

DA 18-0473

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 259N

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT CAZIER,

Defendant and Appellant.

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APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Broadwater, Cause No. BDC-2016-41  
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Herman A. Watson, III, Watson Law, P.C., Bozeman, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Roy Brown, Assistant  
Attorney General, Helena, Montana

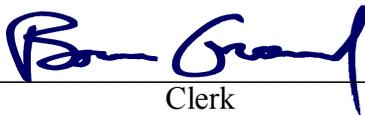
Cory J. Swanson, Broadwater County Attorney, Townsend, Montana

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Submitted on Briefs: August 28, 2019

Decided: October 29, 2019

Filed:

  
Clerk

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Justice Laurie McKinnon 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 On June 4, 2018, a jury in the First Judicial District Court, Broadwater County, found Robert Cazier (Cazier) guilty of assault with a weapon, in violation of § 45-5-213(b), MCA. The District Court sentenced Cazier to five years with the Department of Corrections, all time suspended, and a \$2,000 fine. Cazier alleges: (1) the District Court erred by denying his motion to dismiss the assault with a weapon charge; (2) the State improperly argued use of force to the jury; and (3) the State erroneously charged assault with a weapon pursuant to common scheme. We affirm.

¶3 Renee and David Schiller rented a residence from Cazier and were delinquent on their rent. On July 1, 2016, law enforcement officers executed the eviction and the Schillers loaded their belongings into two vehicles—a Chevrolet Impala and a pickup truck with a horse trailer. After the Schillers loaded their two vehicles, they drove both vehicles off the property but parked the truck and trailer near the property. The Schillers then drove away in the Impala. The officers also left. Cazier remained at the property.

¶4 Renee called her father, David Adamson, to tell him about the eviction and ask him to pick up the truck and trailer. David called Cazier's wife, Jane, and asked for

permission to retrieve the truck. Cazier was present during this conversation and understood Jane gave David permission and that David would be coming to pick up the truck.

¶5 Later that day, David and his wife, Irene, and their grandson, P.S., drove out to the property in a station wagon to retrieve the truck and trailer. David was driving, Irene was in the front passenger seat, and P.S. was in the backseat. They located the truck and trailer, discovered it was locked, and approached the property in their vehicle, thinking that Cazier had the keys. David tried to call Jane but discovered there was no service. As their vehicle approached the residence, David and Irene observed a man, later identified as Cazier, running from the house to his truck. Cazier started his truck and drove quickly down the road toward the Adamsons. David and Irene testified they thought Cazier was going to hit their station wagon, but Cazier swerved at the last second. David rolled his windows down and asked Cazier if he had the keys to the pickup truck and trailer. Before David could finish his question, Cazier began yelling at the Adamsons, using profanities and then “reached down and pulled up a gun.” The Adamsons and P.S. testified that Cazier “threatened to shoot” them if they did not get off his property and “had his gun and was waving it around.” The Adamsons and P.S. testified that Cazier pulled out the gun and waved it around repeatedly; Cazier appeared to be out of control and upset; and they were afraid Cazier would shoot them. David turned the station wagon around and went back to where the truck and trailer were parked.

¶6 Cazier testified he did not wave the gun around, but merely took it out and placed it on the dashboard. Cazier knew it was the Adamsons' station wagon approaching because they had previously visited to pay the Schiller's rent. Cazier also testified he thought he observed someone in the group pick up a firearm from the trailer, before coming towards the house. Cazier explained he did not say he would shoot the group, but rather said that "somebody could shoot you."

¶7 Cazier contends the District Court erred when it denied his motion to dismiss the felony charge of assault with a weapon. Cazier argues that he issued a "contingent" threat of force or threat of future harm to the Adamsons and P.S. and such a threat is insufficient to satisfy the use of force element of assault with a weapon. We review a district court's denial of a motion for a directed verdict de novo. *State v. Ellerbee*, 2019 MT 37, ¶ 13, 394 Mont. 289, 434 P.3d 910 (citation omitted). We review the sufficiency of the evidence in a criminal case to determine whether "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ellerbee*, ¶ 13 (citation omitted).

