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3 IN THE COURT OF APPEALS  
4 OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
5 OF THE FLATHEAD INDIAN RESERVATION

5 CONFEDERATED SALISH AND KOOTENAI ) Cause No. 94-301-CR  
6 TRIBES, )  
7 Plaintiff and Appellee, )  
8 vs. ) OPINION  
9 THOMAS JOE ROBERTS, )  
10 Defendant and Appellant. )

10 Submitted on Briefs April 20, 1995

11 Decided May 20, 1996

12 Thomas R. Myers, Office of the Tribal Prosecutor, Confederated Salish and  
13 Kootenai Tribes, Pablo, Montana 59855, for plaintiff and appellee.

14 Edward Hayes, Office of the Tribal Public Defender, Confederated Salish and  
15 Kootenai Tribes, Pablo, Montana 59855, for defendant and appellee.

16 Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes,  
17 Gary L. Acevedo and Stephen A Lozar, Tribal Judges, Presiding.

18 Before: PEREGOY, Chief Justice, and HALL and WHEELIS, Associate Justices.

19 WHEELIS, Justice:

19 INTRODUCTION

20 The defendant, Thomas Joe Roberts, was convicted of driving without a driver's  
21 license, a violation of Montana Code Annotated § 61-5-102, incorporated into the Law  
22 and Order Code of the Confederated Salish and Kootenai Tribes under Chapter IV,  
23 Section H(12). He was thirteen years old when he was cited for the offense, and thus  
24 could not obtain a driver's license.

25 Thomas moved for a jury trial. The Honorable Gary L. Acevedo, the original  
26 presiding Tribal Judge, denied his motion, concluding that the Tribes were not  
27 obligated to provide a jury trial for petty offenses that did not carry with them the  
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1 possibility of incarceration, as was the case with the defendant, who was a juvenile and  
2 thus could not be jailed for driving without a license.

3 At trial, Thomas raised the defense of duress, arguing that he was compelled to  
4 drive because his mother, who directed him to drive, was too intoxicated to drive safely  
5 herself. This allegation was not disputed by the Tribes. The trial judge rejected the  
6 defendant's defense of duress and found him guilty of the charge. It assessed a fine of  
7 \$500.00 suspending all but \$200.00 of that amount.

8 Thomas's appeal brings two issues to this Court:

- 9 1. Whether the affirmative defense of duress should have exonerated the  
10 defendant of the crime with which he was charged; and  
11 2. Whether the Tribal Court erred in concluding that Thomas was not entitled to a  
12 jury trial.

13 We affirm.

#### 14 DISCUSSION

15 **1. Duress.** Should the defendant's affirmative defense of duress have exonerated  
16 him from the charge of driving without a driver's license? From the transcript of the  
17 proceedings, it is clear that the defendant was allowed to present evidence on that  
18 defense and argue it to the Court. It is equally clear that Judge Lozar considered the  
19 defense, but rejected it at least in part as a factual matter:

20 Whereas the Court recognizes the concern of the youth for obeying  
21 his mother, that concern nevertheless does not circumvent the law;  
22 Whereas the [C]ourt believes that if this offense were allowed to go  
23 without penalty, it would set a precedent that would nullify the  
24 law; Whereas the Court finds that the youth endangered himself,  
25 his passenger and the public as would his mother have endangered  
26 the same if she had driven; and whereas the Court finds the youth  
27 was in fact driving without a valid driver's license; ...  
28 Judgment, November 9, 1994, page 1.

29 The Tribal Court's concern that accepting the defense of duress would "set a  
30 precedent that would nullify the law" could be interpreted as a conclusion that the

1 defense does not apply to regulatory traffic charges. The main thrust of its judgment,  
2 however, was that the Court did not accept as a matter of fact that the defendant was  
3 under duress when he drove without a license.

4 Absent an abuse of discretion, which we do not find here, a Tribal Court's factual  
5 conclusions require deference. When the Tribal Court sits without a jury, it is the sole  
6 finder of fact. Chapter III, § I(3), Law and Order Code of the Confederated Salish and  
7 Kootenai Tribes. The Tribal Court committed no error when it rejected the defendant's  
8 affirmative defense of duress. It appears unnecessary for this Court to discuss further  
9 the affirmative defense of duress.

