

DA 21-0280

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 31N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIEL GEORGE RICHARDS,

Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Lewis and Clark, Cause No. DDC 20-249  
Honorable Christopher D. Abbott, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Joseph P. Howard, Joseph P. Howard, P.C., Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Michael P. Dougherty,  
Assistant Attorney General, Helena, Montana

Kevin Downs, Lewis and Clark County Attorney, Helena, Montana

Submitted on Briefs: January 18, 2023

Decided: February 21, 2023

Filed:

  
Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, we decide this case by memorandum opinion. It shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 A jury in the First Judicial District Court, Lewis and Clark County, convicted Daniel Richards on five counts of aggravated sexual intercourse without consent against M.S. Richards appeals his convictions, arguing that the District Court committed plain error when it did not verify that Richards knowingly, intelligently, and voluntarily waived his right to confront M.S. and three other State witnesses at trial. Richards's attorney stipulated to the State presenting M.S.'s testimony at trial via a recorded deposition. Richards's attorney also stipulated to remote testimony from the State's two State Crime Lab witnesses and its witness who testified as a blind expert on the behaviors of sexual assault survivors. We decline to invoke plain-error review of Richards's convictions because he does not demonstrate that the alleged error undermined the fairness of his proceedings. We affirm.

¶3 In October 2019, M.S. was a mostly isolated woman in her sixties. She lived alone in a trailer park and was reliant on a caregiver to drive her places due to her extensive health conditions. To combat her loneliness, M.S. started online dating. She matched with Daniel Richards, and the two arranged to have a dinner date together. As M.S. was preparing for

the date, Richards arrived at her home. M.S. had given him the address at his request. Richards reportedly announced that he wanted to have sex. M.S. hesitantly agreed at first, but Richards started to hurt her. M.S. asked him to stop. Richards continued over her protests, causing M.S. to bleed. Richards left, and M.S. did not hear from him again that night.

¶4 About two weeks after this incident, M.S. went to the hospital for sepsis. She spent nearly a week in the ICU. Richards, having learned that M.S. was in the hospital, offered to drive her home upon release. Richards was supposed to leave after dropping M.S. off, but he decided to stay. Faced with his refusal to go, M.S. offered Richards her spare bedroom, making it clear that he could not sleep with her if he intended to stay. Over the course of the remaining day and into the night, Richards raped M.S. multiple times.

¶5 The next day, M.S.'s caregiver, a personal care attendant and certified nursing assistant, arrived. The caregiver noticed that M.S. was uncomfortable, and the two left for the post office together. Once alone with her caregiver, M.S. disclosed what had happened. The caregiver returned home with her to assist M.S. in removing Richards. M.S.'s landlord became involved and insisted that Richards leave the property. The landlord notified law enforcement and drove M.S. to the emergency room for a physical examination on law enforcement's recommendation. An emergency room nurse examined M.S. for sexual assault and other physical injuries.

¶6 The State charged Richards with five counts of aggravated sexual intercourse without consent. Prior to trial, the State requested that M.S. not be required to testify live or in Montana because she had relocated to Texas and her health was not conducive to traveling. Richards’s defense attorney stipulated to this request. Similarly, the State asked that three witnesses give remote testimony via Zoom, an online audio and visual medium, at trial. Richards’s attorney stipulated to this request as well. The case proceeded to trial where the State presented M.S.’s testimony via recorded deposition and three State witnesses appeared via Zoom. The jury convicted Richards on all five counts.

¶7 Richards now argues that the District Court committed plain error when it did not establish on the record that Richards knowingly, intelligently, and voluntarily waived his right to confront M.S. and the other three remote witnesses.

¶8 “Generally, we do not review issues raised for the first time on appeal.” *State v. Strizich*, 2021 MT 306, ¶ 19, 406 Mont. 391, 499 P.3d 575 (citation omitted). “When a defendant’s fundamental rights are at stake, we may choose, nonetheless, to invoke plain-error review where failing to review the error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process.” *Strizich*, ¶ 19 (citation omitted). This Court invokes plain-error review “sparingly” and on a “case-by-case basis.” *State v. Johns*, 2019 MT 292, ¶ 21, 398 Mont. 152, 454 P.3d 692 (citation omitted).

