we will proceed with trial.

Andre: Yes, your honor. (Tr. Min. 10:00-10:15.)

Without further introduction, the City commenced its case against Andre.

The City started its opening argument by saying the evidence would show Andre had participated in “a common scheme,” to get cash onto store gift cards and reuseable cash cards without paying for them at the Hardin Family Dollar Store. (Tr. Min. 10:40.) As in its charging documents, the City did not articulate a theory of guilt for the three distinct offenses separately, or introduce a timeline for each offense. Instead, the City said its evidence would show Andre was “part of the entire scheme” by arriving at the Family Dollar with the individuals who stole the gift cards, at one time helping to distract the clerk, leaving the store together, and later being arrested together with the other two individuals. (Tr. Min. 11:30-12:00.) The three gift cards were alleged to have a \$500 dollar value, amounting to \$1512.35 loss to the store.

In the City’s case-in-chief, it put on two witnesses, the Hardin Family Dollar store manager and Officer Timothy Smells, the Hardin police officer who investigated the shoplifting incident. (Tr. Min. 10:00-50:08.) Through Smells, the City introduced receipts for the gift card transactions, which were found along with a bottle of Dove body wash, in a Silver Dodge Charger that the three men had traveled in together.

The receipts indicate three gift card transactions occurred at 9:22 a.m., 9:26 a.m., and 9:28 a.m. (Tr. Min. 41:00-45:00; Exhibit D, Admitted at Min. 43:00.)

The City also introduced the Family Dollar surveillance video through Smells. (Exhibit E, Admitted Tr. Min. 47:00-47:30.) As the City played the surveillance video for the court, it asked Smells to narrate what he saw. With the City's prompts, Smells describes the first 9:22 a.m. transaction as one in which the gentleman in the white shirt, not Andre, "swipes and dips" a card without pushing the card into the reader. (Tr. Min. 51:00-55:00.) Smells noted upon initially citing Andre he believed, mistakenly, that Andre was the gentleman in the white shirt. Smells describes that man, not Andre, reach across and touch the screen on the cashier's side, after which the cash register opened. Smells agreed Andre appeared to be "just standing there" during this first transaction. (Tr. Min. 1:11:00-1:12:00.) The City then confirmed with Smells that this concluded what was alleged to be the first fraudulent transaction, at 9:22 a.m., then moved on. (Tr. Min. 54:00-55:00.)

After a long pause as the video plays, the City asked Smells to pick up with his narration. At that time, Smells describes Andre's first interaction with Shawna, the cashier. (Tr. Min. 54:40-55:00.) Smells describes both the man in the white shirt and the blue shirt, Andre, gesture behind the cash register, which caused Shawna to turn around and reach for a bottle of Dove body wash. (Tr. Min. 55:30.) The man in the white shirt then engages the cash register similarly to how he had done a few minutes before. (Tr. Min. 55:00.) By that time, Andre was standing farther back, away from the register, looking down at his phone. (Tr. Min. 1:14:28.)

Smells next described what he determined to be the third fraudulent transaction. This time, Smells described a third man, not Andre, engage the cashier and manipulate the register similarly to how the man in the white shirt had done. (Tr. Min. 56:00-1:03:00.) Smells admitted that Andre "appears to be looking at his phone," not causing any distraction, throughout that time. (Tr. Min. 1:15:00.) Smells agreed Andre did not appear to participate in the third transaction. (Tr. Min. 1:16:00.)

On redirect, Smells confirmed that he had “more or less” admitted Andre wasn’t involved in “some” of the instances when the other individuals reached around and touched the screen, falsifying a transaction. (Tr. Disk 2, Min. 20:00- 21:00.) Nevertheless, Smells said in his experience as a police officer, he believed Andre was still involved and participated in the entire “scheme.” (Tr. Disk 2, Min. 20:15.) After Smells testimony, the City rested.

