IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0499

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ESANDRO ROMAN RODRIGUEZ,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John A. Kutzman, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Code Annotated

Other Authorities

INTRODUCTION

The State's theory of the case below was that Jesse assaulted Leah with a weapon inside the home. That gave the jury the predicate offense to convict Esandro for Count IV, aggravated burglary by accountability. That same assault also served as the basis for Count V, assault with a weapon against Leah by accountability.

The State now seeks to change its theory of its case. It argues the general environment of "pandemonium" that occurred when Jesse ran inside the house for 10 seconds before panicking and running away might have caused a hypothetical person to reasonably fear serious bodily harm. That was not sufficient evidence that Jesse—and by accountability Esandro—committed assault with a weapon against an actual person inside that home.

The aggravated burglary charge was based on Jesse's assault with a weapon against Leah. Even if Jesse hypothetically assaulted Leah inside the home, that was part of the same transaction as the outdoor porch assault. This singular transaction served as the basis for Esandro's dual convictions of aggravated burglary and the included offense of assault with a weapon. This was a double jeopardy violation.

ARGUMENT

I. The State's aggravated burglary charge was not supported by sufficient evidence.

The State does not challenge Esandro's argument that the law of the case required the State to prove Jesse *actually committed* assault with a weapon inside the home, not that he entered the home with the *purpose* of committing an offense inside. (*See* Appellant's Br. at 13–15.) Nor does it challenge Esandro's argument that Jesse pointing a gun at Leah on the porch was insufficient to establish the predicate offense for aggravated burglary, because this did not occur *inside* the occupied structure. (*See* Appellant's Br. at 15–20.)

The State's theory of the aggravated burglary charge below was crystal clear: the predicate offense occurred when, and only when, Jesse "pointed that gun at Leah," which the prosecutor inaccurately argued occurred both on the porch *and* inside the home. (Trial Tr. at 1471, 1475.)

The State now changes its theory of its case on appeal. It argues the general "pandemonium" that Jesse caused during the 10 seconds he spent in Leah's house, before panicking from all the people yelling at him and running out, was sufficient to prove that any one of the home's

occupants might theoretically have experienced apprehension of bodily injury. (Appellee's Br. at 9–18.) The State believes the "objective standard" for reasonable apprehension means this is all it had to show—that a hypothetical person in that situation *might* have been apprehensive of bodily injury. (Appellee's Br. at 15.)

The State still had to prove that an actual victim experienced actual apprehension. The plain text of the assault with a weapon statute makes this clear. It requires proof that the person purposely or knowingly "causes . . . reasonable apprehension of serious bodily injury in another by use of a weapon." Mont. Code Ann. § 45-5-213(1)(b). The offender must "cause" "apprehension" in "another."

In *State v. Smith*, 2004 MT 191, ¶ 25, 322 Mont. 206, 95 P.3d 137, this Court held that assault with a weapon requires that the defendant "cause reasonable apprehension of serious bodily injury *in the victim*." (Emphasis added). The Court reiterated that reasonable apprehension must be "experienced *by the intended victim of the serious bodily injury*." *Smith*, ¶ 28 (emphasis in original); *see also Smith*, ¶¶ 29–30 (explaining the statute's phrase, "in another," refers to "the intended victim of the serious bodily injury").

The Court similarly held in *In re R.L.S.*, 1999 MT 34, ¶ 14, 293 Mont. 288, 977 P.2d 967, "The reasonable apprehension *of the victim* pertains to whether *the victim reasonably believes* he or she will be seriously bodily injured." (Emphasis added). And as legal scholars have explained, to prove the "reasonable apprehension" element of assault with a weapon, "the victim must be aware of the impending harm." 2 Jens David Ohlen, *Wharton's Criminal Law* § 23:4 (16th ed. 2021).

The "objective standard" on which the State relies is used to determine whether the victim's apprehension of bodily harm was reasonable. But the State must still point to a specific victim or victims who *subjectively* experienced apprehension of serious bodily harm. *State v. Birthmark*, 2013 MT 86, ¶ 17, 369 Mont. 413, 300 P.3d 1140 ("The separate element of the offense—causing reasonable apprehension of serious bodily injury—is established *by the perception of the victim*.") (emphasis added); *accord State v. Hagberg*, 277 Mont. 33, 40, 920 P.2d 86, 90 (1996); *State v. Misner*, 234 Mont. 215, 219, 763 P.2d 23, 25 (1988) (holding the State presented sufficient evidence of felony assault—the precursor to assault with a weapon—even though the

victim did not see a gun, because the victim "unequivocally testified to his apprehension of serious bodily injury").

