IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0455

STATE OF MONTANA,

Plaintiff and Appellee,

vs.

JACOB WILLIAM ABEL,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Eleventh Judicial District Court, Flathead County, the Honorable Dan Wilson presiding

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ISSUE PRESENTED

Whether the trial court erred when it accepted from defense counsel a waiver of his client's constitutional right to testify in his own defense, without eliciting a knowing and voluntary waiver from Mr. Abel himself.

STATEMENT OF THE CASE

On June 7, 2018, Jacob Abel was charged with Count I: Partner or Family Member Assault, Strangulation and Count II: Assault With a Weapon, both felonies. A warrant was issued for his arrest, setting bail at $20,000 and his Arraignment was set for August 2nd, 2018. On July 19th, 2018 and pursuant to the warrant, Mr. Abel was arrested by a Flathead County Sheriff's Deputy, and the next day initially appeared in custody before the court. The court appointed the Office of the Public Defender to represent him, and on July 29th, 2018 he posted bond and was released on standard conditions. He appeared with appointed counsel and pled Not Guilty at his arraignment. His trial began on April 10th, 2019. On April 11th, 2019, when the State rested its case, the court determined the matter would be in recess for the day. The court then, outside the presence of the jury, inquired of defense counsel whether Mr. Abel would be testifying or calling any witnesses.

His counsel advised the court that he would not be calling witnesses but was not certain as to whether Mr. Abel would testify, and needed to discuss this with his client. Tr. 359. The court advised that the case would resume at 9 the following morning, and that the parties would reconvene earlier so that the court could hear that decision. The next morning, the court again inquired about the defendant's potential testimony, and his counsel advised the court that Mr. Abel would not be testifying. Tr. 364-365. After settlement of jury instructions, the jury retired to deliberate. Approximately two hours later it returned verdicts of Guilty on Count I, Strangulation of a Family Member, and Not Guilty on Count II, Assault with a Weapon. The court set sentencing for June 13th, 2019. At the sentencing hearing, two witnesses were called by the defense, and Mr. Abel also testified on his own behalf. After hearing argument from the parties, the court sentenced him to the Department of Corrections for a period of five years, all suspended.

STATEMENT OF FACTS

At the trial, once the state had rested, and the jury had been dismissed for the evening, the court engaged in a colloquy with defense counsel as to whether the defense would call any witnesses, or whether Mr. Abel would testify. Tr. 359. It was determined that when the parties reconvened the following morning, the defense could inform the court as to its decisions. The following morning, outside the presence of the jury, the court again inquired of defense counsel as to whether Mr. Abel would be testifying or planning to call any other witnesses. Tr. 365. In response to the court's inquiry, defense counsel asks his client what he "is going to do." He replies "I really want Chris Kidney", which is evidently a reference to a person he hoped to call as a witness for his defense. His attorney responds "That's nice. We don't have that as a witness. Are you going to testify or not?" The court asks if Mr. Abel and his attorney want some time alone and his attorney responds "No. We've had plenty of moments alone." The court says "Okay." Defense counsel says "We're out of time." The court again says "Okay." Mr. Abel then asks if he may "say something." His attorney responds with "We need to talk alone then. You can't say it in open court or you will incriminate yourself. This is a courtroom." Then he says (evidently to

the court) "I'll be back in a moment." Tr. 365. At that point, the court grants a brief recess to permit private discussion between Mr. Abel and his attorney.

When the parties reconvene, the court asks defense counsel how his client wishes to proceed. Defense counsel replies "He wishes to remain silent, your honor. We won't be presenting any witness testimony." Tr. 365.

At sentencing, the defense called two character witnesses for Mr. Abel. Both essentially testified that events could not have happened as outlined by the state at trial, since the Jacob Abel they knew was not violent and was in fact a very gentle person. Tr. 487, 493. Mr. Abel then took the stand and testified that he wanted "to tell the court exactly what happened." The court commented "You didn't testify at trial." Mr. Abel responded "Yes sir, I ... " and his attorney interrupted and told the court "He did not." Mr. Abel said "I did not. I wanted to. I was talked out of it at the last moment. Really didn't get to make a decision. But I ..." Again, he is interrupted by his attorney, who says "So let's go through it." Tr. 500-501.

