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6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

**NO. 29,718**

10 **RICHARD SHARPE,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

13 **Jane Shuler Gray, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 for Appellee

17 Hugh W. Dangler, Chief Public Defender

18 Adrienne R. Turner, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

21 **MEMORANDUM OPINION**

22 **WECHSLER, Judge.**

1 Defendant is appealing from a district court judgment and sentence entered after  
2 a bench trial finding Defendant guilty of battery against a household member. We  
3 issued a calendar notice proposing to affirm. Defendant has responded with a  
4 memorandum in opposition. We affirm.

5 **Issue 1:** Defendant continues to challenge the validity of the magistrate court’s  
6 reliance on the written waiver of the right to a jury trial. [MIO 1] However, Defendant  
7 received a de novo trial in district court, and we do not review any alleged defects in  
8 the magistrate court proceeding. *See State v. Foster*, 2003-NMCA-099, ¶ 9, 134 N.M.  
9 224, 75 P.3d 824 (observing that in a de novo trial, “a district court conducts a new  
10 trial as if the trial in the lower court had not occurred”).

11 **Issue 2:** Defendant contends that the district court erred in concluding that he  
12 waived his right to a jury trial. [MIO 3] Defendant states that he did not raise an  
13 objection below, but he claims that the matter may be raised for the first time on  
14 appeal because it involves a fundamental right. [MIO 4] However, fundamental rights  
15 may be waived or lost by failing to timely invoke the ruling of the district court. *See*  
16 *State v. Pacheco*, 2007-NMSC-009, ¶ 10, 141 N.M. 340, 155 P.3d 745. Accordingly,  
17 our calendar notice proposed to affirm for lack of preservation. Alternatively, our  
18 calendar notice proposed to affirm on the merits.

19 The district court judge informed the parties at a pre-trial conference that they  
20 were scheduled for a jury trial. [MIO 2] The prosecutor informed the judge that  
21 Defendant had waived his right in magistrate court, and the judge responded by stating

1 that the jury trial setting was a mistake and that Defendant would be given a bench  
2 trial date. [MIO 2] Defense counsel did not object. [MIO 2]

3 As we observed in our calendar notice, it appears that the judge was simply  
4 noting that Defendant had previously waived his right to a jury trial, and the judge  
5 would likewise proceed with a bench trial in district court. The prosecutor then  
6 concurred with a bench trial. [DS 3] Given this context, we believe that Defendant's  
7 behavior amounted to a knowing concurrence as well. *See State v. Aragon*,  
8 1997-NMCA-087, ¶ 24, 123 N.M. 803, 945 P.2d 102 (observing that a defendant may  
9 waive jury trial if done voluntarily, knowingly, and intelligently). To the extent that  
10 Defendant is claiming that he in fact wanted a jury trial, there is no indication to that  
11 effect on the record. Matters not of record cannot be reviewed on appeal. *See State*  
12 *v. Martin*, 101 N.M. 595, 603, 686 P.2d 937, 945 (1984). In the absence of any  
13 indication in the record that Defendant timely indicated that he wanted a jury trial, we  
14 do not believe that Defendant has established a mistake in the process that would  
15 amount to fundamental error. *See State v. Barber*, 2004-NMSC-019, ¶ 17, 135 N.M.  
16 621, 92 P.3d 633 (providing that fundamental error includes both "cases with  
17 defendants who are indisputably innocent, and cases in which a mistake in the process  
18 makes a conviction fundamentally unfair notwithstanding the apparent guilt of the  
19 accused").

20 For the reasons set forth above, we affirm.

21 **IT IS SO ORDERED.**

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**JAMES J. WECHSLER, Judge**

3 **WE CONCUR:**

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5 **MICHAEL D. BUSTAMANTE, Judge**

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7 **ROBERT E. ROBLES, Judge**