DA 19-0455

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 293

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JACOB WILLIAM ABEL,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC 18-224(D)
Honorable Dan Wilson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Kathleen Foley, Attorney at Law, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Bree Gee, Assistant Attorney General, Helena, Montana

Travis R. Ahner, Flathead County Attorney, Kalispell, Montana

Submitted on Briefs: July 28, 2021

Decided: November 9, 2021

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Jacob William Abel (Abel) appeals from his June 13, 2019 judgment of conviction and sentence in the Montana Eleventh Judicial District Court, Flathead County, on the offense of partner or family member strangulation, a felony in violation of § 45-5-215, MCA (PFMS). The restated issue on appeal is:

> *Whether the District Court committed plain error by allowing counsel to waive his right to testify at trial through counsel without a record inquiry and judicial finding that he knowingly, voluntarily, and intelligently chose not to do so?*

We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 By Information filed June 7, 2018, the State charged Abel with PFMS and assault with a weapon, a felony in violation of § 45-5-213, MCA. The State alleged that, during separate arguments with his girlfriend over a two-day period, he strangled her and struck her in the face with a folding chair. After the State rested at the end of the first day of trial in April 2019, a sidebar conference occurred between court, counsel, and Abel at which the court asked whether he was going to testify. Defense counsel advised that he was unsure and would be discussing the matter with Abel before trial resumed in the morning. After dismissing the jury for the evening, the court stated to counsel that "I assume that over the evening recess, . . . , you'll have time to discuss with your client whether he'd like to testify," to which counsel responded in the affirmative. When trial resumed the next morning, the following colloquy occurred between the court, defense counsel, and Abel outside the presence of the jury:

Court: Good morning.

Counsel: Good morning. [To Abel:] What are you going to do?

Abel: I really want Chris Kidney.

Counsel: That's nice. We don't have [him] as a witness. Are you going to testify, or not?

Court: Do you want a moment alone?

Counsel: No. We've had plenty of moments alone.

Court: Okay.

Counsel: We're out of time, Your Honor.

Court: Okay.

Abel: Can I say something?

Counsel: We need to talk alone, then. You can't say it in open court or you will incriminate yourself. This is a courtroom. [To Court:] I'll be back in a moment.

Court: Okay.

After a short recess, the court asked defense counsel, "how does your client wish to proceed?" Counsel responded, "[h]e wishes to remain silent, Your Honor. We won't be presenting any witness testimony." The court then proceeded with settling of jury instructions and closing arguments. The jury ultimately found Abel guilty of PFMS, but not assault with a weapon.

¶3 Later, at sentencing, Abel presented two witnesses who testified that he was not a violent person and thus could not have strangled his girlfriend as alleged. Rather than allocute, and upon acknowledging to counsel that "we're not here to second guess the jury or say they[] [were] wrong," Abel stated that he wanted to testify "to tell the [c]ourt exactly

what happened." In response to the District Court's challenge that "you didn't testify at trial," Abel stated, "I did not. I wanted to. I was talked out of it at the last moment. Really didn't get to make a decision." He then testified to a different version of events that contradicted the victim's account at trial. Based on his new account of events, Abel countered the State's recommendation, for an unsuspended three-year commitment to the Department of Corrections (DOC), with his alternative recommendation for a *suspended* three-year commitment. Deviating from both, the District Court sentenced him to a suspended five-year DOC commitment with credit for time served, subject to various conditions of probation and statutory fees and charges. Abel timely appeals.