¶8 Pursuant to § 45-5-213(1)(b), MCA, "[a] person commits the offense of assault with a weapon if the person purposely or knowingly causes reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon." "The crime of assault with a weapon may be established: (1) if a person uses a weapon, or what reasonably appears to be a weapon, to cause reasonable apprehension of

serious bodily injury in the victim, or (2) 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.” *State v. Smith*, 2004 MT 191, ¶ 26, 322 Mont. 206, 95 P.3d 137. The requirements of § 45-5-213(1)(b), MCA, are satisfied by the existence of circumstances which lead the victim to reasonably apprehend that he or she will be injured by a weapon. *State v. Swann*, 2007 MT 126, ¶ 27, 337 Mont. 326, 160 P.3d 511.

¶9 Here, viewed in the “light most favorable to the prosecution,” the evidence shows a rational trier of fact could find the Adamsons reasonably apprehended being shot. *Ellerbee*, ¶ 13. The Adamsons and P.S. consistently testified that Cazier was visibly enraged, waved a gun around, shouted profanities, and threatened that if they did not get off his property he would shoot. The Adamsons testified that based on the sight of the gun and Cazier’s appearance and behavior, they were in fear of being shot. A rational trier of fact could have found the requirements of § 45-5-213(1)(b), MCA, satisfied. We conclude the District Court properly denied Cazier’s motion to dismiss the felony charge of assault with a weapon.

¶10 Next, we consider whether the District Court erred by allowing the State, during closing argument, to discuss the elements of “using force or the threat of force” when the State addressed Cazier’s affirmative defense of justifiable use of force. Cazier argues the State improperly commented Cazier actually used force, as opposed to

“merely threatening the future use of force” and that these comments allowed the jury to infer a fact not supported by evidence.

¶11 This Court reviews a district court’s rulings on objections to closing argument content for abuse of discretion. *State v. Cooksey*, 2012 MT 226, ¶ 40, 366 Mont. 346, 286 P.3d 1174 (citation omitted). “Closing argument statements are considered in the context of the entire argument.” *Cooksey*, ¶ 40 (internal citations omitted).

¶12 As an initial matter, the District Court issued five instructions pertaining to the affirmative defense of justifiable use of force. These instructions made repeated reference to both use of force and threat to use force. Indeed, the District Court gave Instruction 28, requested by Cazier, which provided: “A person is justified *in the use of force or threat to use force* when and to the extent that person reasonably believes that the use of force is necessary to prevent another’s unlawful entry into an occupied structure . . . .” (Emphasis added.)

¶13 During the State’s closing argument when it addressed Instruction 28 submitted by Cazier, the State argued:

And the affirmative defense is outlined in No. 28, and that is use, justified use of force in defense of an occupied structure, okay. So, what’s the occupied structure? Well, the occupied structure is this house right here (indicating), okay? So, the defense is saying he is justified, his force, he was justified or his threat was justified in defense of that occupied structure.

¶14 The State sought to explain when a person would be justified in using “deadly force or threatening deadly force.” However, Cazier’s counsel objected, stating, “There is no force in this case and I don’t think it should be argued.” The Court ruled:

“The jury will determine if there is force or threat to use force.” The State went through the remaining jury instructions 29-31 on justifiable use of force, arguing that regardless of whether Cazier used force or merely threatened it, such actions were not justified.

¶15 This Court concludes the District Court did not abuse its discretion by allowing the State to comment on the legal principles of use of force and threat to use force, as they were presented in instructions 28-31 to the jury. During closing argument, a prosecutor may comment on “the gravity of the crime charged, the volume of evidence, credibility of witnesses, inferences to be drawn from various phases of evidence, and legal principles involved, to be presented in instructions to the jury.” *State v. Green*, 2009 MT 114, ¶ 33, 350 Mont. 141, 205 P.3d 798. Here, the State methodically discussed each jury instruction on justifiable use of force, including the “legal principles” of use of force and threat to use force. *Green*, ¶ 33. Indeed, Cazier’s counsel discussed these principles during his own closing. This Court concludes the District Court did not abuse its discretion in allowing the State to comment on use of force and threat to use force.

