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Apparent from the Context: The Contemporaneous Objection Rule and Montana Rule of Evidence 103(a)(1)

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APPARENT FROM THE CONTEXT: THE CONTEMPORANEOUS OBJECTION RULE AND MONTANA RULE OF EVIDENCE 103(a)(1)

Lauren R. Fox*

I. INTRODUCTION

It's a rare millennial who is not familiar with "Legally Blonde," a movie about an unlikely law school candidate attending Harvard Law School. In her application video, Elle Woods, click-clacking along in her high heels and pink sundress, tells the camera that she "feel[s] comfortable using legal jargon in everyday life."[1] The audience hears a wolf whistle, and a shirtless man runs up, pats her on the backside, then runs on.[2] She says, "I object!", gives the camera a big smile, and continues on her way.[3] Although this scene is clearly a comedic Hollywood creation, the legal jargon Ms. Woods introduces is familiar to most people in the audience, and specifically to the legal community: the preservation of errors for appeal through timely and specific objections.[4] It is less clear when an objection was not timely, not specific, or did not occur at all. The waters grow murky when a clear "I object" statement is not utilized, and issues on appeal fall to the discretion of the court. This piece explores the conditions under which an objection is sufficiently apparent from the context to satisfy the rules of evidence.

The Montana Supreme Court has traditionally observed the precedent of prohibiting unpreserved and unargued issues on appeal unless they affect a substantial right of a party.[5] But through recent, more flexible application of the Montana Rules of Evidence, the Court has opened the door to departing from the purpose behind the rules of evidence by expanding the interpretation of context-based objections.[6] Recent cases suggest the Court is divided: three justices demonstrate a flexible application and broad interpre-

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1. LEGALLY BLONDE (Metro-Goldwyn-Mayer 2001).

2. *Id.*

3. *Id.*

4. FED. R. EVID. 103(a)(1)(A).

5. State v. Favel, 362 P.3d 1126, 1131 (Mont. 2015); State v. Taylor, 231 P.3d 79, 82 (Mont. 2010).

6. *See generally* State v. Byrne, 495 P.3d 440 (Mont. 2021); State v. Strizich, 499 P.3d 575 (Mont. 2021).

tation of the rules in a divergence from precedent;[7] the other three justices favor a strict application of the rule's plain language in accordance with existing case law.[8]

This paper contends that across federal and state jurisdictions, the rules of evidence were designed to prevent unpreserved issues to be raised on appeal for purposes of efficiency, equity, utility, and stability.[9] Although it is difficult to create a general rule due to the fact-specific nature of context-based inquiries, this paper also asserts that the precedent behind the rules of evidence indicate that if an objection is to qualify as sufficiently context-based, the specific grounds for the objection must be abundantly clear;[10] the record must reflect the use of the specific wording from the requisite rule of evidence;[11] and the record must reflect that the trial court judge understood the specific grounds.[12] The plain error doctrine serves as a safety net to protect a party's rights if their counsel fails to make a timely and specific objection and makes modifications of the Contemporaneous Objection Rule unnecessary.[13]

II. Introduction to the Rules of Evidence and Recent Montana Supreme Court Cases

The Montana Rules of Evidence are substantively consistent with federal and state jurisdictions on the proper preservation of issues for appeal.[14] Montana Rule of Evidence 103(a)(1) provides that to claim error to the admission of evidence, "a timely objection or motion to strike appears of

7. *Byrne*, 495 P.3d at 440.

8. *Id.*

9. Notes to Decisions on Fed. R. Evid. 103, Note 12: Purpose, LexisNexis (2023); Mont. R. Evid. 103 commission comments (a)(1); Dorais v. Doll, 83 P. 884, 886 (Mont. 1905); Copenhaver v. Northern Pacific Ry., 113 P. 467, 471 (Mont. 1911); Baldwin v. Silver, 193 P. 750, 751–52 (Mont. 1920); Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. Kan. L. Rev. 947, 949–50 (1998).

10. *See* Busta v. Columbus Hosp., 916 P.2d 122, 129 (Mont. 1996); State v. Tome, 495 P.3d 54, 60 (Mont. 2021); Palmerin v. Riverside, 794 F.2d 1409, 1413 (9th Cir. 1986); Thronson v. Meisels, 800 F.2d 136, 142 (7th Cir. 1986); Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir. 1997); Curreri v. Int'l Brotherhood of Teamsters, 722 F.2d 6, 13 (1st Cir. 1983) (quoting Subecz v. Curtis, 483 F.2d 263, 266 (1st Cir. 1973)); United States v. Aguirre, 605 F.3d 351, 356 (6th Cir. 2010).

11. *See* United States v. Carey, 589 F.3d 187, 191 (5th Cir. 2009) (citing United States v. Polasek, 162 F.3d 878, 883 (5th Cir. 1998)); State v. Greytak, 865 P.2d 1096, 1097 (Mont. 1993); State v. Tome, 495 P.3d 54, 60–61 (Mont. 2021); State v. Rogers, 306 P.3d 348, 357 (Mont. 2013); State v. Heidinger, 455 P.3d 459, 459 (Mont. 2019).