STANDARD OF REVIEW

¶4 Failure to contemporaneously object to an asserted error generally constitutes a waiver of the right to later raise it on appeal. *See* §§ 46-20-104(2) and -701(2), MCA; *State v. Long*, 2005 MT 130, ¶ 35, 327 Mont. 238, 113 P.3d 290 (issues raised for the first time on appeal are generally not reviewable due to unfairness of faulting a lower court for failure to correct an error not brought to its attention). As a narrow exception to the waiver rule, however, we may, in our discretion, review and correct an unpreserved assertion of error upon a showing of: (1) a plain or obvious error; (2) that affected a constitutional or other substantial right; and (3) which prejudicially affected the fundamental fairness or integrity of the proceeding. *State v. Finley*, 276 Mont. 126, 134-38, 915 P.2d 208, 213-15 (1996) (citing *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392 (1936), *inter alia*), *partially overruled on other grounds by State v. Gallagher*, 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817. *See also State v. Favel*, 2015 MT 336, ¶¶ 30-48, 381 Mont. 472, 362

P.3d 1126 (McKinnon, J., specially concurring—contrasting "traditional" plain error analysis under *Finley* and *Atkinson* with inconsistent "threshold" analytical approach); *State v. Whitehorn*, 2002 MT 54, ¶¶ 15-18, 309 Mont. 63, 50 P.3d 121 (discussing *Finley* formulation of common law plain error doctrine); *State v. Clausell*, 2001 MT 62, ¶¶ 53-54, 305 Mont. 1, 22 P.3d 1111 (in re analytical inconsistency in Montana plain error doctrine jurisprudence). But, mere assertion that an asserted error implicates a constitutional or other substantial right is thus insufficient—the party asserting plain error must affirmatively demonstrate satisfaction of all elements of the plain error doctrine. *State v. Gunderson*, 2010 MT 166, ¶ 100, 357 Mont. 142, 237 P.3d 74. While our review of "issues of constitutional law" is plenary, we generally do not address constitutional issues raised for the first time on appeal, except under the plain error doctrine. *State v. Flowers*, 2018 MT 96, ¶ 12, 391 Mont. 237, 416 P.3d 180; *City of Billings v. Nelson*, 2014 MT 98, ¶ 16, 374 Mont. 444, 322 P.3d 1039. *See also State v. Taylor*, 2010 MT 94, ¶¶ 12-13, 356 Mont. 167, 231 P.3d 79. Whether an asserted constitutional or other error of law was plain error is a question of law subject to de novo review. *State v. Trujillo*, 2020 MT 128, ¶ 6, 400 Mont. 124, 464 P.3d 72 (citing *State v. Stratton*, 2017 MT 112, ¶ 7, 387 Mont. 384, 394 P.3d 192).

DISCUSSION

¶5 Criminal defendants have fundamental federal and Montana constitutional rights to testify on their own behalf. *Cheetham v. State*, 2019 MT 290, ¶ 19, 398 Mont. 131, 454 P.3d 673 (right to testify implicit in Mont. Const. art. II, § 24 right to remain silent and corresponding right to due process); *State v. Hamm*, 250 Mont. 123, 128, 818 P.2d 830,

833 (1991) (right to testify implicit in Mont. Const. art. II, § 25 "right to appear and defend in person"), *overruled on other grounds by State v. Running Wolf*, 2020 MT 24, ¶ 29, 398 Mont. 403, 457 P.3d 218; *Rock v. Arkansas*, 483 U.S. 44, 49-53, 107 S. Ct. 2704, 2708-10 (1987) (right to testify implicit in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution). Like waivers of other fundamental constitutional trial rights, a defendant's waiver of the right to testify at trial must be knowing, voluntary, and intelligent. *See State v. Boucher*, 2002 MT 114, ¶ 22, 309 Mont. 514, 48 P.3d 21(internal citations omitted); *State v. Knox*, 2001 MT 232, ¶ 9, 307 Mont. 1, 36 P.3d 383 (internal citations omitted); *United States v. Ortiz*, 82 F.3d 1066, 1070-71 (D.C. Cir. 1996); *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987).

