

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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STATE OF OREGON,

Plaintiff-Respondent,

v.

CLIFFORD DARRELL KEYS,

Defendant-Appellant.

Marion County Circuit  
Court No. 16CR24492

CA A163519

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RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

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Appeal from the Judgment of the Circuit Court  
for Marion County  
Honorable SEAN E. ARMSTRONG, Judge

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## RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

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### SUMMARY OF ARGUMENT

This case is on remand from the Supreme Court following its decision in *State v. Keys*, 368 Or 171, \_\_\_ P3d \_\_\_ (2021) (*Keys II*). In defendant's first appeal, he raised an unpreserved argument that he never validly waived his right to a preliminary hearing under Article VII (amended), section 5, of the Oregon Constitution. Defendant argued, first, that the lack of a valid waiver posed a jurisdictional defect that could be raised for the first time on appeal despite his failure to preserve it below. Alternatively, defendant asked this court to reach his claim as plain error.

This court agreed that defendant's argument posed a jurisdictional defect that required reversal regardless of preservation, and thus did not reach defendant's plain-error claim. *State v. Keys*, 302 Or App 514, 526-27, 460 P3d 1020 (2020), *rev'd*, 368 Or 171 (2021) (*Keys I*). On review, the Supreme Court reversed, concluding that an assertedly invalid waiver of preliminary hearing does not pose a jurisdictional defect, and thus remains subject to ordinary preservation requirements. *See Keys II*, 368 Or at 173, 202-05. The Supreme Court remanded to this court to address defendant's alternative plain-error argument in the first instance. *Id.* at 204-05.

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This court should now affirm. Any error is not plain because the claimed error is not “obvious,” and this court would have to choose between competing inferences to find the error. And, regardless, this court should decline to exercise its discretion to correct any plain error because, as the majority of jurisdictions nationwide have held, defendant’s asserted error is manifestly harmless on this record: Defendant argues that he was deprived of an opportunity to test the state’s evidence against a probable-cause standard of proof, yet his subsequent conviction is based on a judicial finding of guilt beyond a reasonable doubt. Defendant does not challenge the sufficiency of the evidence to support that conviction, nor does he identify any other way in which the absence of a preliminary hearing posed any likelihood of affecting the result of the proceedings below.

## **ARGUMENT**

### **A. Background**

Police discovered a bindle of methamphetamine in defendant’s wallet during a traffic stop. (10/20/16 Tr 5; eTCF 39-40 (stipulations of fact)). The state filed an information charging defendant with felony possession of methamphetamine. (ER-1; 4/29/16 Tr 2); *former* ORS 475.894 (2016).

At defendant’s arraignment on that information, counsel was appointed to represent him and, shortly thereafter, counsel stated, “We are prepared to waive preliminary hearing at this time, reserving the right to assert that in the future

should that become necessary.” (4/29/16 Tr 2). But defendant never did assert his right to a preliminary hearing. Instead, after pursuing an unsuccessful motion to suppress evidence (eTCF 17-21, 27), defendant elected to waive jury and proceed to a trial to the court on stipulated facts. (10/20/16 Tr 3-6; eTCF 33). The trial court found defendant guilty, concluding beyond a reasonable doubt that he had, in fact, possessed methamphetamine. (10/20/16 Tr 6; eTCF 39-40; ER-2).

Appealing his conviction, defendant did not assign error to any affirmative trial court ruling or challenge the legal sufficiency of the evidence to convict him. (*See generally* App Br). Instead, defendant asserted that he never validly waived his right to a preliminary hearing under Article VII (amended), section 5, of the Oregon Constitution. (App Br 2-3).

In so asserting, defendant presented two alternative arguments. Defendant argued, first, that the trial court lacked subject matter jurisdiction over defendant’s case, rendering his conviction void and requiring reversal despite defendant’s failure to preserve his claim before the trial court. (*Id.* at 6-9 (citing *Huffman v. Alexander*, 197 Or 283, 300-01, 251 P2d 87 (1952)). Alternatively, defendant asked this court to reach his argument as one of plain error. (App Br 2-5).