12. United States v. Barrett, 539 F.2d 244 (1st Cir. 1976); United States v. Vargas, 471 F.3d 255, 263 (1st Cir. 2006); State v. Castle, 982 P.2d 1035, 1037 (Mont. 1999); Superior Enters. LLC v. Mont. Power Co., 49 P.3d 565, 566 (Mont. 2002); State v. Tome, 495 P.3d 54, 60 (Mont. 2021).

13. Fed. R. Evid. 103(e); Mont. R. Evid. 103(d).

14. *See generally* Fed. R. Evid. 103(a)(1); Mont. R. Evid. 103(a)(1); Ala. R. Evid. 103(a)(1); Ill. R. Evid. 103(a)(1); Utah R. Evid. 103(a)(1); N.H. R. Evid. 103(a)(1).

record, stating the specific ground of objection if the specific ground was not apparent from the context."[15] The rules intend that if an objection is not made in accordance with Rule 103(a) then it is waived.[16] The Montana Supreme Court has reiterated and maintained this intention in cases dating back to 1929:[17] "[O]ne must object to improper testimony when it is offered or abide the result; failure to object at the proper times waives the error."[18]

The Federal Rules of Evidence's appeals preservation rule is very similar in substance, if not in verbiage, to other jurisdictions.[19] A party's counsel objects to errors to preserve a substantial right of a party.[20] An objection to an error requires "timely and specific objections [that] are normally required to preserve the allegedly erroneous issue for appellate review."[21] To preserve an error for appeal, there must be a timely objection and the grounds for objection clearly stated.[22] If a party failed to preserve an issue properly, then the plain error standard applies.[23] But in some cases, parties run into issues with the latter part of 103(a)(1)(B) where the specific ground must be clearly stated, "unless it was apparent from the context."[24]

Most state jurisdictions have some variation of the Federal Rules of Evidence, with a few exceptions. Most states either adopted an identical version[25] to the Federal Rules, or the version adopted by Montana, all of which mention objections being apparent from the context.[26] A few States such as California and Kansas have no provision for context-based objections at all.[27]

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15. MONT. R. EVID. 103(a)(1).

16. MONT. R. EVID. 103 commission comments (citing Labbitt v. Bunston, 277 P. 620 (1929); Estate of Schueren v. Union Bank & Trust Co., 512 P.2d 1283 (1973)).

17. *Labbitt*, 277 P. at 621.

18. State v. Lawrence, 948 P.2d 186, 200 (Mont. 1997) (quoting *Labbitt*, 277 P. at 621).

19. FED. R. EVID. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: (1) if the ruling admits evidence, a party, on the record: (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context."); CAL. EVID. CODE § 353 ("There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion.").

20. FED. R. EVID. 103(a) ("Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party. . . .").

21. David William Navarro, *Comment: Jury Interrogatories and The Preservation Of Error In Federal Civil Cases: Should The Plain-Error Doctrine Apply?*, 30 ST. MARY'S L.J. 1163, 1165 (1999).

22. *Id.* at 1165.

23. FED. R. EVID. 103(e) ("Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.").

24. FED. R. EVID. 103(a)(1)(B).

25. *See generally* ARIZ. R. EVID. 103; UTAH R. EVID. 103; N. H. R. EVID. 103.

26. *See generally* MONT. R. EVID. 103; ILL. R. EVID. 103; OHIO R. EVID. 103; ALA. R. EVID. 103.

27. CAL. EVID. CODE § 353(a); KAN. STAT. ANN. § 60-404 (2022).

A. State v. Byrne

The Montana Supreme Court indirectly addressed context-based objections when it decided *State v. Bryne* in 2021.[28] The defendant, Byrne, was charged in 2018 with three counts of felony sexual intercourse without consent with a minor for conduct that occurred between 2009 and 2011.[29] Byrne filed a motion in limine to prevent any elicited testimony regarding the credibility of the victim either from lay or expert witnesses.[30] The prosecutors agreed with the stipulation and the court granted "all the motions that were made that were agreed to."[31] During the trial, however, the State questioned four of its witnesses about the victim's credibility and in closing arguments made statements about the victim being reliable.[32] Defense counsel made one objection but was overruled without explanation, and it is unclear from the opinion if the Defense counsel had stated the specific grounds for the objection.[33]

1. Majority Opinion in State v. Byrne

The opinion for the majority was authored by Justice Laurie McKinnon, joined by Justices Ingrid Gustafson, Dirk Sandefur, and James Shea.[34] The majority found the issue was properly preserved for appeal, despite no timely objections from the defense counsel, through a judicially created carve-out to the general rule.[35] It is a well-established practice that a motion in limine could preserve an issue for appeal if the trial court had been "directly faced with the question" and provided "a definitive ruling."[36] The majority leaned heavily on *State v. Partin*,[37] where the defense filed a motion in limine to prevent testimony of prior bad acts.[38]

In *Partin*, the State agreed not to include testimony of prior bad acts and warned witnesses against mentioning them.[39] When a witness violated this agreement, the defense objected and filed for a mistrial.[40] The majority

28. 495 P.3d 440, 447 (Mont. 2021).
29. *Id.* at 443.
30. *Id.*
31. *Id.* at 454.
32. *Id.* at 444–47.
33. *Id.* at 445.
34. *Byrne*, 495 P.3d at 443, 453.
35. *Id.* at 447.
36. *Id*. *See also* Anderson v. BNSF Ry., 354 P.3d 1248 (Mont. 2015); Peterson-Tuell v. First Student Transp., LLC, 339 P.3d 16 (Mont. 2014); State v. Crider, 328 P.3d 612 (Mont. 2014); State v. Vukasin, 75 P.3d 1284 (Mont. 2003).
37. 951 P.2d 1002 (Mont. 1997).
38. *Id*. at 1003.
39. *Id.*
40. *Byrne*, 495 P.3d at 448 (quoting *Partin*, 951 P.2d at 1003).

