

DA 18-0281

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 248N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN MICHAEL BERRINGTON,

Defendant and Appellant,

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Butte-Silver Bow, Cause No. DC-17-26
Honorable Brad Newman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Quentin M. Rhoades, Nichole L. Siefert, Rhoades Siefert
& Erickson PLLC, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Aislinn W. Brown,
Assistant Attorney General, Helena, Montana

Eileen Joyce, Butte-Silver Bow County Attorney, Kelli Fivey, Deputy
County Attorney, Butte, Montana

Submitted on Briefs: September 4, 2019

Decided: October 15, 2019

Filed:


Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and 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 Steven Michael Berrington ("Berrington") appeals from an order of the Second Judicial District Court, Butte-Silver Bow County, whereby the District Court denied his pretrial motion to dismiss the State's Information on grounds that the affidavit supporting the charge of assault with a weapon failed to present probable cause. Berrington also argues on appeal that the State failed to present sufficient evidence at trial to convict Berrington of assault with a weapon. We affirm the District Court's order denying Berrington's motion to dismiss and deny Berrington's alternative argument of failure to present sufficient evidence.

¶3 On January 17, 2017, Berrington was arrested for and charged with assault with a weapon pursuant to § 45-5-213, MCA. At the time of his arrest, Berrington was the subject of a fugitive warrant for failure to report to probation and parole. While questioning Berrington at Berrington's son's apartment, Probation Officer Cameron noticed that Berrington was wearing "a black woven style carrier usually used to carry a knife or firearm." During questioning, Berrington had pushed back his coat with his right hand revealing a holster that probation officers later discovered contained a loaded .22

caliber semi-automatic pistol with a bullet in the chamber. Berrington's movement towards the holster led Probation Officer Cameron and Probation Officer Miller, who was also present during the encounter, to become fearful that Berrington was going to use a weapon to harm them. Probation Officer Cameron and other law enforcement officers, after struggling to restrain Berrington, gained control over Berrington and removed the weapon. Berrington was then placed under arrest.

¶4 On February 24, 2017, after reviewing the State's affidavit, the District Court determined the State presented probable cause and granted leave to file the Information. On February 27, 2017, the State filed its Information detailing the encounter between Berrington and Probation Officer Cameron. On March 2, 2017, Berrington pled not guilty to the offenses charged in the Information. On October 2, 2017, Berrington filed a motion to dismiss the charge for assault with a weapon for lack of probable cause. On December 6, 2017, after an evidentiary hearing, the District Court denied Berrington's motion, and on February 5, 2018, Berrington was found guilty of assault with a weapon by a jury. On April 16, 2018, the District Court issued its judgment and order of commitment. Berrington now appeals the District Court's denial of his motion to dismiss, and, alternatively, that there was insufficient evidence for the jury to convict him of assault with a weapon.

¶5 This Court reviews a district court's denial of a motion to dismiss in a criminal proceeding de novo. *State v. Burns*, 2011 MT 167, ¶ 17, 361 Mont. 191, 256 P.3d 944. We review a question on the sufficiency of the evidence to determine whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Booth*, 2012 MT 40, ¶ 7, 364 Mont. 190, 272 P.3d 89 (citing *State v. Azure*, 2008 MT 211, ¶ 13, 344 Mont. 188, 186 P.3d 1269). Our review of a jury's verdict to determine whether sufficient evidence exists to support the verdict is de novo. *Booth*, ¶ 7.

¶6 As to the first issue, Berrington maintains that the District Court erred in granting leave to the State to file its Information on the basis that the State's Information charging Berrington and the attached affidavit did not allege facts that would satisfy the essential elements of assault with a weapon under § 45-5-213, MCA. The essence of the defense argument is that Berrington did not actually use, but merely possessed, the weapon at issue and that the probation officers' fear of injury was unreasonable under the circumstances.