In *City of Hamilton v. Mavros*, 284 Mont. 46, 943 P.2d 963 (1997), this Court reversed an assault conviction for insufficient evidence. Witnesses saw the defendant pull in front of his estranged wife as she was driving, hit the front of her car, attempt to open her driver's side door, and swear at her. *Mavros*, 284 Mont. at 48, 943 P.2d at 965. But the victim testified at trial that she "was not scared or afraid of Mavros during the entire incident." *Mavros*, 284 Mont. at 53, 943 P.2d at 967. The victim said she was "only startled" by the defendant's behaviors and was not actually "afraid of bodily injury at all." *Mavros*, 284 Mont. at 52–53, 943 P.2d at 967. Even though the facts in that case *objectively* might have led a reasonable person in the victim's shoes to experience apprehension of bodily injury, this Court held that "no evidence was offered at trial to show that Mavros had caused a reasonable apprehension of injury in [the victim] to support a claim of assault against her." *Mavros*, 284 Mont. at 53, 943 P.2d at 967.

The State relies on *State v. Vukasin*, 2003 MT 230, 317 Mont. 204, 75 P.3d 1284, *State v. Finley*, 2011 MT 89, 360 Mont. 173, 252 P.3d 199,

and *State v. Michelotti*, 2018 MT 158, 392 Mont. 33, 420 P.3d 1020, for its belief that the "objective standard" obviates its need to produce any evidence of *actual* apprehension in an *actual* victim. (Appellee's Br. at 15–16.) *Vukasin* and *Finley* were domestic violence cases in which the victims attempted to cover for their abusers at trial. *Vukasin*, ¶¶ 6–11, 18; *Finley*, ¶¶ 4–13. In *Michelotti*, the victim did not testify at all. *Michelotti*, ¶ 26.

In all three cases, the Court held that even though the victims did not *testify* to their apprehension, there was ample circumstantial evidence to show the victims did, in fact, feel actual apprehension of bodily injury. *Vukasin*, ¶¶ 21–22; *Finley*, ¶¶ 30–31; *Michelotti*, ¶ 28. For instance, in *Vukasin*, the victim's actions during the defendant's assault clearly betrayed her apprehension of serious bodily injury, even though she testified she was not afraid. The victim fled the home during the defendant's attack, went to a neighbor's house, locked herself in a bathroom there, and called 9-1-1 three times, all while the defendant "went into a rage" and was "threatening to kill" her. *Vukasin*, ¶ 21. Despite the victim's testimony, the Court held the circumstantial evidence showed she did experience reasonable apprehension. *Vukasin*,

¶ 22; *accord Finley*, ¶ 30 (holding the victim's actions during and immediately after the defendant's assault established her reasonable apprehension at that time, even if her testimony did not).

The central holding of those cases is that *direct* evidence in the form of victim testimony is not necessary to establish a victim's reasonable apprehension. A jury can infer the victim's apprehension from the objective, circumstantial facts. But there must still be an actual victim, and the evidence must at least circumstantially establish that victim's subjective apprehension. *See Mavros*, 284 Mont. at 53, 943 P.2d at 967.

Unlike at trial, when the State unequivocally identified Leah as the victim of Jesse's supposed assault with a weapon inside the home, the State struggles here to identify an actual victim or point to evidence—circumstantial or otherwise—of that person's *personal* apprehension of bodily harm.

The State points primarily to evidence that various people feared Jesse might harm *someone else* in the home. For instance, the State cites Celeste's concern that Jesse might have accidentally shot her one-year-old daughter, Karen's fear based on Leah yelling at her to call

9-1-1, and Jonathan's fear about his wife's and daughter's safety in the home. (Appellee's Br. at 14.) Karen was in the back of the house and did not personally see or hear anything Jesse did or said. (Trial Tr. at 807, 813.) And Jonathan was at Walmart when the incident occurred, not at the house. (Trial Tr. at 848–49.)

The requirement of "reasonable apprehension of serious bodily injury in another" means the apprehension must be personally experienced by "the intended victim of the serious bodily injury, *not a third party who was merely fearful that the intended victim would be harmed*." *Smith*, ¶ 29 (emphasis added). The statute "does not expand the crime of assault with a weapon to an entire new group of third parties who were fearful about the defendant inflicting serious bodily injury upon an intended victim." *Smith*, ¶ 29. It was not sufficient that someone in that house might have been apprehensive that *someone else* might be harmed.