asserted that when the State stipulates to a motion in limine and subsequently reneges on its word, "resolving any doubt . . . in favor of the prosecution would be inappropriate."[41] The majority further held that contemporaneous objections are unnecessary if the objection would be redundant to a motion in limine and that there are tactical reasons for not objecting in front of the jury.[42]

2. *Dissent in* State v. Byrne

The dissent was authored by Justice Beth Baker and was joined by Chief Justice Mike McGrath and Justice Jim Rice.[43] They contend that the issue was not preserved for appeal by the motion in limine because the trial court did not definitively rule on the issue.[44] Although not mentioned by the majority, Byrne did not make the argument on appeal that his motion in limine preserved the issue for appeal and instead requested plain-error review.[45] When the district court granted "all the motions that were made that were agreed to," the dissent did not consider this a definitive ruling and that it did not alter the parties' pretrial posture.[46] This is because the district court had asked and received a response in the affirmative that the parties agreed on what questions the prosecutor could ask.[47]

3. *Discussion of* State v. Byrne

The use of a motion in limine to preserve an issue for appeal is a well-established practice in Montana and rooted in the Federal and Montana Rules of Evidence.[48] The objection needs to be clear,[49] and the district court must be "directly faced" with the issue and provide a "definitive ruling."[50] These judicial requirements can be traced to the Fourth Circuit Court of Appeals case *Werner v. Upjohn*,[51] which was incorporated into Montana

41. *Partin*, 951 P.2d at 1008.

42. *Byrne*, 495 P.3d at 447.

43. *Id.* at 453, 460.

44. *Id.* at 454.

45. *Id.* at 453, 458, 455 ("Whether a party does or does not object to an evidentiary ruling, the Court may review the admission or exclusion of evidence affecting the party's 'substantial rights'."); FED. R. EVID. 103(a), (d).

46. *Byrne*. 495 P.3d at 454.

47. *Id.*

48. *See generally* Anderson v. BNSF Ry., 354 P.3d 1248 (Mont. 2015); Peterson-Tuell v. First Student Transp., LLC, 339 P.3d 16 (Mont. 2014); State v. Crider, 328 P.3d 612 (Mont. 2014); State v. Vukasin, 75 P.3d 1284 (Mont. 2003).

49. *Crider*, 328 P.3d at 618 ("To preserve an objection for appeal through use of a motion in limine, the objecting party must make the basis for his objection clear to the district court."); *see also* State v. Ingraham, 966 P.2d 103, 109 (Mont. 1998).

50. State v. Favel, 362 P.3d 1126, 1130 (Mont. 2015).

51. Werner v. Upjohn Co., Inc., 628 F.2d 848, 853 (4th Cir. 1980).

case law by *State v. Fuhrmann*.[52] There, the Montana Supreme Court held that "Rule 103(a)(1), Fed.R.Evid., [is] identical in substance to Rule 103(a)(1), M.R.Evid., which holds that specific objection is required 'only where the specific ground would not be clear from the context'."[53] If the judge has provided a definitive ruling, then further objections are not required.[54]

There are two issues that distinguish *Byrne* from its cited precedent: first, that the motion was granted, and second, that the defense counsel still had the responsibility to object when the prosecution violated the motion.[55] In the cases cited in *Byrne*, the respective motions in limine were denied by the court and thereby preserved for appeal.[56] Here, the issue was not preserved for appeal because the district court had the opportunity to prevent the error from being admitted when it granted the motion in limine.

Simply filing a motion in limine does not relieve the defense counsel from the need to make specific objections: "specific objections must be made to portions of testimony deemed inappropriate; broad general objections do not suffice."[57] This is reinforced by the case cited by the majority, *Partin*, which they even distinguished from *Byrne* because the counsel in *Partin* made a timely and specific objection to the testimony that violated the motion in limine and moved for a mistrial.[58] By failing to object to the specific portions of the testimony that violated the motion in limine, the defense counsel failed to preserve the issue for appeal.

B. State v. Strizich

In 2021, the Montana Supreme Court addressed context-based objections again. In *State v. Strizich*, the defendant and a friend had burglarized a cabin in December 2016.[59] During the burglary, they were interrupted by the owners pulling into the drive.[60] The owner ran after the two men, and a standoff at gunpoint occurred.[61] Strizich approached the owner, who fired warning shots with his gun and shot Strizich in the leg.[62] Strizich crawled