VI. After the City rests, the City Court denies Andre’s request to testify.

At the start of Andre’s case, he notified the court of his decision to testify. (Tr. Disk 2, Min. 25:00.) The court asked the City for its position on whether the court should allow this. (Tr. Disk 2, Min. 25:00.) Now the City objected. (Tr. Disk 2, Min. 25:00.) The City gave no reason for its objection. The court responded that it would deny Andre’s request. Although it had not said so at the start of trial, the court now explained that its grant of Andre’s motion to appear remotely for his trial was only permission for him to watch, not testify. (Tr. Disk 2, 25:25-26:00.)

Andre then reasserted his request as a motion to exercise his constitutional right to testify in his defense. (Tr. Disk 2, Min. 26:10-27:00.) The court concluded, “I understand, but I am still going to deny

your motion.” (Disk 2, Minute 26:15-20.) The court gave no further reasoning for its decision.

Andre had no further witnesses and the court moved on to closing argument. (Tr. Disk 2, Min. 26:30.)

The City started its closing argument by restating its theme that Andre was guilty because he was involved in a “scheme” to defraud the Family Dollar of \$1512.35. It then re-played the surveillance video, narrating as it played. (Tr. Disk 2, Minute 26:45-27:00.)

The City first admits how on first blush, it appears Andre only participated in distracting the store clerk during one of the stolen gift card transactions, otherwise he appears to be just standing there looking down at his phone. (Tr. Disk 2, Min. 28:00.) But then while the video played, the City asked the court to “watch closely” so the court could see “exactly what it is for behavior” that shows Andre was actually involved in not just one transaction, but “partially” all three. (Tr. Disk 2, Min. 27:00-28:00.)

The first behavioral indication of Andre’s involvement in a “scheme,” implicating all three transactions, the City argued, was based on “what we in law enforcement call the ‘Felony Stretch.’” (Tr. Disk 2,

Min. 27:30.) The City asked the court to notice “[e]ach individual as they walk up... do[] a stretch. And you’ll notice this stretch is contagious.” (Tr. Disk 2, Min. 27:40). The City told the court, “we that prosecute or in law enforcement know this [type of stretch] means something is about to happen. This is not normal behavior. So watch as each individual does this, and watch how it’s contagious between all three of them.” (Tr. Disk 2, Min. 27:00- 28:00). The City said Andre was legally accountable for his acquaintances’ actions because he “...caught the same stretching disease” they had, which meant he knew they were stealing. (Tr. Disk 2, Min. 42:00.)

The City continued to narrate as the video played. It argued the second indication of Andre’s guilt by accountability in the “scheme” was that “even though it appears Mr. Anthony is not involved and is just looking at his phone,” if the court looked closely, the court “...can see that Andre is watching Mr. P[] as he presses the buttons on the till.” And, “Instead of “shouting ‘Hey don’t do that!’ or notifying the cashier, [Andre] is just watching. And he knows exactly what’s going on.” For proof of Andre’s accountability for each offense, the City said, the court

should, “[c]arefully watch Mr. Anthony’s eyes.” (Tr. Disk 2, Min. 29:30-29:00.)

Finally, the City said, “yes he distracts in one transaction, points to something in the back” but in the other two transactions, even though he doesn’t do anything to distract the clerk, “he is not an innocent bystander by his body language alone.” As the video played on, the City asked the court to watch Andre come back around again to the register, “[y]ou’ll see,” “[y]ou’ll see the stretching, and you’ll see his eyes watching,” and by those two actions, the City said, the court would see he was a participant in the first and third transactions as well. (Tr. Disk 2, Min. 28:45.)

The City then started to conclude its argument saying all three men, including Andre, were later “caught” driving in the same car that contained the three receipts for the gift cards. The City interrupted that thought, as the video played on, to return to the “Felony Stretch” idea, once again narrating the screen, “...[t]here’s one stretch, there’s another stretch...carefully watch Mr. Anthony’s eyes.” (Tr. Disk 2, Min. 28:00-31:00.)

At the close of trial, the City Court found Andre guilty for each of the three charged offenses. (C.C. Doc. 11; attached Appendix A.)