¶9 The State requested that the court allow it to record a deposition of M.S. to be played at trial in lieu of live testimony. The State told the court that M.S. had moved to Texas and was in a state of significantly poor health. The State explained that it tried to get M.S. a plane ticket to come back to Montana to testify, but that she had been recently hospitalized and her ability to travel was severely limited. The court asked to hear defense counsel's thoughts on this request. Defense counsel stipulated to the recorded deposition of M.S. in lieu of live testimony at trial. The court authorized the deposition. Richards was present during this discussion and was present with his counsel by two-way video at M.S.'s deposition. At trial, the deposition was admitted into evidence and played for the jury. Defense counsel did not object to the playing of the recorded deposition at any time before or during trial.

¶10 Prior to trial, the State also gave notice that it intended to call an out-of-state expert witness to offer blind testimony on the behavioral characteristics of sexual assault survivors. It alerted the court that defense counsel agreed the State could present the expert's testimony via Zoom. At trial, the expert testified via Zoom and defense counsel did not object. Similarly, the State brought to the court's attention, outside the presence of the jury, that defense counsel agreed the two State Crime Lab witnesses also could testify via Zoom. The court asked defense counsel if he had any objection to the remote testimony. Defense counsel had no objection and did not object at any point to these remote appearances.

¶11 “The Confrontation Clause of the Sixth Amendment of the United States provides that ‘in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’” *State v. Mercier*, 2021 MT 12, ¶ 15, 403 Mont. 34, 479 P.3d 967 (quoting U.S. Const. amend. VI). This right is also guaranteed by the Montana Constitution. *Mercier*, ¶ 15 (citing Mont. Const. art. II, § 24). A defendant may waive a constitutionally guaranteed right, such as the right to confront witnesses, if the waiver is made knowingly, intelligently, and voluntarily. *State v. Hatfield*, 2018 MT 229, ¶ 53, 392 Mont. 509, 426 P.3d 569.

¶12 Richards does not argue that he tried to object when his counsel stipulated to the playing of M.S.’s recorded deposition and the remote testimony of other State witnesses. Nor does Richards argue that his counsel was ineffective for failing to object to the State’s requests for the recorded deposition or remote testimony. Richards was present when his counsel stipulated to the State’s request to make a recorded deposition of M.S.’s testimony to play at trial. Richards also was present at trial when the recorded deposition was played and the three other witnesses offered remote testimony. Nothing in the record suggests that Richards disagreed with his counsel’s stipulations or otherwise objected to the presentation of these testimonies. By not objecting, Richards did not provide the District Court an opportunity to consider whether these testimonies violated Richards’s right to confront witnesses. Richards therefore failed to preserve these issues for this Court to review. *See State v. LaFreniere*, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161.

¶13 Richards now argues that, despite his lack of objection, we should review the District Court for plain error. Richards maintains that the District Court committed plain error when it did not verify that Richards knowingly, intelligently, and voluntarily waived his right to confront certain witnesses at his trial and instead allowed his counsel to speak for him on these matters. The State counters that there is no authority holding that a defense attorney’s stipulation to evidence implicating a defendant’s right to confrontation is reversible error. It contends that even if the court should have verified Richards’s waiver of his right to confrontation, Richards cannot demonstrate that the admission of this testimony prejudiced him to the extent that this Court should reverse under plain-error review.

¶14 We sparingly review claims implicating fundamental rights that were not preserved properly for appeal. *See Strizich*, ¶ 19. To invoke plain-error review, Richards must (1) demonstrate that the claimed error implicates a fundamental right; and (2) “firmly convince” this Court that failure to review the claimed error would “result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process.” *State v. Favel*, 2015 MT 336, ¶ 24, 381 Mont. 472, 362 P.3d 1126 (quoting *State v. Daniels*, 2011 MT 278, ¶ 12, 362 Mont. 426, 265 P.3d 623). To convince this Court to review under plain error, “mere assertion that an asserted error implicates a constitutional or other substantial right is . . . insufficient—the party asserting plain error must affirmatively demonstrate

satisfaction of all elements of the plain error doctrine.” *State v. Abel*, 2021 MT 293, ¶ 4, 406 Mont. 250, 498 P.3d 199 (citation omitted). It is the appealing party’s burden to convince this Court that the implication of a fundamental right resulted in an undermining of the fairness of the proceedings. *Favel*, ¶ 27.