52. State v. Fuhrmann, 925 P.2d 1162, 1166 (Mont. 1996) (citing *Werner*, 628 F.2d at 853).
53. *Id.*
54. Hulse v. Dep't of Justice, 961 P.2d 75 (Mont. 1998); Barrett v. ASARCO, Inc., 799 P.2d 1078, 1083–84 (Mont. 1990); Beil v. Mayer, 789 P.2d 1229, 1232–1233 (Mont. 1990).
55. *Hulse*, 961 P.2d at 75.
56. State v. Ingraham, 966 P.2d 103, 109 (Mont.1998); *Fuhrmann*, 925 P.2d at 1166–67.
57. State v. Ankeny, 243 P.3d 391, 398 (Mont. 2010) (quoting State v. Vukasin, 75 P.3d 1284, 1289 (Mont. 2003)).
58. State v. Partin, 951 P.2d 1002, 1003 (Mont. 1997).
59. State v. Strizich, 499 P.3d 575, 579 (Mont. 2021).
60. *Id.*
61. *Id.*
62. *Id.*

away in the snow and was later arrested in a nearby cabin.[63] The police took him to the hospital where he underwent surgery and was later transferred to Elkhorn Healthcare and Rehabilitation.[64] When he learned that there was an arrest warrant for his participation in the burglary, Strizich fled the hospital with three friends.[65] Strizich's would-be rescuers engaged police in a high-speed chase, with Strizich as a passenger.[66] After the vehicle crashed, Strizich was again arrested.[67]

Over the course of the trial, Strizich's counsel objected four times to the mention of the high-speed chase as irrelevant and an impermissible introduction of subsequent bad acts in violation of Montana Rules of Evidence 402 and 404(b).[68] Strizich was convicted by the trial court of aggravated burglary, criminal trespass to property, and criminal possession of dangerous drugs.[69]

1. Majority Opinion in State v. Strizich

The majority opinion was written by Justice Beth Baker and joined by Chief Justice Mike McGrath, Justice James Shea, and Justice Jim Rice.[70] The Justices in the majority are the same justices in the dissent from *Byrne*, with the addition of Justice James Shea. On appeal, Strizich argued that mentioning his flight was irrelevant (Rule 402), unfairly prejudicial (Rule 403), and used as a subsequent bad act (Rule 404(b)).[71] The majority analyzed the Rule 402 and Rule 404(b) objections but found that there was no mention in the record of prejudice when Strizich's counsel objected to flight evidence.[72] Montana Rule of Evidence 103(a)(1) requires that objections be timely and state the specific ground of the objection.[73] Trial courts will not be "put in error when it was never given a chance to rule on the specific objection."[74] Since the counsel's objections did not mention prejudice, the Rule 403 objection was not preserved for appeal and the plain error standard applied.[75]

63. *Id.*
64. *Id.*
65. *Strizich*, 499 P.3d at 579.
66. *Id.*
67. *Id.* at 580.
68. *Id.* at 584.
69. *Id.* at 579.
70. *Id.* at 578, 588.
71. *Strizich*, 499 P.3d at 582.
72. *Id.* at 582–84.
73. MONT. R. EVID. 103(a)(1).
74. *Strizich*, 499 P.3d at 584 (quoting State v. Baker, 15 P.3d 379, 383 (Mont. 2000)).
75. *Id.*

2. Dissent in State v. Strizich

The dissent was written by Justice Laurie McKinnon and joined by Justices Ingrid Gustafson and Dirk Sandefur.[76] They contend that Strizich did preserve a Rule 403 objection and that the flight evidence was unfairly prejudicial.[77] The dissent asserts the majority's citation of Rule 103 was a half-truth because they omitted that an objection must be timely and state the specific ground of the objection if "the specific ground was not apparent from the context."[78]

Though they agree that the defense counsel did not raise a specific Rule 403 objection, Rule 402 implies the need to balance the relevance of the evidence with Rule 403.[79] The dissent believes it is apparent in the context as demonstrated by the court transcript where the district court stated:

> Well, I think I'm still obligated to examine the relevant probative value of the evidence of — that's going to be offered and weigh this against the prejudice inherent in this type of evidence in light of the actual need to introduce it. I still think I have that obligation under Rule 404, even at this late juncture.[80]

The fact the court mentions Rule 404 instead of 403 "makes no functional difference" to the dissent's analysis, and Strizich's objection should be found as properly preserved.[81]

3. Discussion of State v. Strizich

The general rule in federal and Montana case law is that courts do not consider issues raised for the first time on appeal.[82] The exception to this general rule is if the court exercises its discretion to protect a defendant's fundamental rights under plain error review.[83] In *State v. Favel*,[84] the court clarified that "failing to review the claimed error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fair-

76. *Id.* at 588, 595.

77. *Id.* at 589.

78. *Id.* at 590 (quoting MONT. R. EVID. 103(a)(1)).

79. *Id.*at 591.

80. *Strizich*, 499 P.3d at 591 (McKinnon, J., dissenting).

81. *Id.* at 592 (McKinnon, J., dissenting).

82. *See* State v. Favel, 362 P.3d 1126, 1129 (Mont. 2015); State v. Taylor, 231 P.3d 79, 82 (Mont. 2010); Duggan v. Hobbs, 99 F.3d 307, 313 (9th Cir. 1996) (holding that courts "will not consider an issue raised for the first time on appeal").

83. *See, e.g.*, *Favel*, 362 P.3d at 1129; Singleton v. Wulff, 428 U.S. 106, 121 (1976) (finding that certain circumstances justify a federal appellate court's decision to hear an unpreserved issue).