VII. Without any prior criminal history, the City Court sentences Andre to 135 days in custody.

At sentencing, the City recommended Andre be sentenced to six months in Big Horn County jail on each of the three counts, consecutive, with forty-five days custodial time on each count, suspending the remainder. This amounted to 135 days in custody. The parties agreed to seven days of credit for time served. (1.4.2023 Sentencing Hearing, “Sentencing” Tr. Min. 14:00.)

Noting his youth and lack of any criminal history, Andre responded that the City’s recommendation far exceeded sentences regularly imposed by the Hardin City Court for similar property offenses. (Sentencing Tr. Min. 9:00-10:00.) The City agreed the sentence was more severe but said the reason for its “stiff recommendation” was because it “...should have been a felony,” referencing the offense of theft by common scheme, but wasn’t because, “the County Attorney wouldn’t take the case.” (Sentencing Tr. Min. 11:30-11:40) The City then hedged, saying “[y]es we have Mr. Anthony by mistake, but he was still part of the crime.” (Sentencing Tr. Min. 11:00-11:11.)

The court sentenced Andre to the City’s recommended sentence.
(C.C. Doc. 7; attached as Appendix B.)

The city court additionally granted the City’s request for Andre to pay \$1512.35 in restitution. The City said it would “notify the court” if the Family Dollar was subsequently able to cancel the value of the gift cards, reducing the total loss to the store. (Sentencing Tr. 15:00-17:00).

Andre timely appealed to Big Horn District Court, where the decision was affirmed. (D.C. Doc. 12; attached as Appendix C.)

Andre now timely appeals to this Court. (D.C. Doc. 13.)

STANDARD OF REVIEW

This Court reviews an appeal from a city court of record independently of the district court’s decision, as if the appeal originally had been filed in this Court. *City of Bozeman v. Cantu*, 2013 MT 40, ¶ 10, 369 Mont. 81, 296 P.3d 461.

This Court exercises plenary review of constitutional questions. *State v. Mercier*, 2021 MT 12, ¶11, 403 Mont. 34, 479 P. 3d 967.

Whether a waiver of a fundamental fair trial right was voluntary, unequivocal, and knowing and intelligent is a mixed question of law and fact subject to de novo review for the correct application of

constitutional law to the totality of the circumstances. *State v. Hogues*, 2024 MT 304, ¶ 21, 561 P.3d 1. This Court will “indulge in every reasonable presumption against waiver of a fundamental constitutional right.” *State v. Marquart*, 2020 MT 1, ¶ 16, 398 Mont. 233, 455 P.3d 460.

This Court reviews de novo whether sufficient evidence supports a conviction. *State v. Stillsmoking*, 2020 MT 154, ¶9, 400 Mont. 256, 470 P. 3d 183. “The standard of review of sufficiency of the evidence on appeal is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Boyd*, 2021 MT 323, ¶12, 407 Mont. 1, 501 P. 3d 409.

This Court reviews sentences imposing less than one year of actual incarceration for equity and abuse of discretion. *Cantu*, ¶ 11; *State v. Herd*, 2004 MT 85, ¶ 22, 320 Mont. 490, 87 P.3d 1017.

SUMMARY OF THE ARGUMENT

When Andre decided to testify in his own defense, he invoked a fundamental fair trial right enshrined in both federal and Montana constitutions. The City Court was wrong to defer to the City to decide,

after it put on its case in chief, whether to allow it. The federal and Montana constitutions provide the *criminally accused* the right to confront adverse witnesses face to face; there is no reciprocal promise in the constitution or anywhere else extending the same right to the City, or by extension the State, who have no constitutional rights.

This Court has held that the right of the criminally accused to testify in one's own defense is so foundational to a fair trial that any waiver must be voluntary, unequivocal, knowing and intelligent, with every presumption applied against a waiver. Here, when the City Court granted Andre permission to attend his misdemeanor trial by Zoom, it started trial without seeking any waiver of his right to testify. Andre gave no waiver. The City Court's pre-trial silence as to any unspoken implication on Andre's right to testify the court may have considered inherent in Andre appearing via two-way audio-visual communication, without objection, fails to satisfy this stringent standard. Andre's convictions must be reversed; he must be afforded a new trial.