¶6 However, due to the strategic and often last-minute nature of the decision to testify at trial, and the corresponding duty of counsel to apprise and advise the client in regard thereto, trial courts may infer a knowing, voluntary, and intelligent waiver of the right to testify from the statements and conduct of the defendant and counsel despite a split of authority among federal circuit courts of appeal as to the proper analytical approach for making that inference. One line of authority holds that courts may properly infer a knowing, voluntary, and intelligent waiver based solely on a represented defendant's failure to personally object or otherwise assert the right at trial. *See Joelson*, 7 F.3d at 177; *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *United States v. Martinez*, 883 F.2d 750, 760 (9th Cir. 1989); *Bernloehr*, 833 F.2d at 751-52. The other holds that a defendant's mere silence is insufficient alone to manifest a knowing, voluntary, and

intelligent waiver absent some other record indicia of awareness of the right and his or her voluntary and intelligent adherence or acquiescence to counsel's advice to not testify. *See Chang v. United States*, 250 F.3d 79, 83-84 (2d Cir. 2001) (holding that defendant's "silence alone" is insufficient basis for inference of waiver of right to testify absent some record indicia "suggesting a knowing waiver"); *Ortiz*, 82 F.3d at 1070-72 (noting duty of counsel to advise client in furtherance of knowing, voluntary, and intelligent decision to testify or not and that court may thus properly infer waiver of the right from the silence of represented defendant absent record indicia of client-counsel discord, reason to believe waiver may be "detrimental to [the client's] interests," or other reason to suspect that the client was unaware of the right or not voluntarily acquiescing to the advice of counsel); *Underwood v. Clark*, 939 F.2d 473, 475-76 (7th Cir. 1991) (rejecting *Martinez/McMeans* affirmative demand approach but holding that a "barebones" after-the-fact assertion that counsel ignored or overrode defendant's desire to testify is an insufficient basis upon which to conclude that he or she did not knowingly, voluntarily, or intelligently decline to testify absent some particularized "substantiation . . . , such as an affidavit from the lawyer who allegedly forbade [the] client to testify[,] to give the claim sufficient credibility to warrant a further investment of judicial resources in determining the truth of the claim"); *United States v. Teague*, 953 F.2d 1525, 1532-34 (11th Cir. 1992) (noting duty of counsel to advise client in re "strategic implications" of testifying and thus holding that an ineffective assistance of counsel claim is the proper remedy for assertions that counsel ignored or overrode a defendant's desire to testify). However, regardless of differing analytical approaches for inferring a valid waiver, the federal circuit courts of appeal nonetheless

concur that the requirement for a knowing, voluntary, and intelligent waiver of the right to testify does not necessarily require the trial court to explicitly advise defendants of the right to testify or to make record inquiry of whether they are knowingly, voluntarily, and intelligently declining to do so. *Ortiz*, 82 F.3d at 1071; *Underwood*, 939 F.2d at 476 (rejecting contrary rule adopted in *People v. Curtis*, 681 P.2d 504, 514-15 (Colo. 1984), *et al.)*; *McMeans*, 927 F.2d at 163 (citing *Martinez*); *Martinez*, 883 F.2d at 760. *See also Chang*, 250 F.3d at 83-84; *Joelson*, 7 F.3d at 178 (quoting *Martinez*); *Teague*, 953 F.2d at 1534; *Bernloehr*, 833 F.2d at 752.

¶7 While we have previously applied the *Martinez* explicit demand/objection approach for inferring a valid waiver of the right to testify under a particular fact pattern, we have yet to squarely adopt either the *Martinez/McMeans* demand/objection approach or the affirmative indicia of awareness/acquiescence approach for inference of a knowing, voluntary, and intelligent waiver of the right to testify. *See Hamm*, 250 Mont. at 128-29, 818 P.2d at 832-33 (holding that the defendant implicitly "waived [his] right [to testify] by failing to testify and failing to notify the court that he wished [to do so]" after having "exercised his right to testify at [a] prior rape trial" and thus agreeing with the same counsel at a subsequent rape trial that he should not testify in order to avoid losing "his cool" and "open[ing] the door for the [State] to bring in evidence of [the] prior rape conviction"). We have nonetheless squarely adopted the generally accepted federal rule that the constitutional requirement for a knowing, voluntary, and intelligent waiver of the right to testify in either event neither necessarily requires the trial court to explicitly advise defendants of their right to testify, nor necessarily requires a record inquiry and

determination as to whether he or she knowingly, voluntarily, and intelligently waived that right. *Hamm*, 250 Mont. at 128-29, 818 P.2d at 833 (adopting stated rationale in *Martinez*, 883 F.2d at 760, and rejecting contrary state procedural rule adopted in *Curtis*, 681 P.2d at 515).