Mr. Abel then testifies as to the events at issue in the trial and essentially presents a defense of innocence to the conduct of which he was convicted. He is then briefly cross-examined by the prosecutor and steps down. After hearing sentencing arguments from both counsel, and before pronouncing sentence, the court states that it did not find the testimony of defense witnesses, Tr. 491, or of Mr. Abel himself to have been " . . .a good use of time for this Court to hear evidence, either from Mr. Strizich or from Mr. Abel, that the jury trial or the jury's verdict was a farce, that these proceedings ought not to be respected, that the jury verdict ought to be either disbelieved, discounted or even impeached." Tr. 526. The court further advises Mr. Abel that it did not find his own testimony convincing, after hearing the trial evidence and receiving the guilty verdict. Tr. 526. The court sentences him to five years with the Department of Corrections, all suspended.

STANDARD OF REVIEW

A criminal defendant's decision to testify in his own defense at trial, or not, involves a fundamental constitutional right. The decision is his to make, and must be knowing and voluntary, which is to say free from any coercion. For this reason, the standard of review for this

court is plenary. State v. Charlie, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934; Williams v. Bd. of County Comm'rs, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 188.

SUMMARY OF ARGUMENT

Mr. Abel was deprived of a fundamental constitutional right when the court did not elicit from him directly a statement as to whether or not he would testify at his trial, but instead accepted from his attorney a waiver of that right, even though there were indications during the colloquy between the court and defense counsel that counsel's statement might not accurately reflect Mr. Abel's wishes. This deprivation was not harmless error beyond a reasonable doubt.

ARGUMENT

I. MR. ABEL WAS DEPRIVED OF HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE WHEN THE COURT ACCEPTED A WAIVER FROM HIS COUNSEL.

This court has held that a criminal defendant's right to testify in his own defense at his trial is a fundamental constitutional right.

> . . . The Fifth Amendment to the United States Constitution and Article II, Section 25 of the Montana Constitution guarantee an individual the right against self-incrimination.

> A necessary corollary to the right against self-incrimination is the right to testify in one's own behalf. *Rock v. Arkansas*, 483 U.S. at 53, 107 S.Ct. at 2710 (quoting *Harris v. New York*, 401 U.S. 222, 225, 91 S.Ct. 643, 645 (1971).
>
> – In re J.S.W., 2013 MT 34, ¶18, 369 Mont. 12, 202 P.3d 741.

* * * * *

> In addition, the Fourteenth Amendment secures the right of a criminal defendant to choose between silence and testifying in his own behalf. *Rock*, 483 U.S. at 51, 107 S.Ct. at 2708-09 ("The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.' " (quoting *Faretta v. California*, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525, 2533 n. 15 (1975)).
>
> – In re J.S.W., *supra,* ¶19.

This court has also long held that a fundamental constitutional right can not be waived by defense counsel, but must be waived by the defendant himself, and further, that:

> [b]efore a defendant can waive a fundamental right, "such waiver, to be recognized by the courts, must be informed and intelligent for there can be no waiver by one who does not know his rights or what he is waiving. *State v. Allison*, (1944), 116 Mont. 352, 360, 153 P.2d 141, 145. In holding that the defendant in *Allison* had not expressly waived his right to remain silent, this Court stated:
>
> > The rights guaranteed by the Constitution apply to all alike–the well-informed who know their rights as well as to the ignorant who never heard of such rights.

> There stands the right like the rock of Gibraltar and it so remains protecting the life and liberty of every person whether the particular person knows about it or not. *Allison*, 116 Mont. at 360, 153 P.2d at 144-45.

– State v. Bird, 2002 MT 2, 308 Mont. 75, 43 P.3d 266, ¶36.