In the alternative, Count I and Count III must be reversed and dismissed. After realizing they charged Andre by mistake, the City struggled to find a way to hold him responsible for three gift cards

stolen by others from the Family Dollar store. The City sought to prove legal accountability, but only argued Andre affirmatively helped distract the cashier during a single gift card transaction, forming Count II. For Count I and III, the City argued Andre was in on a “scheme” to steal from the store, implying Andre was guilty merely by associating with two other Black men who did steal from the store, arriving and leaving the store together. The City otherwise argued that Andre’s body language alone proved his guilt— a so-called “Felony Stretch” and watchful eyes— which the City argued indicated Andre was aware of the other’s actions but did not yell out, “Hey don’t do that!” Andre’s association with the two men who stole the gift cards does not make him legally accountable for their actions, nor does his presence or failure to tell the clerk what was happening. Each of the three charged offenses requires sufficient evidence of legal accountability standing alone, which the City failed provide. It is not sufficient to merely argue Andre was in on a “scheme” implicating Count I and III, consequently these counts must be reversed and dismissed.

Finally, if the Court does not reverse Andre’s convictions, it should review Andre’s custodial sentence in equity because the Sentence

Review Board cannot. This Court should strike the 135 days of custodial time the City Court ordered Andre to serve in Big Horn County jail. The sentence is severe, out of step with a first time misdemeanor property offense, and under the circumstances of Andre's case, unjust.

ARGUMENT

I. The City Court erred when it denied Andre his constitutional right to testify on his own behalf without a voluntary, unequivocal, knowing and intelligent waiver.

The right of a defendant to testify on his own behalf is a fundamental constitutional right protected by both the federal and Montana constitutions, and foundational to a fair trial. *Rock v. Arkansas*, 483 U.S. 44, 49-53, (1987)(right to testify is secured by the Fifth, Sixth, and Fourteenth amendments to the United States Constitution); *Cheetham v. State*, 2019 MT 290, ¶ 19, 398 Mont. 131, 454 P.3d 673 (right to testify implicit in Mont. Const. art. II, § 24 right to remain silent and corresponding right to due process); *State v. Hamm*, 250 Mont. 123, 128, 818 P.2d 830, 833 (1991) (right to testify implicit in Mont. Const. art. II, § 25 “right to appear and defend in person”), *overruled on other grounds* by *State v. Running Wolf*, 2020 MT 24, ¶ 29, 398 Mont. 403, 457 P.3d 218. The right to testify at trial is “essential to due process of law in a

fair adversary process.” *Faretta v. California*, 422 U.S. 806, 819, n. 15, (1975); *Accord, State v. Hogues*, 2024 MT 304, ¶ 21, 561 P.3d 1 (right to testify guaranteed under Mont. Const. art. II, § 17 as safeguard against deprivation of liberty without due process of law.)

Bedrock to our system of law, an accused’s right to testify is among the fundamental fair trial rights that may only be waived by a voluntary, unequivocal, and *knowing and intelligent* act of relinquishment, with “every reasonable presumption against waiver.” *State v. Hogues*, 2024 MT 304, ¶ 21, 561 P.3d 1, 12; *State v. Abel*, 2021 MT 293, ¶ 5, 406 Mont. 250, 498 P.3d 199 (*Emphasis* supplied).

The State, by contrast, has no constitutional rights. Relevant to this case in particular, the State has no right to face-to-face confrontation of a criminal defendant. *See Hogues*, ¶36 (a *defendant’s* constitutional right to face-to-face confrontation of adverse witnesses is “personal to the accused.”); *See also Faretta*, 422 U.S. 806, 819-20 (Sixth Amendment rights are “grant[ed] to the accused personally”).

Here, the city court erred when it denied Andre his fundamental constitutional right to testify at his trial. Upon the close of the City’s case, Andre was entitled to make the choice whether to testify or not.

The totality of the circumstances does not support a finding that he voluntarily, unequivocally, knowingly, and intelligently waived this right.