¶15 The State argues that, even if Richards’s right to confrontation was violated by the admission of remote or pre-recorded testimony, Richards cannot demonstrate the second part of the plain-error standard. It contends that the testimony from the State Crime Lab witnesses “merely showed that male DNA was found on M.S.’s body.” Because Richards admitted to having sex with M.S.—his defense being that she consented—Richards cannot demonstrate that the presence of male DNA on M.S. prejudiced him. Further, the expert witness did not provide any fact-specific testimony that prejudiced Richards; she testified as a blind expert on the behaviors of people who have been sexually assaulted. The State also argues that it would have been “frivolous” for defense counsel to object to M.S.’s appearance by recorded deposition because the State met its burden in demonstrating that M.S. was not otherwise available for trial. *See* § 46-15-201, MCA; *Daenzer v. Mun. Court*, 2020 MT 140, ¶ 5, 400 Mont. 179, 464 P.3d 996 (noting that “§§ 46-15-201 and -202, MCA, preserve a defendant’s fundamental trial rights under the Montana and United States Constitutions,” including the right to confront witnesses against him).

¶16 Richards focuses his argument solely on the first part of the standard for invoking plain-error review: the implication of a fundamental right. Richards does not argue that



the alleged violation of his right to confrontation undermined the fairness of his proceedings other than that he did not personally waive his right to confront witnesses. Richards argues that, because the State cannot prove that he knowingly, intelligently, and voluntarily waived his right to confront these witnesses, the proceedings were inherently unfair. But without a demonstration that the remote and recorded testimonies specifically resulted in a manifest miscarriage of justice that affected the outcome of Richards's trial, his assertion is not enough for this Court to invoke plain-error review. *Abel*, ¶ 4.

¶17 To the extent that Richards's Opening Brief makes mention of harmless error, Richards suggests that "[o]nly M.S. had personal knowledge as to whether Richards committed the criminal acts alleged in the State's Information." Without her testimony, therefore, the State would not have had a viable case against Richards. Harmless error, however, is not the applicable standard. Richards asks this Court to review under plain error, under which he bears the burden. *See State v. George*, 2020 MT 56, ¶ 5, 399 Mont. 173, 459 P.3d 854. And he does not apply his contention regarding the strength of the State's case to his request for plain-error review. Nonetheless, we do not find merit in this argument.

¶18 The State presented significant circumstantial evidence against Richards. It urged the jury to rely on that circumstantial evidence it presented instead of solely on M.S.'s testimony, acknowledging that her story differed from Richards's version. The State presented testimony from three law enforcement officers regarding their investigation of

the incident. The State also offered the testimony of an emergency room nurse who evaluated M.S. for sexual assault. Finally, the State offered the testimonies of M.S.’s landlord and her caregiver regarding Richards’s behavior at M.S.’s home and M.S.’s demeanor. The State also entered into evidence two voicemails from Richards to M.S.; the 9-1-1 call that started law enforcement’s investigation of Richards; and a text message from Richards to M.S. when she was in the hospital being examined for sexual assault. Richards makes no argument that this testimony and evidence would not have been enough for the jury to convict him, nor does he explain why M.S.’s deposition testimony violated his confrontation rights. And it is not our obligation to “develop legal analysis that may lend support” to a party’s position when the party fails to do so itself on appeal. *State v. Whalen*, 2013 MT 26, ¶ 32, 368 Mont. 354, 295 P.3d 1055 (citations omitted).

¶19 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. On review of the record, we conclude that Richards has not met his burden to demonstrate that the alleged error of which he complains caused a manifest miscarriage of justice or rendered his trial fundamentally unfair. *See State v. Lawrence*, 2016 MT 346, ¶ 11, 386 Mont. 86, 385 P.3d 968 (citations omitted). We affirm.

/S/ BETH BAKER

We Concur:

/S/ LAURIE McKINNON  
/S/ INGRID GUSTAFSON  
/S/ DIRK M. SANDEFUR  
/S/ JIM RICE