The state responded that both arguments were foreclosed by this court’s case law, including specifically *State v. Sheppard*, 35 Or App 69, 73, 581 P2d

549 (1978), *rev den*, 285 Or 1 (1979), which rejected a similar jurisdictional argument and held that the defendant waived preliminary hearing by pleading not guilty to the charged offense and submitting to trial without raising any objection. (Resp Br 4-10); *see also Barnes v. Cupp* 44 Or App 533, 606 P2d 664, *rev den*, 289 Or 587 (1980) (any error in failing to hold a preliminary hearing “was removed by petitioner’s plea of guilty,” where the petitioner did not argue that police lacked probable cause to detain him or that the lack of a preliminary hearing “was somehow a material factor” in his decision to plead guilty).

This court agreed with defendant’s jurisdictional argument, concluding that counsel’s purported waiver of preliminary hearing on defendant’s behalf posed a jurisdictional defect that rendered defendant’s conviction void and required reversal despite defendant’s failure to object below. *Keys I*, 302 Or App at 523-24. Acknowledging that its own case law suggested a different result, this court reached that conclusion only by overruling *Barnes* and limiting *Sheppard*, concluding that doing so was compelled by the Supreme Court’s decision in *Huffman* on which defendant relied. *Id.* at 523-25. Given its acceptance of defendant’s jurisdictional argument, this court did not reach defendant’s alternative plain-error claim.

On the state’s petition for review, the Supreme Court reversed, concluding that its prior decision in *Huffman* stood “for a more limited



proposition” than this court had perceived, and that preliminary hearing defects do not deprive a trial court of subject matter jurisdiction, but remain subject to ordinary preservation principles. *See Keys II*, 368 Or at 173, 202-05. The Supreme Court remanded to this court to address defendant’s alternative plain-error claim in the first instance. *Id.* at 205. This court should now reject defendant’s plain-error claim and affirm.

**B. This court should reject defendant’s plain-error argument.**

“No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court \* \* \* provided that the appellate court may, in its discretion, consider a plain error.” *State v. Dilallo*, 367 Or 340, 344, 478 P3d 509 (2020) (quoting ORAP 5.45(1)). “For an error to be plain error, it must be an error of law, obvious and not reasonably in dispute, and apparent on the record without requiring the court to choose among competing inferences.” *Id.* (quoting *State v. Vanornum*, 354 Or 614, 629, 317 P3d 889 (2013)).

Even if an error qualifies as plain error, the appellate court must decide whether to exercise its discretion to consider the error. *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d 956 (1991). Plain-error review is “contrary to the strong policies requiring preservation and raising of error,” so this court engages in plain-error review “with utmost caution” and “only in rare and exceptional cases.” *State v. Gornick*, 340 Or 160, 166, 130 P3d 780 (2006).

Here, defendant's claim does not qualify as plain error, because the claimed error is not obvious and beyond reasonable dispute, and this court would also have to choose between competing inferences to identify it. Regardless, the error is manifestly harmless, so this court should not—indeed, cannot—exercise its discretion to correct the error.

**1. Defendant's claim does not qualify as plain error.**

Defendant's argument does not qualify as plain error for two reasons. First, the error is not obvious and beyond reasonable dispute. As noted, in defendant's first appeal, this court accepted defendant's jurisdictional argument only by expressly overruling or limiting this court's prior decisions in *Barnes* and *Sheppard*. See *Keys I*, 302 Or App at 523-25. As noted, *Sheppard* had held that a defendant waived preliminary hearing because, while assisted by counsel, he pleaded not guilty to the charged offense and submitted to a subsequent trial without raising any objection. *Sheppard*, 35 Or App at 73. And *Barnes* had held that any error in failing to hold a preliminary hearing is "removed" by a defendant's decision to plead guilty, at least in the absence of any affirmative showing that the state lacked probable cause or that the absence of a preliminary hearing materially impacted the defendant's decision to plead guilty. *Barnes*, 44 Or App at 538. As also noted, this court in *Keys I* concluded that disavowing or limiting those cases was required by this court's

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understanding of the Supreme Court's prior decision in *Huffman*. *Keys I*, 302 Or App at 523-25.