Quite the opposite. When at the start of trial, the court told Andre he can “certainly appear by video,” it never advised him it would only allow him to do so as a passive spectator. The city court granted Andre’s motion to appear for trial by two-way audio-visual communication outright, it never qualified this approval with any limitations or caveats. Having granted Andre’s request, the court then took steps to prepare for Andre’s participation. It first ensured that the computer was placed where Andre could see and hear the proceedings and such that both parties were satisfied. Then, the court had a microphone placed near the computer so the court and counsel could hear Andre. For its part, the City also made no disclaimer when it said it did not object to Andre’s appearance by Zoom, and instead lauded the idea by saying, “...certainly I am not going to step in the way of him wanting to participate...um... by video. I think everybody should have every opportunity they can to defend themselves in court.” No part of the court’s preparations for trial after granting his motion to appear

remotely would have reasonably indicated to Andre that he would later be denied his constitutional right to tell his own story on the stand.

The court did not make any affirmative mention of a waiver of Andre's right to testify, whereas it did review other constitutional and statutory rights he was waiving. Prior to the start of trial, the court confirmed Andre was aware of his constitutional right to appear in person and by extension confront witnesses against him, to which Andre agreed. The court had originally scheduled a change of plea hearing, then indicated it would proceed to trial instead, asking Andre to confirm that he was satisfied his case was going to trial, right then, and Andre again agreed. The court made no mention that appearing, with permission, via Zoom would limit in any way Andre's right to participate in his defense.

Waiver is defined as the voluntary abandonment of a known right. *State v. Bird*, 2001 MT 2, ¶ 35, 308 Mont. 75, 43 P.3d 266. There can be no waiver by one who does not know his rights or what he is waiving. *State v. McCarthy*, 2004 MT 312, ¶ 32, 324 Mont. 1, 101 P.3d 288; *State v. Boucher*, 2002 MT 114, ¶ 22, 309 Mont. 514, 48 P.3d 21. Any waiver of Andre's right to testify was required to be voluntary, unequivocal,

and *knowing* and *intelligent*, with every presumption applied against it; an unspoken, implied waiver under these circumstances does not satisfy this standard. While Mont. Code Ann. ¶46-16-122(1)¹ says a court *may* in its discretion proceed with trial when a misdemeanor defendant fails to appear, this does not satisfy the State’s heavy burden to show a waiver in this case. Andre *did* appear, upon the city court’s explicit approval, by Zoom. The court never advised Andre or his counsel that its agreement for Andre to appear remotely was conditional on waiving his right to testify. Andre simply moved via his counsel to appear remotely and after hearing the City agree by saying it believed, “everybody should have every opportunity they can to defend themselves in court,” the court granted Andre’s motion without qualification. If Andre had had any reason to think that by appearing remotely the court would — *after* the city put on its case — decide to deny him his right to testify, he likely would have requested a continuance per Mont. Code Ann. ¶46-16-122(1) instead. It was only

¹ Mont. Code Ann. §46-16-122(1) says, in the case of a misdemeanor, if the defendant fails to appear in person, the court may proceed with the trial if the defendant’s counsel is authorized to act on the defendant’s behalf, unless good cause exists for a continuance. Mont. Code Ann. ¶46-16-122(1).

when the City rested and Andre asserted his right to testify that the court said its prior approval of his remote appearance did not include a right to testify, and the court would deny the request. The court simply deferred to the City to decide whether Andre could testify, and the City objected without giving any explanation or authority.

The City's objection had no legal authority. The City is not bestowed, in the constitution or anywhere else, a right to confront Andre face-to-face. By contrast, the basis for the City's objection to Andre appearing by two-way video for his change of plea hearing was statutory. For misdemeanor offenses, Mont Code Ann. §46-17-203(3) allows a defendant to enter a guilty plea through the use of two-way electronic audio-visual communication if neither party objects.² Here, the City objected. And based on that objection, per statute, the court denied Andre's motion to plead by Zoom.