The State also argues that perhaps the jury could have based the predicate assault with a weapon on Jesse's actions toward Leah and William inside the house. (Appellee's Br. at 14, 17.) Neither Leah nor William suggested in their testimony that Jesse caused them

apprehension of serious bodily injury *inside* the house. Leah testified Jesse was not pursuing her in the home but rather "rushed by" her. (Trial Tr. at 783.) William testified he did not even notice Jesse in the home until he turned around in the kitchen and saw him, at which point Jesse immediately got scared and fled. (Trial Tr. at 672.) William said Jesse did not threaten or say anything to him. (Trial Tr. at 678.) Leah testified Jesse got a frightened look on his face immediately before running out of the house. (Trial Tr. at 783.) None of this suggests Leah or William thought Jesse was about to seriously harm them.

Unlike in *Michelotti*, Leah and William were present at trial and able to give the jury a firsthand account of their apprehension or lack thereof. And unlike in *Vukasin* and *Finley*, Leah and William were not reluctant witnesses trying to cover for their assailant's behavior, such that the jury had to rely purely on circumstantial evidence to determine their apprehension. Leah and William both readily testified to Jesse's threatening behaviors, including his pointing a gun at Leah's stomach, pointing a gun at William's head, and holding William hostage in the car—all of which occurred before Jesse ran into the home. (Trial Tr. at 663, 782.) By their own seemingly credible accounts, they experienced

plenty of apprehension of serious bodily harm at Jesse's hands *outside* the home, but not during the 10 seconds he ran inside before getting spooked and fleeing.

The State went all in on the theory that Jesse committed aggravated burglary when he pointed his gun at Leah's stomach, which the State believed occurred both inside *and* outside the house. (Trial Tr. at 1471.) The State was wrong about the facts; this occurred outside only. (Trial Tr. at 779–82.) The evidence was not sufficient to support the State's theory of guilt on the aggravated burglary charge. Nor was the evidence sufficient to support the State's new theory on appeal that 10 seconds of people yelling at Jesse inside the home established that a particular victim actually experienced apprehension of serious bodily injury to themselves, rather than someone else.

II. Even if there was sufficient evidence to show Jesse assaulted Leah with a weapon inside the home, Esandro's two convictions based on Jesse's singular transaction of assaulting Leah violated double jeopardy.[1]

If the sufficiency question asks, "on what *could* the jury have based its aggravated burglary verdict?", the double jeopardy question is, "on what *did* the jury base its verdict?"

There is no question the jury found Esandro guilty of aggravated burglary by accountability based on Jesse's assault with a weapon against Leah. The jury was instructed to decide the aggravated burglary count on whether Jesse "committed the offense of Assault with a Weapon in the occupied structure." (Doc. 161, Instr. 25.) The jury was

[1] The State claims Esandro failed to "sufficiently develop a constitutional argument to warrant consideration of his claim under those principles." (Appellee's Br. at 19.) First, the statutory and constitutional double jeopardy analysis is the same: under either one, Esandro could not lawfully be convicted of both the lesser and the greater offenses arising from the same transaction. Mont. Code Ann. § 46-11-410(2)(a); *Brown v. Ohio*, 432 U.S. 161, 169 (1977) ("[T]he Fifth Amendment forbids . . . cumulative punishment for a greater and lesser included offense."). Second, this Court prefers to resolve double jeopardy claims under a statutory analysis when possible. *State v. Russell*, 2008 MT 417, ¶ 19, 347 Mont. 301, 198 P.3d 271. Given that preference, and given the constitutional and statutory double jeopardy analyses here are the same and lead to the same conclusion, appellant counsel deemed it redundant to separately expound in detail on the constitutional provisions. That does not waive Esandro's claim that his duplicative convictions violate statutory *and* constitutional double jeopardy principles.

separately instructed that it could convict Esandro of assault with a weapon by accountability only if it found that Jesse assaulted Leah (Count V) or William (Count III) with a weapon. (Doc. 161, Instrs. 30, 31.) Parroting the language from the instructions, the prosecutor explicitly told the jury that Jesse "committed the offense of assault with a weapon inside that structure" when, and only when, he "pointed that gun at Leah on the porch and in the building." (Trial Tr. at 1471.) The jury instructions and the prosecutor's argument, taken together, made clear the jury's task was to decide the aggravated burglary count based on whether Jesse assaulted Leah inside the home.

The State reiterates on appeal that Jesse assaulted Leah with a weapon inside the home, and it argues this was sufficient to prove aggravated burglary. (Appellee's Br. at 17.) The State also claims that twice convicting Esandro for Jesse's assault of Leah is perfectly acceptable, because technically Jesse assaulted Leah *two times* in the span of a few seconds—once on the porch, and once inside. (Appellee's Br. at 9, 20–23.)