In addition,

> [i]n the context of a criminal prosecution, this Court has stated that defendant's attorney cannot waive a defendant's fundamental rights as a matter of convenience. *State v. Tapson*, 2002 MT 292, ¶38, 307 Mont. 428, 41 P.3d 305. Before accepting a waiver of rights, a court must ascertain on the record that the criminal defendant has been apprised of his rights, understands what rights he is waiving and waives those rights voluntarily. *Tapson*, ¶27.

– State v. Finley, 2003 MT 239, ¶33, 317 Mont. 268, 77 P.3d 193.

This court last addressed the question of a defendant's waiver of the right to testify in his own defense in 1991. In State v. Hamm, 250 Mont. 123, 818 P.2d 830 (1991) this court "...agree[d] that criminal defendants have a constitutional right to testify" Hamm, *id.* at 833, but held that a trial court does not have a duty to inform a defendant of that right, and that a defendant waived the right to testify simply by not testifying. *Id.* at 833.

In light of its rulings in Finley and Bird, *supra*, this court should now overrule its holding in Hamm, and hold that a criminal defendant

cannot waive his fundamental right to testify by his silence or through his attorney, but must do so on the record, personally and explicitly.

The Hawai'i Supreme Court addressed this issue in 1995, in a case that has become the leading case on the subject, and set forth a procedure that its trial courts must follow before accepting a waiver of the right to testify from a criminal defendant. This involves a two-part colloquy with defendants, which could take place at the outset of the trial outside the presence of the jury, or after the state rests its case. The first part of the colloquy mandates that the trial court advise the defendant of his constitutional right to testify, as well as his right not to testify. The second part requires the court to engage in a "meaningful colloquy" with the defendant to ascertain whether he understands those rights, and furthermore, and equally important, that he understands the decision is up to him, and therefore cannot be made for him by his attorney. That court set forth its reasoning as follows:

> A defendant's right to testify in his [or her] own defense is guaranteed by the constitution of the United States and Hawai'i and by a Hawai'i statute.
>
> The right to testify in one's own behalf arises independently from three separate amendments to the United States

> Constitution. It is one of the rights guaranteed by the due process clause of the fourteenth amendment as essential to due process of law in a fair adversary process...
>
> The right to testify is also guaranteed to state defendants by the compulsory process clause of the sixth amendment as applied through the fourteenth amendment ...
>
> Lastly, the opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony, since every criminal defendant is privileged to testify in his [or her] own defense, or to refuse to do so.
>
> – Tachibana v. State, 79 Haw. 226, 900 P.2d 1293 (1995), at 1299.
>
> Thus, we hold that in order to protect the right to testify under the Hawai'i Constitution, trial courts must advise criminal defendants of their right to testify and must obtain an on-the record waiver of that right in every case in which the defendant does not testify.
>
> –Tachibana, *supra*, at 1303.

In another case following Tachibana, the Hawai'i high court reiterated the justification for the rule and set out its required colloquy in detail:

> An on-the-record waiver assures that the defendant is "aware of [the] right to testify and that [the defendant] knowingly and voluntarily waive[s] that right."
>
> – State v. Celestine, 142 Haw. 165, 415 P.3d 907 (2018).

Beyond the advisement of rights,

> [t]he second component of the Tachibana colloquy involves the court engaging in a true "colloquy" with the defendant. State v. Hann, 130 Hawai'i 83, 90-91, 306 P.3d 128, 135-36 (2013). This portion of the colloquy consists of a verbal exchange between the judge and the defendant "in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights." *Id.* at 90. 306 P.3d at 135 (quoting Black's Law Dictionary 300 (9th Ed. 2009)).
>
> – Celestine, *supra*.

Mr. Abel's right to testify in his defense at trial was violated when the court accepted a cursory waiver of that right by his counsel, notwithstanding indications that he wished to testify. Tr. 364-365. This court has previously held that the right to testify is a fundamental due process right. J.W.S. It is well-established by this court that a fundamental constitutional right can only be waived by the criminal defendant personally. Bird, Finley. This court should therefore find and hold, that a court cannot accept a waiver of any fundamental constitutional right, including the right to testify, from anyone but the defendant himself, and then only after providing the advisement and engaging in a colloquy like the one outlined in the Hawai'i cases cited herein.