10 **2. Jury trial.** Chapter III, Section I(1), Law and Order Code of the Confederated  
11 Salish and Kootenai Tribes, provides:

- 12 1. Defendants in all criminal cases shall have a right to trial by jury  
13 of six fair and impartial jurors.
- 14 2. A defendant may waive the right to a jury trial. Such waiver  
15 must be in writing.

16 The defendant argues, understandably, that the quoted section of the Law and Order  
17 Code is clear and unequivocal, thus requiring that it be given effect without  
18 interpretation:

19 Our role in construing statutes is clear. We must "ascertain and  
20 declare what is in terms or in substance contained therein ...;" we  
21 may not insert what has been omitted or omit what has been  
22 inserted. Section 1-2-101, MCA. The intention of the legislature is to  
23 be pursued. Section 1-2-102, MCA. If that intention can be  
24 determined from the plain meaning of the words used, a court may  
25 not go further and apply other means of interpretation. *State v.*  
26 *Hubbard* (1982), 200 Mont. 106, 111, 649 P.2d 1331, 1333 (citation  
27 omitted). Where the statutory language is "plain, unambiguous,  
28 direct and certain, the statute speaks for itself and there is nothing  
left for the court to construe." *Hubbard*, 649 P.2d at 1333.

*Curtis v. District Court*, 266 Mont. 231, 235, 879 P.2d 1164, 1166  
(1994).

The Tribal Court, in its denial of the defendant's request for a jury, and the Tribes  
in their brief rely principally on *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed.

1 99 (1904), which held that the United States was not required to supply a jury trial to a  
2 defendant charged with the "regulatory" offense of failing to properly label  
3 oleomargarine. That charge carried a \$50.00 fine. At issue there was the third clause of  
4 Article 2, § 3, of the United States Constitution, which states in pertinent part that "the  
5 trial of all crimes, except in cases of impeachment, shall be by jury." To determine the  
6 meaning of that clause, the United States Supreme Court examined the common law at  
7 the time the Constitution was written and concluded that the term "crimes" did not  
8 include petty offenses. It also noted that the convention that enacted the Constitution  
9 amended the original language the draft of Article 2, § 3, from "the trial of all criminal  
10 offenses" to "the trial of all crimes." *Schick*, 195 U.S., at 70. The majority distinguished  
11 between "crimes" and "misdemeanors," holding that misdemeanors and petty offenses  
12 were not "crimes," because conviction of a petty offense did not stigmatize an accused  
13 with "moral delinquency" and thus did not enjoy the guarantee of a jury trial, which  
14 they held reserved for more serious offenses. *Id.*

15 Justice Harlan, writing for the minority in *Schick*, argued that the phrase from the  
16 Sixth Amendment, "[i]n all criminal prosecutions" should expand the right of a jury  
17 trial, noting that the Amendment was enacted after the original Constitution. In its  
18 entirety, the Sixth Amendment to the United States Constitution provides:

19 In all criminal prosecutions, the accused shall enjoy the right to a  
20 speedy and public trial, by an impartial jury of the State and district  
21 wherein the crime shall have been committed, which district shall  
22 have been previously ascertained by law, and to be informed of the  
23 nature and cause of the accusation; to be confronted with the  
24 witnesses against him; to have compulsory process for obtaining  
25 witnesses in his favor, and to have the Assistance of Counsel for his  
26 defense.

25 Harlan argued that "all criminal prosecutions" was broader than the word "crimes,"  
26 and that the later wording should amend the earlier, narrower construction. *Schick*, 195  
27 U.S., beginning at 103, 49 L.Ed., beginning at 73. Although the issue has been before the  
28 United States Supreme Court since *Schick*, Justice Harlan's position has not prevailed.

1 The *Schick* Court's reliance on "moral delinquency" has been abandoned, but the  
2 majority's conclusion that jury trials are reserved only for serious offenses has survived.  
3 *Blanton v. North Las Vegas*, 489 U.S. 538, 103 L.Ed.2d 550, 109 S.Ct. 1289 (1989).