² Mont Code Ann. §46-17-203(3); For purposes of this section, in cases in which the defendant is charged with a misdemeanor offense, an entry of a plea of guilty or nolo contendere through the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present, is considered to be an entry of a plea of guilty or nolo contendere in open court. Audio-video communication may be used if neither party objects and the court agrees to its use. Mont Code Ann. §46-17-203(3).

Trial is different. Andre had the fundamental constitutional right to testify, and the City had no corresponding right to confront him face-to-face. If the court granted Andre's motion to appear for trial remotely, as it did here, without eliciting any express or implied waiver, the court and the City must accept Andre's desire to testify remotely as well. The city court's denial of Andre's right to testify in his trial was err requiring reversal.

II. The City offered insufficient evidence of legal accountability for two of the charged counts when, for Count I and III, it only argued Andre was present and aware shoplifting was occurring.

In the alternative, Counts I and III must be dismissed, because a so-call "Felony Stretch" and watchful eyes over an acquaintance in the act of shoplifting is the balance of the City's theory of guilt as to these two counts of misdemeanor misuse of a computer by accountability. Taken as true, this evidence does not support a conviction for accountability under settled law.

The law is well-settled that "mere presence at the scene of a crime, even with knowledge and approval of the criminal intent or acts of others, is not a crime and is insufficient alone to establish criminal

accountability for a crime committed by another.” *State v. Pierre*, 2020 MT 160, ¶22, 400 Mont. 283, 466 P. 3d 49, (citations omitted.)

Under the 2021 version of the statute defining misdemeanor misuse of a computer, which applies here, a person may be found guilty with evidence beyond a reasonable doubt that a person obtained the use of or altered or destroyed a computer, computer system, computer network, or any part thereof as part of a deception for the purpose of obtaining money, property, or computer services from the owner of the computer, computer system, computer network, or part thereof or from any other person. Mont. Code Ann. § 45-6-311 (2021).

A person is legally accountable for the conduct of another when either before or during the commission of an offense, with the purpose to promote or facilitate the commission, the person solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of the offense. Mont. Code Ann. § 45-2-302(3).

As charged, the City was required to prove Andre was legally accountable as to each distinct misdemeanor offense, with proof beyond a reasonable doubt. The City confused matters with its trial theme. The City started its opening and closing arguments with the theme that

Andre was legally accountable for each misdemeanor offense because he was in-on a “common scheme” to steal from the Family Dollar. The reference conjures Mont. Code Ann. §45-2-101(8), theft by “common scheme.” Property offenses charged as part of a “common scheme” serve to enhance a series of misdemeanor crimes to a felony when the combined pecuniary loss to the victim exceeds \$1500. Mont. Code Ann. § 45-2-101(8), MCA; *State v. Rowe*, 2024 MT 37, ¶ 20, 415 Mont. 280, 543 P.3d 614. In addition to the total pecuniary loss, to prove a “common scheme,” Mont. Code Ann. §45-2-101(8) requires the State in relevant part to prove, in addition to each underlying misdemeanor offense, that the offenses were motivated by “...a common purpose or plan that results in the repeated commission of the same offense...” Mont. Code Ann. § 45-2-101(8).

Here, the City did not charge Andre with misuse of a computer by common scheme. And indeed, it could not have done so because while the city court has concurrent jurisdiction over all misdemeanors, Mont. Code Ann. § 3-11-101, it does not have jurisdiction over felonies. But confusingly, the city carried a theme throughout trial that Andre’s guilt could be adjudged by whether he was in on a “common scheme,” that is,

whether any act on his part was “motivated by a common purpose or plan” to repeatedly “defraud the Family Dollar.”

Notwithstanding the City’s theme at trial, this is not the standard required to prove legal accountability for an offense. As charged, Andre could not be guilty unless the City proved he aided or abetted each separate and distinct misdemeanor misuse of a computer offense. As to the sufficiency of the City’s evidence, each count charged is a separate offense and stands alone.