¶8 Contrary to Abel's assertion here, neither *State v. Bird*, 2002 MT 2, ¶ 36, 308 Mont. 75, 43 P.3d 266 (generally requiring knowing, voluntary, and intelligent waiver of fundamental constitutional rights), nor *State v. Finley*, 2003 MT 239, ¶¶ 33-35, 317 Mont. 268, 77 P.3d 193 (holding that court erroneously accepted representation of counsel that probationer waived his right to a revocation hearing and admitted to all alleged probation violations without record acknowledgment of waiver and admission of facts), are inconsistent with any of the foregoing federal authority, or our context-specific holding in *Hamm* where we similarly rejected the Colorado *per se* record inquiry/waiver rule adopted in *Curtis*, 681 P.2d at 515. Nor is there anything in the Hawaii authority cited by Abel, adopting a similar prophylactic rule, that undermines the generally accepted federal rule that we adopted in *Hamm*. *See Tachibana v. State*, 900 P.2d 1293 (Haw. 1995), and *State v. Celestine*, 415 P.3d 907 (Haw. 2018).

¶9 Aside from that critical point of law, the record reflects that Abel was duly arraigned on August 2, 2018, and at that time signed a written acknowledgment of his various trial rights including, *inter alia*, the rights to "present evidence in [his] defense" and to "remain silent." He was further twice present with counsel at trial, first at a sidebar at the end of the first day and again when trial resumed the next morning, when the District Court specifically inquired as to whether he would exercise his right to testify at trial. The record

manifests that, on both occasions, he had ample advance opportunity to privately discuss the matter with counsel. On the second occasion, counsel cautioned him on the record that they should consult privately before he personally responded to the court's question otherwise "you will incriminate yourself." When trial resumed after a short recess for that purpose, he said nothing when counsel advised the court outside the presence of the jury that Abel "wishes to remain silent" and "won't be presenting any witness testimony." Even after he was convicted, Abel's later assertion at sentencing that he wanted to testify at trial but was "talked out of it" was not an objection or assertion that he did not knowingly, voluntarily, and intelligently choose not to testify but, rather, merely a retort to the District Court's chafing at his attempt to conveniently backfill the record with an alternative set of facts in support of his lesser sentencing recommendation that would follow.

¶10 The record clearly manifests that Abel was represented by counsel, had ample opportunity and did in fact consult with counsel before deciding whether to testify, was acutely aware of his right to testify, and at worst acquiesced to counsel's advice to not testify in order to avoid incriminating himself. The record is devoid of any assertion, much less evidentiary showing, that: (1) Abel's ability to understand his right to testify, or the ramification of testifying or not, was in any way impaired; (2) his counsel threatened, coerced, or improperly induced him not to testify; (3) counsel otherwise prevented him from testifying if ultimately so inclined; or (4) he did not receive effective advice and assistance of counsel in regard to the decision. There was thus no contemporaneous record basis upon which the District Court could or should have suspected that Abel was doing anything other than knowingly, voluntarily, and intelligently acquiescing to his counsel's

advice to not testify. Under these circumstances, we need not indulge Abel's request that we consider which approach for inference of a valid waiver of the right to testify best comports with the right because the record in this case clearly supports such an inference under either federal approach. We hold that Abel has not demonstrated that the District Court committed plain error by failing to make a record inquiry and determination as to whether he validly waived his right to testify at trial.

¶11 Affirmed.

Justice

We concur:

Justices