The State seemingly concedes these two supposed assaults were part of the "same transaction." (Appellee's Br. at 20.) But it nonetheless

argues it could lawfully use the porch assault to convict Esandro of Count V (assault with a weapon against Leah) and the indoor assault as the predicate offense to Count IV (aggravated burglary) without running afoul of double jeopardy. (Appellee's Br. at 9, 20–23.) The State is incorrect.

Esandro could not be lawfully prosecuted for multiple offenses arising out of the "same transaction" if one offense was included in the other. § 46-11-410(2)(a). Jesse's assault(s) of Leah with a weapon served as the basis for Count V (assault with a weapon) and as the predicate offense to Count IV (aggravated burglary). (*See* Appellant's Br. at 21–23.) A predicate offense is an "included offense" for double jeopardy purposes. (*See* Appellant's Br. at 21–23.) Therefore, if Jesse's assault of Leah on the porch was part of the same transaction as Jesse's supposed assault of Leah inside the house, then Esandro was unlawfully convicted of multiple offenses (Counts IV and V) arising out of the same transaction (Jesse's assault of Leah), where one offense (Count V) was included in the other (Count IV). *See* § 46-11-410(2)(a).

Jesse's supposed two assaults of Leah were part of the "same transaction." The phrase "same transaction" means "conduct consisting

of a series of acts or omissions that are motivated by: (a) a purpose to accomplish a criminal objective and that are necessary or incidental to the accomplishment of that objective; or (b) a common purpose or plan that results in the repeated commission of the same offense or effect upon the same person or the property of the same person." Mont. Code Ann. § 46-1-202(23).

"When analyzing a 'transaction' for purposes of § 46-11-410, MCA, a court must examine the facts underlying the charged offenses, including the defendant's motivat[ion] by . . . a common purpose or plan[.]" *State v. Ellison*, 2018 MT 252, ¶ 21, 393 Mont. 90, 428 P.3d 826 (internal quotations omitted). "Whether two offenses arise from the same transaction or involve the same criminal objective" depends on "the defendant's underlying conduct and purpose in engaging in that conduct." *Ellison*, ¶ 21.

In *State v. Neufeld*, 2009 MT 235, ¶¶ 19-20, 351 Mont. 389, 212 P.3d 1063, this Court held the defendant's multiple charges in state and federal court arose from the same transaction. Neufeld was charged with SIWC in state court and convicted of sexual exploitation of children and possessing child pornography in federal court, both based

on his participation in and filming of sexual acts with a minor victim. *Neufeld*, ¶ 1. The Court noted the separate charges were both based on events that occurred at "the same time" and that involved "the same sexual conduct with the same victim." *Neufeld*, ¶ 19. The Court held the defendant had the "same criminal objective" with both offenses: to engage in sexual contact with a minor while filming it. *Neufeld*, ¶ 20. The Court thus held that, due to Neufeld's federal conviction, double jeopardy barred the subsequent state prosecution. *Neufeld*, ¶ 21.

The evidence showed Jesse first pointed a gun at Leah's stomach on the porch and demanded to know where Michael was. Seconds later, after Leah ran inside, he entered the home with his gun in his hand, ostensibly looking for Michael. To the extent this second act was an assault against Leah, it was part of the same transaction as the first. As in *Neufeld*, Jesse's two alleged assaults of Leah had the same criminal objective (finding Michael to demand his money back), involved the same victim (Leah), happened at the same time and place (within mere seconds and feet of each other), and involved the same conduct (using a gun to cause Leah apprehension of bodily harm).

The State unlawfully used the "same evidence"—Jesse's single transaction of assaulting Leah—to prove both the standalone assault with a weapon charge and the predicate offense to aggravated burglary. *Cf. Russell*, ¶ 24 (holding it was a double jeopardy violation when "the State conceded that the same evidence was used to prove the stand-alone aggravated assault charge in Count II, and the predicate felony relied upon in the felony homicide charge in Count I"). This was a double jeopardy violation. *See* § 46-11-410(2)(a); *Brown*, 432 U.S. at 169.

CONCLUSION

Through evidence, jury instructions, and argument, the State clearly relied on Jesse's assault with a weapon against Leah as both the basis for Count V (assault with a weapon) and as the predicate offense to Count IV (aggravated burglary).

Either Jesse assaulted Leah inside the home, or he did not. If he did not, there was insufficient proof to support the State's aggravated burglary charge. If he did, then Esandro was convicted of two offenses arising out of same transaction, where one offense was included in the other. This violated double jeopardy.

The Court should either reverse the aggravated burglary conviction for insufficient evidence or reverse the assault with a weapon conviction for violating double jeopardy. The State could not lawfully convict Esandro of both.

Respectfully submitted this 8th day of September, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,342, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Michael Marchesini
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CERTIFICATE OF SERVICE

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