But the Supreme Court's decision now makes clear that this court read *Huffman* too broadly, casting doubt on this court's reasoning for disavowing and limiting its prior case law. In the plain-error posture in which defendant's argument now arises, that case law now precludes the conclusion that defendant's asserted preliminary hearing defect poses an obvious error, because defendant, while represented by counsel, did not object to the lack of a preliminary hearing but submitted to a trial to the court. *See Sheppard*, 35 Or App at 73 (defendant waived preliminary hearing by pleading not guilty to charging instrument and submitting to trial with the assistance of counsel); *cf. Barnes*, 44 Or App at 538 (preliminary defects not reversible error when defendant subsequently pleads guilty to charged offense and does not challenge the state's evidence or make some other affirmative showing of prejudice). In short, given the Supreme Court's intervening clarification of the scope of *Huffman*, defendant's claimed error is not obvious for the same reasons that the state originally argued in its opening brief before this court.

Second, defendant's claimed error is not apparent on the face of this record, because this court could find the claimed error only by impermissibly choosing between competing inferences. *See State v. Turnidge*, 359 Or 507, 518, 521-22, 373 P3d 138 (2016) (a claim does not qualify for plain error

review if the court would have to choose between competing inferences to find the error). Specifically, at defendant's arraignment, although defendant's counsel purported to waive preliminary hearing on defendant's behalf, counsel expressly reserved the right to assert the right to a preliminary hearing later if defendant determined that that was appropriate. (4/29/16 Tr 2). But defendant never did assert his right to a preliminary hearing; instead, he chose to plead not guilty to the charged crime and proceed to trial. (10/20/16 Tr 3-6; eTCF 33). Defendant's choice not to assert his right to a preliminary hearing despite expressly reserving his right to do so gives rise to an inference that defendant *did* knowingly waive preliminary hearing. This court would have to impermissibly reject that inference to find defendant's claimed plain error on this record. *Turnidge*, 359 Or at 518, 521-22.<sup>1</sup>

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<sup>1</sup> In *Keys I*, this court suggested that the state did not argue that counsel's purported waiver on defendant's behalf had legal effect. *Keys I*, 302 Or App at 517. Nothing about that should preclude the state's present argument regarding the inferences arising from counsel's qualified waiver and defendant's subsequent inaction. When this case first came before this court, the state acted reasonably in relying on *Sheppard*, which appeared to provide controlling authority for the proposition that defendant's submission to trial without objection waived preliminary hearing.

**2. This court should not exercise its discretion to correct the error because it is manifestly harmless.**

Finally, even if defendant's claim qualified as plain error, this court "will not and cannot exercise [its] discretion to correct a plain error" that is harmless. *State v. Kerne*, 289 Or App 345, 349-50, 410 P3d 369 (2017); *accord* Or Const, Art VII (Amended), § 3 (requiring appellate courts to affirm judgment despite non-prejudicial error). Here, defendant's claim is, in substance, a complaint that he never received a hearing at which to test the state's evidence against a probable-cause standard of proof. But, at defendant's subsequent trial, the trial court found defendant guilty of the charged crime beyond a reasonable doubt, and defendant does not challenge the legal sufficiency of the evidence to support that verdict.

In *Barnes*, this court held that preliminary hearing defects are cured by a defendant's subsequent conviction, at least in the absence of any challenge to the sufficiency of the evidence or other affirmative showing that the lack of a preliminary hearing materially affected the trial-court proceedings. *Barnes*, 44 Or App at 538. In so holding, *Barnes* is consistent with the rule in most other jurisdictions nationwide, which nearly uniformly recognize that preliminary hearing defects are harmless if a defendant is ultimately convicted beyond a reasonable doubt (by plea or after trial) and does not challenge the legal sufficiency of the evidence or identify any other affirmative way in which the