Other jurisdictions have also found and held similarly.

> The distinction between constitutional rights for which procedural safeguards are required to guarantee that waiver is voluntary, knowing and intentional, and other constitutional rights of the defendant in a criminal case, is founded on at least two considerations. First, some rights are so inherently personal and basic that fundamental fairness of a criminal trial is called into question if they are surrendered by anyone other than the accused, or if the accused relinquishes them in any manner other than voluntary knowing and intentional waiver. *See Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Second, establishing waiver of such a right in court on the record helps assure that the waiver is effective and facilitates meaningful appellate review without significantly impeding trial court proceedings.
>
> - People v. Curtis, 681 P.2d 504, 511 -512 (Colo. 1984).
>
> * * * * *
>
> A close reading of relevant authority in light of these considerations persuades us that the right to testify is so fundamental that the effectiveness of its waiver must be tested by the same constitutional standards applicable to waiver of the right to counsel.
>
> – Curtis, *supra*.

A criminal defendant's right to testify in his own defense, to be heard and seen by the jury and perhaps by the public at large, is such a fundamental one, that the defendant himself must have the ability to make that decision even against the advice of counsel. The Second

Circuit Court of Appeals highlighted this principle, holding that

> [a] defendant in a criminal case has the right to testify on his own behalf. *See Rock v. Arkansas*, 483 U.S. 44, 49, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). We have held that the right to testify is "personal" and, therefore, can be waived only by the defendant. *Brown v. Artuz*, 124 F.3d 73, 77, (2d Cir. 1997). Thus, "regardless of strategic considerations that his lawyer concludes weigh against such a decision," *id.*, a defendant who wishes to testify must be permitted to do so.
>
> – Chang v. U.S., 250 F.3d 79, 2nd Cir. (2001).

II. THE TRIAL COURT'S ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

Ordinarily, the deprivation of a defendant's right to testify in his own defense would not be subject to harmless error analysis, since naturally there is no record of testimony that was not given. However, in this very unusual case, there is some indication of what the testimony would have been, because the defendant gave a summary version of his testimony at the sentencing hearing. That being so, the State will likely argue that this Constitutional error was harmless beyond a reasonable doubt. It was not.

In Mr. Abel's case, not only did he not waive his right to testify

personally, knowingly and voluntarily, there were indications that he did in fact want to testify but was not permitted to voice those wishes. Tr. 364-365. He ultimately did express more explicitly his desire to have testified in his defense at his trial. He did this at his sentencing hearing, when he told the court that he had wanted to testify, but "was talked out of it at the last moment. Really didn't get to make a decision." Tr. 500-501.

The fact that Mr. Abel was deprived of his right to testify in his own defense at his trial, was not, after the fact, rectified (nor could it have been) by the court's comments at the sentencing hearing, when it indicated it was not convinced by his testimony at that juncture. Tr. 526. At that point, the judge had of course heard the testimony of the complaining witness and knew the verdict. The court was equally dismissive of the testimony of Mr. Abel's witnesses at sentencing. The first, Thomas Strizich, testified, when asked if his friend Jacob Abel was "a violent person or not," that "[h]e's the opposite of that, totally. He's very caring and giving." Tr. 487. And that while his then-girlfriend (the state's complaining witness) was "a notorious alcoholic," that Jacob himself "doesn't drink." Tr. 487. And further that she "was getting

money out of Jacob to gamble, and to drink" while he watched her four year old daughter, and that he couldn't have inflicted any injury on this woman "because that's not Jacob." Tr. 490. The court interrupted his testimony to comment that Mr. Abel had been convicted and that it was not interested in hearing the witness' "lay opinion about whether the jury was correct or not." Tr. 491. Mr. Abel's other witness, Matthew Veneman, also testified that he had "never" seen Jacob Abel behave violently toward anyone. Tr. 493.[1]