The City understood this by the time of its closing argument and was left to scramble. Whereas in its charging documents, the City did not differentiate the conduct that it alleged comprised each offense, in closing, it needed to find a way to argue Andre somehow aided or abetted the others even though Smells testified he did not distract the clerk during the first and third transaction, he was merely standing nearby looking at his phone at those times. In its charging affidavit, the City alleged generally that another individual — not Andre — used a debit card and his phone to purchase gift cards at the register. The City alleged this individual did not fully insert the debit card, however, and at one time he and Andre distracted the store clerk by asking that she

reach a Dove body wash from behind the counter, causing her to turn away. During that time, the other individual reached around and pushed a button on the screen, purportedly to confirm the transaction without paying. The City alleged this occurred three times but did not specify when in the sequence of those counts Andre participated in distracting the cashier.

At trial, the City offered the Family Dollar surveillance video and Officer Smells' testimonial narrative of this video as its primary evidence. Smells testimony confirmed that the City's own timeline, taken as true, was that Andre did not gesture toward the body wash or show the cashier his own phone until several minutes *after* the first fraudulent transaction, alleged to have occurred at 9:22 a.m., was fully complete. Indeed, Smells' testimony describes the first transaction as carried out entirely by the man in the white t-shirt, the person who Smells had originally mistaken for Andre, while Andre himself was "just standing there." (Tr. Min. 51:00-55:00, 1:11:00-1:12:00; Surveillance Video Min. 00:00- 3:00.) It isn't until several minutes later in the surveillance video, during what the City alleged was the second fraudulent transaction, that Smells describes Andre as actively

participating in distracting the cashier. By the end of this second transaction, Smells confirms that Andre was again standing farther back, unengaged, just looking at his phone. (Tr. Min. 55:00, 1:14:28; Surveillance Video Min. 3:00-8:00.) Smells then describes a third man, again not Andre, engage in similar behavior as the man in the white t-shirt had. This third individual's actions, at 9:28 a.m., corresponds to what the City alleged as the third count of misuse of a computer by accountability against Andre. However, Smells confirmed that by this time, Andre was standing back, uninvolved, looking at his phone throughout this third and final fraudulent transaction. (Tr. Min. 1:15:00; Surveillance Video Min. 9:00-12:00.)

The City had to pivot in its closing, realizing the evidence it presented at trial, at best, established Andre participated in distracting the cashier in only the second count of misuse of a computer. Andre arriving and departing from the store with the others merely shows association, not accountability. Now the City asserted Andre was legally accountable for the first and third fraudulent gift card transactions by his "body language alone," which the City said showed Andre was aware of what was happening. At length, the City described a so-called

“Felony Stretch,” which the City said, “we who prosecute and in law enforcement” recognize as the body language of people who know “something is about to happen.” The City made no claim that this “Felony Stretch” was distracting to the cashier, just that it indicated Andre was aware of what the others were doing. The City then asked the court to find that Andre’s eyes were watching the register, again to show Andre knew that his acquaintances’ would reach around to press the cashier’s side of the till but didn’t try to stop them. These acts, taken as true, amount only to mere presence at the scene of a crime, or being a knowing spectator, neither of which is enough to convict someone as an “accomplice.”

For Count I and Count III, being present and being a knowing spectator is all the City argued or presented any evidence of to show that Andre was legally accountable. But, knowledge that a crime was about to be committed does not make one an accomplice or accountable for that crime. *State v. Johnston*, 267 Mont. 474, 481, 885 P.2d 402, (1994). And being a knowing spectator or failure to disapprove or oppose criminal conduct is not in itself criminal behavior. *State v. Maetche*, 2008 MT 184, ¶ 17, 343 Mont. 464, 185 P.3d 980; *State v. Kills on Top*,

243 Mont 56, 92, 793 P. 2d 1273 (1990)(quotation marks omitted). For Count I, the City argued Andre stretching his hands above his head just prior to the man in the white t-shirt approaching the register indicated he was aware his acquaintance was about to steal. For Count III, the City argued that Andre's eyes could be seen to be looking on as the other man manipulated the till, and he failed to yell out, "Hey stop that!" Both of these actions are insufficient to show accountability for those offenses, and other than leaving the store together, they are the balance of what the City argued comprised Andre's guilt.