absence of a preliminary hearing affected the trial proceedings. *See* Wayne R. LaFave, 4 *Criminal Procedure* §§ 14.2(g) (4th ed 2019) (“[M]ost courts hold that the conviction, by establishing guilt beyond a reasonable doubt, ‘cures’ the lack of a probable cause finding at a preliminary hearing—at least absent a defense showing of specific prejudice to the trial proceedings as a result of the lack of a preliminary hearing[.]”); *see also, e.g., State v. Norcutt*, 139 P3d 1066, 1070 (Utah App 2006) (“It is rather difficult to see how a guilty defendant is prejudiced by waiving a preliminary hearing when all that is entailed at the hearing is that sufficient evidence be given to the committing magistrate to cause him to believe that a crime has been committed and that there is probable cause to believe the defendant guilty thereof.”); *State v. Adams*, 554 NW2d 686, 693-94 (Iowa 1996); *State v. Butler*, 897 P2d 1007, 1021 (Kan 1995) (“We hold that where an accused has gone to trial and been found guilty beyond a reasonable doubt, any error at the preliminary hearing stage is harmless unless it appears that the error caused prejudice at trial”); *State v. Hardman*, 828 P2d 902, 904-05 (Idaho 1992) (“Where the fairness of a trial is uncontested, errors at the preliminary hearing are not grounds for vacating a conviction.”); *Esparaza v. State*, 595 So 2d 418, 423 (Miss 1992) (the defendant “must prove that some prejudice to the defendant’s case resulted” from a preliminary hearing defect); *Commonwealth v. Tyler*, 587 A2d 326, 328 (Pa 1991) (“Once appellant has gone to trial and been found guilty of the crime, any defect in the

preliminary hearing is rendered immaterial.”); *State v. Webb*, 467 NW2d 108 (Wisc 1991) (“[A] conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing.”); *People v. Hall*, 460 NW2d 520, 525-28 (Mich 1990); *People v. Alexander*, 663 P2d 1024, 1025 n 1 (Colo 1983) (“Absent unusual circumstances not present here \* \* \* any [defect at the preliminary hearing stage] is rendered moot by the jury’s guilty verdict”); *State v. Long*, 408 So 2d 1221, 1226 (La 1982) (defects at the preliminary hearing stage are “rendered moot by [a defendant’s] subsequent trial and conviction”); *People v. Pompa-Ortiz*, 612 P2d 941, 947 (Cal 1980) (preliminary hearing defects “shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error”); *State v. Franklin*, 234 NW2d 610, 615 (Neb 1975) (“[A]fter trial and conviction” preliminary hearing defects are “cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt”).

Here, defendant identifies no affirmative way in which the lack of a preliminary hearing posed any likelihood of affecting the trial proceedings below. Instead, defendant’s arguments on remand appeal only to the abstract nature of the right involved. (*See Supp App Br 2-5*). And even those arguments lose all force considering defendant’s subsequent conviction beyond a reasonable doubt. That is, because the trial court ultimately found defendant guilty of the charged crime beyond a reasonable doubt, any error in failing to

test the state's evidence against a probable-cause standard of proof is *not* grave; the state *does* have an interest in maintaining defendant's conviction; judicial efficiency would *not* be served by reversal (and defendant will have a poor prejudice argument on post-conviction); and it would benefit future cases to *affirm* the trial court's judgment here, making clear that a defendant convicted under a beyond-a-reasonable-doubt standard of proof must affirmatively identify some specific way in which the absence of a preliminary hearing caused him prejudice to obtain reversal. Defendant has failed to do that here, so Article VII (Amended), section 3, of the Oregon Constitution, requires that this court now affirm the trial court's judgment.

For similar reasons, the well-established principles that this court will decline to correct plain error that easily could have been corrected or where an objection would have resulted in a different record also militate against reaching defendant's claim. *See Dept. of Human Servs. v. H.F.E.*, 288 Or App 609, 612, 410 P3d 1108 (2017) (this court declines to correct error that easily could have been corrected); *State v. Campbell*, 266 Or App 116, 120, 337 P3d 186 (2014) (this court declines to correct error when opposing party was deprived of an opportunity to respond); *Kirkpatrick and Kirkpatrick*, 248 Or App 539, 551-52, 273 P3d 361 (2012) (this court declines to correct error when an objection may have resulted in a different record).

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Here, if defendant had objected to the lack of a preliminary hearing, the trial court easily could have held one. And defendant's subsequent conviction beyond a reasonable doubt strongly suggests that, at such a hearing, the state would have easily been able to establish probable cause to believe that defendant committed the charged offense. Defendant raises no argument suggesting otherwise.

### **CONCLUSION**

Defendant's claim does not qualify as plain error and, even if it did, it would not warrant discretionary correction by this court. This court should affirm the trial court's judgment.

Respectfully submitted,

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## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on July 30, 2021, I directed the original Respondent's Supplemental Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Kyle Krohn, attorneys for appellant, by using the court's electronic filing system.

### **CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)**

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 2,941 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

/s/ Jordan R. Silk

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