If Mr. Abel had been permitted to testify at his own trial, the jury – made up of twelve of his fellow citizens – could have been swayed by his testimony, or that of others whom he may have wanted to call in his defense. Those jurors, as they weighed not only the state's evidence, but the defendant's testimony, could have determined *him* to be the credible one, as opposed to the state's complaining witness. This is so because in the normal course of events, a criminal defendant would have prepared his testimony with his attorney prior to testifying. In Mr. Abel's case, since he was not in custody, this could have included going

[1] These lay witnesses were not providing the court with learned legal argument against the verdict reached by the jury in the absence of their or Mr. Abel's testimony. Rather, they were simply expressing their view of their friend in response to questions asked of them.

into the courtroom and stepping onto the witness stand, to be questioned and "cross-examined" by his attorney. Even short of that, in preparing for his testimony, he would have learned what types of questions he likely would be asked by the prosecutor on cross-examination, and other methods designed to lessen his nervousness in the trial setting – all of which could have had a positive impact on the jury. His testimony at sentencing was, by way of contrast, reluctantly facilitated by his attorney, and was that of a nervous and now desperate man, trying to explain what happened to the judge who was about to sentence him. Whether or not the jury would have believed him, is of course unknowable. But there is certainly a reasonable possibility that his testimony could have changed the outcome of the trial in his favor.

Mr. Abel's case is unique in that, because he felt so strongly that he had been deprived of his right to testify in his defense at trial, the court actually heard a version – albeit hasty and truncated – of what his testimony might have been at trial, when he testified at his sentencing hearing. And while the court admonished him and his witnesses for what it characterized as disregarding the jury's verdict, the context of such testimony is important. Had it been given in the trial, it would

have been before the jury in its role as trier of fact, during which time the jurors were listening intently to the evidence while holding foremost in their minds the presumption of innocence. When they retired to deliberate, they would be weighing all of the evidence with the goal of determining whether the state had met its burden of proving each element of the offense beyond a reasonable doubt. On the other hand, the trial court judge is preparing to sentence a convicted felon, and cannot possibly, at that stage, evaluate Mr. Abel's testimony in the way the jury would have. In fact the court stated as much when it told Mr. Abel that he "was convicted, and properly so. And the question is, what should he suffer *by* way of a consequence." Tr. 527.

In reaching its holding that the standard for evaluating deprivation of a fundamental Constitutional right is harmless beyond a reasonable doubt, the U.S. Supreme Court reasoned that

> [w]e prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. Connecticut, 375 U. S. 85. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 375 U. S. 86-87.
>
> – Chapman v. California, 386 U.S. 18, 22 (1967).

In Mr. Abel's case, "the question is whether there is a reasonable possibility that the evidence" *omitted* from the trial, might have led to his acquittal. In other words, it is quite possible that Jacob Abel's testimony - had it been permitted - would have changed the outcome of the trial. For this reason, this court should find that the error was not harmless beyond a reasonable doubt.

CONCLUSION

Since Mr. Abel was deprived of his constitutional right to testify in his own defense, his case should be reversed and remanded for a new trial on Count I. Further, this court should adopt the rule that–whether or not there is any indication from a defendant as to his desire to testify– the trial court must engage in a meaningful colloquy with him or her personally, in order to obviate any uncertainty or unnecessary litigation in that regard, and in order to protect every defendant's fundamental constitutional right to testify on his or her own behalf at his trial. It should going forward be the law that only a knowing, voluntary and explicit waiver on the record from the criminal defendant personally, will suffice to resolve the issue when a defendant does not testify.

RESPECTFULLY SUBMITTED this 29th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.P., I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points, is double-spaced except for quoted and indented material, and the word count calculated by Microsoft is 4,066, exclusive of words not to be counted under M.R.App.P.

/s/ Kathleen Foley
Kathleen Foley

APPENDIX

A. JUDGMENT

B. ORDER APPEALED FROM - TRANSCRIPT (PGS 359-365)

CERTIFICATE OF SERVICE

I, Kathleen Foley, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-30-2020:

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