¶7 It is not necessary that Berrington first draw his weapon in order for apprehension of serious bodily injury to be reasonable. Actual use of the weapon is not necessary; rather, merely causing another to reasonably apprehend serious bodily injury from a weapon is sufficient. *State v. Smith*, 2004 MT 191, ¶ 26, 322 Mont. 206, 95 P.3d 137 (citing *State v. Misner*, 234 Mont. 215, 763 P.2d 23 (1988); *State v. Hagberg*, 277 Mont. 33, 920 P.2d 86 (1996)); see also *State v. Kirn*, 2012 MT 69, 364 Mont. 356, 274 P.3d 746. A person commits the offense of assault with a weapon if the person purposely or knowingly causes: "(b) reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon." Section 45-5-213(1)(b), MCA. As this Court held in *Smith*, the elements of assault with a weapon are established

“if a person causes reasonable apprehension that the victim will sustain serious bodily injury from a weapon, if it reasonably appears to the victim that a weapon is involved, whether actually seen or not.” *Smith*, ¶ 25. Moreover, the elements of assault with a weapon are established “merely by the existence of circumstances which lead the victim to reasonably apprehend that he or she will be injured by a weapon.” *Smith*, ¶ 25 (citing *Misner*, 234 Mont. at 219, 763 P.2d at 25; *Hagberg*, 277 Mont. at 41, 920 P.2d at 90).

¶8 In establishing probable cause through an affidavit filing in support of a motion for leave to file an information, typical probable cause standards are less stringent and the affidavit “need only recite facts sufficient to indicate a probability that the defendant committed an offense; it need not demonstrate a prima facie case.” *State v. Little*, 260 Mont. 460, 469, 861 P.2d 154, 163 (1993) (citation omitted). Absent an abuse of discretion, a district court’s probable cause determination of an information filing will not be reversed. *Little*, 260 Mont. at 469, 861 P.2d at 163.

¶9 The State’s affidavit in this case met the probable cause standard for an information filing. The State’s Information detailed that Berrington revealed a holster containing a weapon to Probation Officer Cameron and that Berrington’s movement towards the holster caused reasonable apprehension in Probation Officers Cameron and Miller that Berrington intended to use the weapon against them to inflict serious bodily injury. The District Court did not abuse its discretion in denying Berrington’s motion to dismiss and finding the State’s Information met the probable cause standard.

¶10 The second issue raised is whether the State presented sufficient evidence at trial to convict Berrington of assault with a weapon. Berrington argues that because the

testimony at trial was consistent with the facts alleged in the affidavit the State also failed to present sufficient evidence during trial to establish Berrington's conduct met the elements of assault with a weapon.

¶11 If the evidence is insufficient to support a finding or verdict of guilty, the court may "on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant." Section 46-16-403, MCA . The key question in determining whether the evidence was sufficient is, after reviewing the evidence in a light most favorable to the prosecution, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Booth*, ¶ 7.

¶12 The State presented testimony during trial that demonstrated sufficient facts to meet the probable cause standard, especially when viewed in light most favorable to the prosecution. The essential elements of assault with a weapon were sufficient evidence to go to the jury. The trial testimony supports that Probation Officer Cameron saw Berrington's weapon holster and that Probation Officers Cameron and Miller each saw Berrington sweep back the right side of his jacket in a movement that caused reasonable apprehension that Berrington was going to use the weapon against the them. Both Probation Officers unequivocally testified that they were scared and concerned for their lives during their encounter with Berrington. The fact that both officers were in an encounter with an armed probationer who had a warrant for failure to report and should not have been in possession of a firearm bolsters the reasonableness of the probation officers' apprehension.

¶13 Overall, the circumstances of the probation officers' interaction with Berrington show they faced an unpredictable situation with a probationer who, although not allowed to possess a weapon, nonetheless was armed with a .22 caliber pistol that was loaded with a bullet in the chamber. Berrington's movement that the probation officers perceived as reaching for the weapon compounded the severity and unpredictability of the encounter. The reasonableness of the probation officers' belief that Berrington intended to use the weapon against them to inflict harm were questions reserved for the jury.

¶14 We conclude under these circumstances that the State presented sufficient evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt and deny Berrington's motion to dismiss for lack of sufficient evidence.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶16 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ JIM RICE

/S/ INGRID GUSTAFSON