As Andre argued below, the law on accountability is clear that neither mere presence nor failure to stop a crime that one is aware is going to occur is sufficient to show legal accountability in Montana. Association with others isn't accountability either. The City failed to meet its burden in Count I and III, the case must be remanded for both counts and corresponding restitution, to be dismissed.

III. This Court should reverse Andre's 135-day active jail sentence as unjust.

If this Court does not reverse and remand for a new trial or reverse and dismiss Count I and III, it should find the sentence imposed an abuse of discretion.

Upon petition, the Sentence Review Division reviews sentences imposing one or more years of actual incarceration for equity and appropriateness under the circumstances. *State ex rel. Greely v. Dist. Ct. of Fourth Jud. Dist.*, 590 P.2d 1104, 1110 (1979); *State v. Coleman*, 605 P.2d 1000, 1006 (1979); see Mont. Code Ann. §§ 46-18-903, -904. When a sentence imposes less than a year of actual incarceration, this Court steps into the place of the Sentence Review Division. *State v. Herman*, 2008 MT 187, ¶ 11, 343 Mont. 494, 188 P.3d 978; *Herd*, ¶ 25.

Andre was 21-years-old with no criminal record when he accompanied two other men while they shoplifted at the Family Dollar store in Hardin, Montana. From the outset, the City has agreed Andre's charges were a result of mistaken identity, he was charged because the store clerk, and then the investigating officer, confused him for one of the other Black men in the store. Andre was confused for the man in the white t-shirt, who stole the gift cards. But, since that man, and the other man who shoplifted from the store were both already released, the City made the charges against Andre stick by adjusting them to allegations of accountability.

The surveillance video shows Andre was little involved. Yet, he still wished to accept responsibility for a single misdemeanor count from his home in Michigan, per a plea offer, but the City refused simply because Andre requested to enter his plea by two-way audio-visual communication. Andre's repeated motions to appear by Zoom were made for necessity, not negligence. Andre could not afford to pay either the price of a ticket to Montana or the price of being absent from Michigan — which meant losing his job — to make repeated appearances on his misdemeanor charges. His wish to enter a plea by video was authorized by statute, save for the City's objection.

These circumstances do not warrant a harsher sentence than would typically be dispensed for a misdemeanor property offense, but that is what happened here.

Anthony's sentence amounts to 135 days of custodial time in Big Horn County jail. The City reasoned that its recommendation for this sentence was because it had hoped the County Attorney would take the case on, charging for the enhanced felony penalty of theft by common scheme. But notably, the Department of Corrections does not supervise misdemeanants in jail, *see* Mont. Code Ann. § 46-23-1004, and parole

and conditional release are not available for misdemeanants sentenced to jail, *see* Admin. R. Mont. 20.7.601(2), (5) (defining parole and conditional release as DOC programs). So, unlike if it had been charged as a felony in another jurisdiction, Andre's 135-day active jail sentence is 135 days that Andre must spend in jail.

Andre is only 21 years old with no other criminal history. A custodial sentence for misdemeanor property offenses, imposed for accountability for other's acts, needlessly puts Andre's promising future at risk, threatens suspension of his driver's license, and hangs burdensome financial obligations over him and his family members. The Court should hold the City Court's custodial sentence unreasonable and strike it as an abuse of discretion.

CONCLUSION

This Court should reverse Anthony's three misdemeanor convictions for a new trial because he was denied his constitutional right to testify in his trial without a valid waiver. Alternatively, because the City failed to proffer sufficient evidence in Count I and III, this Court should remand for both counts and their corresponding restitution, to be dismissed. Finally, if the Court upholds the

convictions, it should find Anthony's sentence unjust and in equity,
eliminate the custodial time ordered.

Respectfully submitted this 19th day of February 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook 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 7,622, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

By: /s/ Kathryn Gear Hutchison
KATHRYN GREAR HUTCHISON

APPENDICES

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CERTIFICATE OF SERVICE

I, Kathryn Grear Hutchison, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-19-2025:

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