¶16 Next, Cazier contends assault with a weapon was improperly charged pursuant to a common scheme and that, as a result, he was prejudiced. The State responds that assault with a weapon was properly charged and that any deficiency in the charge was cured by the jury instructions issued in this matter.

¶17 “An information is a written accusation of criminal conduct prepared by a prosecutor in the name of the State. The information must reasonably apprise the

accused of the charges against him, so that he may have the opportunity to prepare and present his defense.” *State v. Wilson*, 2007 MT 327, ¶ 25, 340 Mont. 191, 172 P.2d 1264 (citation omitted). “We read the information, and the affidavit in support thereof, as a whole to determine the sufficiency of the charging documents.” *Wilson*, ¶ 25 (citation omitted). We apply the “common understanding” rule “to determine if the charging language of a document allows a person to understand the charges against him.” *Wilson*, ¶ 25 (citation omitted). Under this standard, “the test of the sufficiency of a charging document is whether the defendant is apprised of the charges and whether he will be surprised.” *Wilson*, ¶ 25 (citation omitted).

¶18 The Amended Information filed May 8, 2018 charged:

**Assault with a Weapon, a common scheme, a felony** in violation of § 45-5-213(b), MCA, when on or about July 1, 2016, in Broadwater County, Montana, the Defendant purposely or knowingly caused a reasonable apprehension of serious bodily injury by use of a weapon or what reasonably appeared to be a weapon in Dave and/or Irene Adamson and/or their grandson P.S., when the Defendant threatened to shoot the victims while brandishing a pistol that is or reasonably appears to be a firearm capable of causing death or serious bodily injury.

¶19 Here, notwithstanding the words “common scheme,” the amended information set forth all elements of assault with a weapon in violation of § 45-5-213(b), MCA, thereby apprising Cazier of the charges against him and giving him the opportunity to prepare and present his defense. Further, this Court notes none of the language from the common scheme definition in § 45-2-101(8), MCA, appears in the charge. Lastly, even assuming the use of “common scheme” in the title of the charge constituted a charging defect, “[a] charge may not be dismissed because of a formal defect that does not tend to

prejudice a substantial right of the defendant.” Section 46-11-401(6), MCA. Here, Cazier only benefits from the State charging him with one assault with a weapon, and electing not to pursue three charges of assault with a weapon—one for each victim.

¶20 We find the amended information reasonably apprised Cazier of the fact that he was charged with one count of assault with a weapon and that proof Cazier “purposely or knowingly caused a reasonable apprehension of serious bodily injury by use of a weapon or what reasonably appeared to be a weapon” in any of the victims was sufficient for conviction of the charged offense.

¶21 Cazier further contends that by combining all the victims into one count, and alternatively referring to them using “and/or” language, the jury was permitted to “apply to all victims, an element of the offense only proven for one” resulting in a “duplicitous charge.” The State responds that the charge could not have been duplicitous as only one count of assault with a weapon was charged. Interestingly, both parties cite to the same definition of duplicitous charge: “[a]n indictment is multiplicitous when it charges multiple counts for a single offense, thereby resulting in two penalties for one crime . . . .” *United States v. Mancuso*, 718 F.3d 780, 791 (9th Cir. 2013). Here, there is no duplicitous charge. Cazier was charged and convicted of a single count of assault with a weapon. Cazier’s conviction did not result in “two penalties for one crime” but rather one penalty for one crime.

¶22 Further, there was no chance of juror confusion from the State’s “and/or” charging language because the District Court gave both a general and specific unanimity

instruction. The District Court instructed the jury “in order to find the Defendant guilty, all the jurors must agree that the Defendant committed the same act or acts.” As we have previously stated, “jurors are presumed to follow the law as given them.” *State v. Dasen*, 2007 MT 87, ¶ 41, 337 Mont. 74, 155 P.3d 1282. We conclude the general and specific unanimity instruction were sufficient to resolve any potential juror confusion.

¶23 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.

¶24 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH  
/S/ DIRK M. SANDEFUR  
/S/ BETH BAKER