84. *Favel*, 362 P.3d at 1129.

ness of the proceedings, or compromise the integrity of the judicial process."[85]

The Montana Rules of Evidence are straightforward as to what is required to preserve an issue for appeal in that there must be a timely and specific objection unless the objection was apparent from the context.[86] By failing to object, the defense waives the right to appeal, and only certain jurisdictional or constitutional errors are exempted from the waiver rule.[87] Although discussed in greater detail below, in instances where the court has found the grounds for an objection to be apparent from the context, it was typically clear that the defense intended to object on the grounds that it raised on appeal.[88]

III. The Reasoning Behind the Majority in *Byrne* and the Dissent in *Strizich* Diverges from the Contemporaneous Objection Rule, Montana Precedent, and other Jurisdictions

If the reasoning behind the majority in *Byrne* and the dissent in *Strizich* prevails, Montana courts would be departing from the purpose behind the Contemporaneous Objection Rule, changing precedent on the interpretation of context-based objections, and ruling inconsistently with other jurisdictions. The Contemporaneous Objection Rule was created to maximize efficiency, preserve equity between parties, protect utility, and solidify the stability of the justice system.[89] Each time a court considers an issue raised for the first time on appeal, the unintended side effect is the erosion of these benefits. By modifying the precedent of what objections may be considered apparent from the context, the courts accelerate the erosion of the Contemporaneous Objection Rule. By diverging from the purpose behind the rule and the court's precedent, the result is moving Montana courts further from other jurisdictions and allowing unpreserved and unargued issues to be heard by appeals courts.

85. *Id.*

86. Mont. R. Evid. 103(a)(1).

87. Mont. Code Ann. § 46-20-104(2) (2021); § 46-20-701(2).

88. *See* Busta v. Columbus Hosp., 916 P.2d 122, 129 (Mont. 1996); State v. Tome, 495 P.3d 54, 60 (Mont. 2021); Palmerin v. Riverside, 794 F.2d 1409, 1413 (9th Cir. 1986); Thronson v. Meisels, 800 F.2d 136, 142 (7th Cir. 1986); Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir. 1997); Curreri v. Int'l Brotherhood of Teamsters, 722 F.2d 6, 13 (1st Cir. 1983) (quoting Subecz v. Curtis, 483 F.2d 263, 266 (1st Cir.1973)); United States v. Aguirre, 605 F.3d 351, 356 (6th Cir. 2010).

89. *See* Carter, *supra* note 9, at 949–50; Navarro, *supra* note 21, at 1173–76.

A. The Purpose of the Contemporaneous Objection Rule

The purpose behind Rule 103's contemporaneous objection and proffer requirements is "to give the trial judge a chance to correct errors which might otherwise require a new trial, to give him a chance to re-evaluate his ruling in light of evidence to be offered, and to allow the reviewing court to determine if exclusions affected substantial rights of the party offering evidence."[90] Any departure from these rules reduces the efficiency, equity, utility, and stability of the judicial system.

The Montana commission comments indicate that this provision was added in accordance with Montana case law that has found there is "no error for denying a motion that is too broad."[91] This provision also serves to notify opposing counsel to make corrections.[92] The utilitarian benefits of this strategy are plain: the trial judge is given deference to decide the issues presented to them, and by addressing errors immediately there is no needless waste of time and resources on remands or new trials.[93] A great deal of deference is given to the trial court to make definitive rulings in these cases as they are present for the trial and most familiar with the case.[94]

By raising timely and specific objections to errors, the district court is able to form a complete record for the appellate court to evaluate.[95] This ensures that "[o]nly objections that appear in the record will be grounds for appellate review."[96] It also ensures a fair trial for both sides by preventing reversals when objections are not presented at trial, giving opposing counsel an opportunity to respond.[97] The opposing party "would be restricted from introducing new evidence, defenses, and factual arguments in an appellate court in order to rebut or defend an unpreserved issue."[98] Lastly, the rule creates trust and stability in the judicial system when decisions are not being overturned with regularity.[99] Since the respective counsels have the pri-

90. Murphy v. Flagler Beach, 761 F.2d 622, 626 (11th Cir. 1985) (citing Robinson v. Shapiro, 646 F.2d 734 (2d Cir. 1981)).

91. MONT. R. EVID. 103 commission comments (a)(1); Dorais v. Doll, 83 P. 884, 886 (Mont. 1905); Copenhaver v. Northern Pacific Ry., 113 P. 467, 471 (Mont. 1911); Baldwin v. Silver, 193 P. 750, 751–52 (Mont. 1920).

92. Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1, 45 (1993) (stating that "the objection alerts the judge and opposing counsel to errors that might be addressed and corrected to prevent unfair prejudice to either party and avoid error or mistrial if possible.").

93. Carter, *supra* note 9, at 949–50.

94. *Id.*

95. *Id.*

96. Fred Warren Bennett, *Preserving Issues for Appeal: How to Make a Record at Trial*, 18 AM. J. TRIAL ADVOC. 87, 92–93 (1994).