4 Neither the Sixth Amendment nor the guarantee of a jury trial in Article 3, Section  
5 2 of the Constitution, have been held by the United States Supreme Court to require a  
6 jury trial in petty offenses. See *Burch v. Louisiana*, 441 U.S. 130, 670 L.Ed.2d 96, 99 S.Ct.  
7 1623 (1979); *Muniz v. Hoffman*, 422 U.S. 454, 45 L.Ed.2d 319, 95 S.Ct. 2178 (1975); *Duncan*  
8 *v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968)—all of which maintained  
9 the earlier holdings that offenses carrying no more than six months' imprisonment were  
10 "petty."

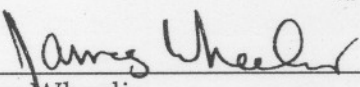
11 More recently, the United States Supreme Court held that a contempt fine of \$52  
12 million imposed on a labor union was a "serious" sanction requiring a jury trial.  
13 *International Union, United Mine Workers v. Bagwell*, \_ U.S. \_, 129 L.Ed.2d 642, 114 S.Ct.  
14 2552 (1994). But there remains no federal right to a jury trial for most offenses that carry  
15 no more than six months' imprisonment. *United States v. Nachtigal*, \_ U.S. \_, 122 L.Ed.2d  
16 374, 113 S.Ct. 1072 (1993). It is also the case that the provision of the Indian Civil Rights  
17 Act analogous to Chapter III, Section I(1) of the Law and Order Code states explicitly  
18 that an Indian tribe must provide a jury trial only for offenses "punishable by  
19 imprisonment." 25 U.S.C. § 1302.

20 The defendant has argued, in effect, that since the Law and Order Code is a  
21 legislative enactment, interpretations derived from the common law should not apply to  
22 its provisions. Ordinarily, that would be the case. *City of Helena v. Lewis*, 260 Mont. 421,  
23 426, 860 P.2d 698 (1993). Absent more explicit language in the Law and Order Code,  
24 however, we are inclined to follow the constraints which federal cases have placed  
25 upon similar provisions affecting the right to a jury trial. The Tribal Council may, if it  
26 wishes, expand the guarantee of a jury trial beyond that afforded by the Indian Civil  
27 Rights Act. A state, for instance, may grant more extensive rights to an accused when  
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1 that grant is based upon a provision of its own constitution. See *Michigan v. Mosley*, 423  
2 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). We believe the Tribal Council must be taken  
3 to have enacted Section I(1) against the backdrop of federal caselaw that has defined the  
4 right to a jury trial, and hold, therefore, that the phrase, "in all criminal cases" includes  
5 only those offenses punishable by imprisonment. We reserve the question of whether,  
6 as in *Bagwell, supra*, a fine of a large amount may of itself be a punishment of sufficient  
7 gravity to require a trial by jury.

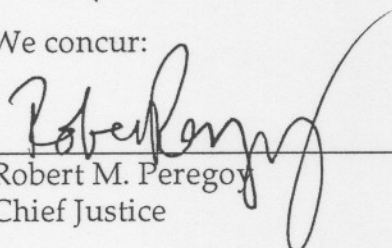
8 AFFIRMED.

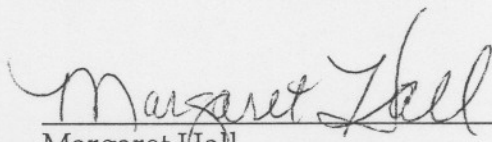
9 IT IS SO ORDERED THIS 20<sup>th</sup> DAY OF MAY, 1996.

10  
11   
12 James Wheelis  
Associate Justice



13 We concur:

14   
15 Robert M. Ferego  
16 Chief Justice

  
Margaret Hall  
Associate Justice

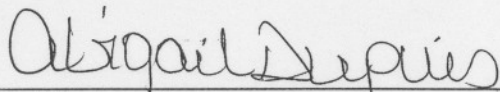
CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **OPINION** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 11th day of June, 1996.

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Tribal Court



Abigail Dupuis  
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