97. Ohlbaum, *supra* note 92, at 45.

98. Navarro, *supra* note 21, at 1175.

99. Carter, *supra* note 9, at 950.

mary burden of ensuring that trials are as fair and just as possible through the objection of errors, there is the added benefit that "the preservation rule encourages competent and vigilant performance by the trial attorneys."[100]

If courts regularly allow issues to be raised for the first time on appeal without being properly preserved, the result would be an unravelling of the judicial system. As one author noted:

> Invariably, there is a negative effect on the appellate court when new issues are raised on appeal. Each time an appellant asks the appellate court to consider an issue not raised in the trial court, the appellate court must devote time to deciding whether to consider the issue and, if it decides to do so, must then spend additional time examining its merits.[101]

Once an appellate court begins considering new issues on appeal with regularity, it is increasingly likely that more appeals will be brought.[102] A party that loses at trial will not appeal new issues unless there is a chance that an appellate court will consider a new issue despite the jurisdiction's rules.[103] This issue was concisely addressed by the Court of Appeals for the District of Columbia in *United States v. Seigel*,[104] when the court stated that:

> [r]ules of procedure . . . are not mere naked technicalities . . . . [R]easonable adherence to clear, reasonable and known rules of procedure is essential to the administration of justice. Justice cannot be administered in chaos . . . . If the courts must stop to inquire where substantial justice on the merits lies every time a litigant refuses to abide [by] the reasonable and known rules of procedure, there will be no administration of justice.[105]

Without strict adherence to these rules, the result would be chaos, and it would adversely impact the administration of justice.

B. Defining "Apparent from the Context"

Although there is no bright-line rule on what "apparent from the context" must entail, there are a few consistent elements that can be pulled from case law and compared between federal circuits. If the specific grounds are not abundantly clear from the record, the failure to state the specific grounds waives the objection.[106] Although the federal circuits differ on this point, specifically in the case of motions in limine, even if the

100. *Id.*

101. Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1032 (1987).

102. *Id.*

103. *Id.*

104. 168 F.2d 143 (D.C. Cir. 1948).

105. *Id.* at 146.

106. MONT. R. EVID. 103 commission comments; Zimmerman v. Bozeman Prod. Credit Ass'n, 759 P.2d 166, 169 (Mont. 1988).

specific grounds were apparent from the context, the defense counsel must renew objections in some instances.[107]

Next, an objection that is apparent from the context is usually evinced by use of the language within a given rule, such as "relevant" for Rule 402 objections or "prejudice" for Rule 403 objections.[108] Lastly, the record must reflect the district court judge's understanding of the counsel's intention to object based on specific grounds. What did not meet the threshold was mere hope from counsel that their failure to specifically object could be construed to fit their needs on appeal.[109]

For states that do mention context-based objections in their rules of evidence, their case law makes it clear that the context should be determined through the type of questions asked.[110] This indicates that the only permissible application of context is when an objection has been made and the counsel failed to state the specific ground, not whether the objection itself is apparent from the context.

1. Abundantly Clear

For the specific ground of an objection to be apparent from the context, the context must clearly demonstrate the grounds for the objection and not require mental gymnastics by the appellate court to justify. *Busta v. Columbus Hospital*[111] was cited by both the majority and the dissent in *Strizich*.[112] In *Busta*, the court held that "[u]ndue prejudice in violation of Rule 403 was also specifically waived because it was not stated as a basis of the defendant's objection at the time the exhibit was offered."[113] Even liberally interpreting the defendant's objection, the court still could not find that the district court had abused its discretion.[114] The dissent in *Strizich* clarified that the "record and context of the objection proved crucial to our

107. *See* FED. R. EVID. 103 advisory committee's note to 2000 amendment; Palmerin v. Riverside, 794 F.2d 1409, 1413 (9th Cir. 1986); Thronson v. Meisels, 800 F.2d 136, 142 (7th Cir. 1986); Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980); Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir. 1997); Curreri v. Int'l Brotherhood of Teamsters, 722 F.2d 6, 13 (1st Cir. 1983) (quoting Subecz v. Curtis, 483 F.2d 263, 266 (1st Cir. 1973)); United States v. Aguirre, 605 F.3d 351, 356 (6th Cir. 2010).

108. *See* United States v. Carey, 589 F.3d 187, 190 n. 1 (5th Cir. 2009) (citing United States v. Polasek, 162 F.3d 878, 883 (5th Cir. 1998)); State v. Greytak, 865 P.2d 1096 (Mont. 1993); State v. Tome, 495 P.3d 51, 60–61 (Mont. 2021).

109. State v. Heideinger, 455 P.3d 459 (Mont. 2019).

110. State v. Gilmore, 503 N.E.2d 147, 149 (Ohio 1986); State v. Wolf, 605 N.W.2d 381, 385 (Minn. 2000).

111. 916 P.2d 122 (Mont. 1996).

112. State v. Strizich, 499 P.3d 575, 584, 591 (Mont. 2021).

113. *Busta*, 916 P.2d at 129.

114. *Id.*

interpretation of the relevance objection in *Busta*."[115] In *State v. Tome*,[116] also cited by both the majority and dissent in *Strizich*,[117] the State claimed that the defendant did not properly preserve his Confrontation Clause right for appeal.[118] However, the court found that the record demonstrated that the grounds of his objection was clear because he raised them multiple times and "specifically argued that his right of confrontation would be violated."[119]

Regarding the use of motions in limine, the requirement to make a contextual objection via a pre-trial motion is reflected in some circuits by requiring that objections be renewed.[120] This topic is considered one of the most difficult evidentiary rulings,[121] yielding a circuit split on the mechanics and frequency of renewing objections.[122] Generally, for pre-trial motions such as a motion in limine, once the court has definitively ruled on admitting the evidence, no further objection is required.[123] The Ninth Circuit has held that as long as the ruling on the motion in limine is "explicit and definitive," then there is no need to renew objections.[124] Similarly, the Seventh Circuit has held that once the motion has been denied, the issue is properly preserved for appeal without further objection.[125]

However, some courts have held that an overruled objection must be renewed when the evidence is being offered at trial in order to give the trial court a final chance to reconsider.[126] This does not relieve the party from clarifying with the court if there is any doubt whether a ruling is definitive.[127] Nor does it excuse a party from making clear that they are still "pressing the point" after a definitive ruling.[128] Most significantly, however, a party still has the requirement to make an initial objection.[129] The Advisory Committee said it best: "Differing views on this question create uncertainty for litigants and unnecessary work for the appellate courts."[130]

115. *Strizich*, 499 P.3d at 591 (McKinnon, J., dissenting).

116. 495 P.3d 54 (Mont. 2021).

117. *Strizich*, 499 P.3d at 584, 591.

118. *Tome*, 495 P.3d at 60.

119. *Id.* at 59.

120. FED. R. EVID. 103 advisory committee's notes to 2000 amendment (stating that "[s]ome courts have held that a renewal at the time the evidence is to be offered at trial is always required.").

121. *Id.*

122. *Id.*

123. *Id.*

124. Palmerin v. Riverside, 794 F.2d 1409, 1413 (9th Cir. 1986).

125. Thronson v. Meisels, 800 F.2d 136, 142 (7th Cir. 1986).

126. Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980).

127. Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir. 1997).

128. Curreri v. Int'l Brotherhood of Teamsters, 722 F.2d 6, 13 (1st Cir. 1983) (quoting Subecz v. Curtis, 483 F.2d 263, 266 (1st Cir. 1973)).

129. United States v. Aguirre, 605 F.3d 351, 356 (6th Cir. 2010).

130. FED. R. EVID. 103 advisory committee's notes to 2000 amendment.

Implicit in these rulings is that the objecting party lost the objection and the objectionable evidence was admitted, but they do not address what occurs when an objection was sustained.

2. Use of Specific Wording

The next criteria for an objection to be apparent from the context is the use of the specific wording from the requisite rule of evidence by the counsel.[131] The Fifth Circuit has also stated that objections that didn't meet the vague "apparent from the context" standard would not preserve the issue for appeal, noting a "loosely formulated and imprecise objection will not preserve error."[132]

In the Montana case *State v. Greytak*,[133] the defense filed a motion in limine to prevent testimony to bolster the victim's credibility.[134] All parties agreed, and at trial, the defense raised the issue again, which was again acknowledged by the judge and the prosecution.[135] During questioning, the prosecution attempted to help the witness recall a prior statement and the defense objected based on "speculation."[136] On appeal, the defense claims that this violated the party's implied agreement, but the court found the prosecutor's question was "not improper for the reason urged at the time of trial and that the reason raised for the first time on appeal was not apparent from the context in which the question was asked."[137] However, on appeal in *Tome*, the defense claimed that they objected to evidence under the confrontation clause, and because the defense counsel mentioned the right to confront on three separate occasions, it was considered apparent from the context.[138] In *State v Rogers*,[139] the court found that the defendant's objection to evidence of past criminal history was preserved by his statements that the court would be prosecuting him for his past.[140] The Montana Supreme Court distinguished *Rogers* in *State v. Heidinger*.[141] The court said that since the defense counsel did not provide the disagreement or explicit

131. *See* United States v. Carey, 589 F.3d 187, 191 (5th Cir. 2009) (citing United States v. Polasek, 162 F.3d 878, 883 (5th Cir. 1998)); State v. Greytak, 865 P.2d 1096, 1097 (Mont. 1993); State v. Tome, 495 P.3d 54, 60-61 (Mont. 2021); State v. Rogers, 306 P.3d 348, 357 (Mont. 2013); State v. Heidinger, 455 P.3d 459, 459 (Mont. 2019).

132. *Carey*, 589 F.3d at 190 n.1.

133. 865 P.2d 1096 (Mont. 1993).

134. *Id.* at 1097.

135. *Id.*

136. *Id.* at 1098.

137. *Id.*

138. State v. Tome, 495 P.3d 51, 60–61 (Mont. 2021).

139. 306 P.3d 348 (Mont. 2013).

140. *Id.* at 357.

141. 455 P.3d 459 (Mont. 2019).

rationale that was provided in *Rogers*, the issue was waived for appellate review because it was not apparent from the context.[142]

3. Record Reflection of Judge's Comprehension

Although these cases do not provide bright-line tests, they indicate that the federal circuits will only consider an objection properly preserved if there was little to no doubt from the context, such that the trial court record indicates the judge's understanding the specific grounds for the objection. In *United States v. Barrett*,[143] the First Circuit Court of Appeals held that a party failing to state the specific grounds for the objection did not lose the objection because it was apparent from the context and evident by the trial court's comments.[144] In another First Circuit Case, the court found that the specific grounds for the defendant's objection were not apparent from the context when it followed a series of questions that covered a range of topics and the district court did not demonstrate in the record that they understood the specific grounds.[145]

In Montana's *State v. Castle*,[146] the defense objected to the prosecution's question of an expert witness as to the nature of "battered woman syndrome" as speculation.[147] The court found the issue was not properly preserved or apparent from the context because the record reflected that the district court assumed the objection related to a different matter.[148] In *Superior Enterprises LLC v. Montana Power Co.*,[149] the issue on appeal was whether the district court should have permitted a witness to testify as an expert witness.[150] From the context, it was apparent the court had understood the witness to be an expert because the court addressed him as an expert witness.[151] Again in *Tome*, the Montana Supreme Court found that the defense had properly preserved the issue for appeal because it was clear from the record that the court understood the basis of the objection.[152]

142. *Id.* at 459.
143. 539 F.2d 244 (1st Cir. 1976).
144. *Id.* at 247 n.5.
145. United States v. Vargas, 471 F.3d 255, 263 (1st Cir. 2006).
146. 982 P.2d 1035 (Mont. 1999).
147. *Id.* at 1037.
148. *Id.*
149. 49 P.3d 565 (Mont. 2002).
150. *Id.* at 566.
151. *Id.* at 568.
152. *Tome*, 495 P.3d at 60.

C. Plain-Error Standard Eliminates Need to Deviate from Rules

Despite the ubiquitous nature of the Contemporaneous Objection Rule, errors can be missed or overlooked, and justice may require that exceptions are made under the plain-error standard.[153] One author noted that:

> Although the justifications for requiring an advocate to preserve errors for appeal are compelling and federal appellate courts usually comply with the general rule, certain instances also compel courts to consider new issues on appeal even if they have not been preserved properly.[154]

The plain-error standard was created in recognition that a party's rights are more important than procedural technicalities and that those rights need to be protected.[155] Plain-error review does not mean that the courts allow a free-for-all, and reversal based on plain error is, and should, remain relatively rare.[156] As one author noted, "[t]he doctrine allows for judicial discretion and is only used in certain circumstances."[157] The United States Supreme Court has held that exceptions are to "be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'"[158] Further, courts, strictly in exceptional circumstances and for the public benefit, may sua sponte take notice of errors if "the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."[159] Because the plain-error doctrine serves to protect a party's rights if their counsel fails to make a timely and specific objection, the Montana Supreme Court would best serve the interests of justice by adhering to the purpose behind the Contemporaneous Objection Rule and the precedent established by the court.

IV. Conclusion

The reasoning behind the majority in *Byrne* and the dissent in *Strizich* has honorable roots, as the group of justices that advocate for flexibly applying the Montana Rules of Evidence 103(a)(1) sought to ensure that the defendant's substantial rights were not violated. A justice system that emphasizes protecting a defendant's rights over procedural rules is the correct order of priorities for a legal system.[160] However, by not strictly applying

153. Navarro, *supra* note 21, at 1165; Mont. R. Evid. 103(d); Fed. R. Evid. 103(e).

154. Navarro, *supra* note 21, at 1176.

155. Debra L. Hovland, *Errors in Interpretation: Why Plain Error is Not Plain*, 11 L. & Ineq. J. 473, 492–93 (1993).

156. *Id.*

157. *Id.*

158. United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982)).

159. United States v. Atkinson, 297 U.S. 157, 160 (1936).

160. Hovland, *supra* note 156, at 492–93.

the Contemporaneous Objection Rule, the inevitable result is that the injustices will spread.

When courts do not hold defense attorneys accountable for failures to make clear and timely objections, injustices will occur by disadvantaging the prosecution who is advocating on behalf of the State and ensuring justice for victims, congesting the appellate system making it harder to thoroughly review more legitimate cases, and putting the district court in error by not enforcing rules of procedure. The unintended consequence of opinions like *Byrne* is that the Montana Supreme Court has started allowing issues to be raised for the first time on appeal. In *Byrne*, the motion in limine was granted by the court and the defense counsel had the responsibility to ensure the motion was followed.[161] The counsel did not make any objections, so claiming that the granted motion in limine was sufficiently apparent from the context did not give the trial court a chance to correct errors.[162] The more direct solution—instead of attempting to stretch improperly made objections to fit the appeal—would be to claim ineffective assistance of counsel. The defense in *Byrne* failed to object on multiple occasions to the prosecution's violation of the motion in limine; thus, ineffective assistance of counsel would be a potential option instead of modifying the standard of apparent from the context.[163] In *Strizich*, when the defense failed to make a timely and specific objection, it was not abundantly clear from the context nor does the opinion reflect that the defense counsel used specific wording from Rule 403 or that the trial court judge understood the grounds for the objection.[164] Rather, his counsel failed to object on Rule 403 grounds and the plain error standard of review should apply.[165] The Montana Supreme Court or the Montana Legislature should develop a bright-line rule on what "apparent from the context" entails in furtherance of a more efficient, predictable, and uniformly-enforceable legal system.

The purpose behind the Montana Rules of Evidence is clear. The courts ensure efficiency, fairness, predictability, and stability by strictly adhering to these rules. The issue at the heart of these two cases is what standard to apply to "apparent from the context." Broadening this standard in the interest of justice is unnecessary because the plain error standard of review ensures that there is a safety net for errors that slipped through the cracks. Therefore, there is little incentive to deviate from these rules and should only be done in extremely rare cases. This divergence sets a troubling precedent and could result in a chaotic future judicial system.

161. State v. Byrne, 495 P.3d 440, 447–48 (Mont. 2021).
162. *Id.*
163. *Id.*
164. State v. Strizich, 499 P.3d 575, 584–85 (Mont. 2021).
165. *Id.* at 584–86.