
STATE OF MONTANA,

Plaintiff and Appellee,

v.

JUSTIN JAMES SWANSON,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, the Honorable John C. Brown, Presiding

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STATEMENT OF THE ISSUES

Montana's heightened right against double jeopardy prohibits the State from punishing a defendant twice for a singular act. Justin James Swanson pled guilty to aggravated sexual intercourse without consent and aggravated kidnapping. Both offenses have a use of force element. Swanson admitted that during both offenses the force he used was a weapon. He was sentenced to an additional ten years in each offense pursuant to § 46-18-221, the weapons enhancement statute. Was Swanson punished twice for using a weapon in violation of his constitutional right against double jeopardy?

STATEMENT OF THE CASE

Justin James Swanson ("Swanson") pled guilty to count one, aggravated sexual intercourse without consent ("SIWOC"); count two, aggravated kidnapping; count four, assault with a weapon; and, count six, surreptitious viewing. (D.C. Doc. 55.) Counts three and five were dismissed pursuant to a plea agreement. He was sentenced to 54 years in the Montana State Prison with no time suspended for the aggravated SIWOC, another 54 years with no time suspended for the aggravated kidnapping, 20 years with no time suspended for the assault with a weapon, and 6 months with no time suspended for the surreptitious viewing, all sentences to run concurrently. (D.C. Doc. 89, attached as Appendix A.) In addition, his aggravated SIWOC sentence and aggravated kidnapping sentence were each enhanced by ten additional

years pursuant to § 46-18-221, the weapons enhancement statute, to run consecutive to the underlying sentences. (Appendix A.) Swanson timely filed a notice of appeal. (D.C. Doc. 95.)

STATEMENT OF THE FACTS

As a child, Justin James Swanson (“Swanson”) took the brunt of his father’s beatings and verbal assaults. (D.C. Doc. 82, at 5.)¹ On one occasion, he tried to fight back but his father nearly beat him to death. He survived, because his mother intervened. (*Id.*) School was no comfort; he was constantly bullied for being “a scrawny little runt.” (*Id.*) He, like his father, attempted suicide but survived. (*Id.* at 5 & 7.) As an adult, he struggled with depression, making friends, and finding a partner. (*Id.* at 6.) He was diagnosed with constant anxiety, debilitating depression, and post-traumatic stress disorder. (*Id.* at 7.)

Then, during the peak of COVID while Swanson was 50 years old, living in Colorado, and working in the oil fields, he met Imogean England (“England”) online. (*Id.* at 2 & 15.) They began texting and

¹ District Court Document 82 is listed in the Register of Actions as Order Filing Document Under Seal. Swanson’s psychosexual evaluation is attached to the order, but it does not have its own document number in the Register of Actions. Therefore, in this brief, citations to D.C. Doc. 82 refer to Swanson’s psychosexual evaluation.

talking regularly. (*Id.* at 2.) Swanson visited England in Montana twice and he felt accepted and wanted. (*Id.* at 6.) In April 2020, Swanson contracted COVID, and, as a result, he lost his job in the oil fields after seven years. (*Id.* at 2.) The same month, he lost his aunt, who he cherished, to cancer and his nephew in a motorcycle accident. (*Id.*) He decided to move to Montana to be with England. (*Id.*) However, quickly after his arrival, the terms of their lease changed, and the couple was forced to find somewhere new to live. (*Id.*) England went to live with her aunt, and, after the separation, she started distancing herself from Swanson. (*Id.* at 3) At first, they saw each other a few times a month, but by January 2021, the two had a falling out and England cut off all communication. (*Id.*)

Swanson needed to know why their relationship ended. He felt abandoned and did not understand why she did not love him the way he loved her. (D.C. Doc. 81, at 3.) In April 2021, he decided he wanted to end his life. (Sent. Hrg. Tr. at 30.) But before he did, he went to England's residence and went inside. (D.C. Doc. 81, at 3.) When she returned with her new boyfriend, he tased her, pointed a pistol at her boyfriend, and told him to leave. (Change of Plea Tr. at 15.) Things

escalated quickly. Swanson believed that if he had sex with England he would know if he truly loved her or was just in love with the idea of finally having someone he could count on, so he threatened her with a pistol, forcing her to have sex. (Change of Plea Tr. at 13–14; D.C. Doc. 81, at 3.) The police arrived shortly thereafter and began talking to Swanson through the trailer door. (D.C. Doc. 1, at 1–2.) After six and a half hours, Swanson released England, exited the residence, and shot himself in the head. (D.C. Doc. 1, at 5 & 9.) He was rushed to a hospital in Salt Lake City, where he was treated and survived. (D.C. Doc. 1, at 9.)

At sentencing, Swanson explained that he “deeply regret[s] and will always be remorseful for events that took place that day.” (Sent. Hrg. Tr. at 30.) He wanted to die, lost himself in the moment, and struggled to understand how things escalated so quickly and so out of his control. (Sent. Hrg. Tr. at 31.) He asked for forgiveness but explained that he knew he did not deserve it, and then promised to never contact England or her boyfriend again. (Sent. Hrg. Tr. at 31.)

STANDARD OF REVIEW

Whether Justin Swanson’s right against double jeopardy was

violated when his sentences were enhanced twice for using a weapon is a question of constitutional law that this Court reviews for correctness.

State v. Guillaume, 1999 MT 29, ¶ 7, 293 Mont. 224, 975 P.2d 312.

SUMMARY OF THE ARGUMENT

Montana's heightened double jeopardy protection prohibits the State from punishing Swanson twice for a singular act. Swanson's SIWOC charge was increased to aggravated SIWOC because he used force. In aggravated SIWOC, the force element is established, in relevant part, by showing that, under the circumstances, the threat of harm was reasonably possible. Here, Swanson admitted that he brandished a pistol while threatening England making it reasonably possible that he could shoot her, which established the force element. Then, the State enhanced the aggravated SIWOC penalty by an additional ten years pursuant to § 46-18-221, Mont. Code Ann, the weapon enhancement statute, because Swanson brandished a pistol.

Similarly, the State enhanced Swanson's kidnapping charge from a misdemeanor to a felony, because he used a taser. In aggravated kidnapping, the use of force element is the cause of the bodily injury. To establish the force element, Swanson admitted that that he used a taser

to restrain England. Then, the State enhanced the kidnapping penalty by an additional ten years pursuant to § 46-18-221, Mont. Code Ann, the weapon enhancement statute, for using a taser.

Swanson's right against double punishment, as applied to this case, was violated twice. In Count I, the use of force element elevated the SIWOC to an aggravated felony because of Swanson's use of a pistol. Then, he received an additional 10-year sentence enhancement also for using a pistol. Swanson was punished twice for the single act of using a pistol. In Count II, the kidnapping charge was elevated to a felony for using a taser. Then he received an additional 10-year sentence enhancement, also for using a taser. Swanson was punished twice for the singular act of using a taser. The weapons enhancements in each count must be stricken from the Sentencing Order because Swanson cannot be punished twice for the singular act of using a weapon.

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ARGUMENT

I. Plain error review is appropriate in this case because Justin Swanson's right against double jeopardy was violated.

Double jeopardy violations are reviewable on appeal, even when not raised in district court, under the plain error doctrine. This Court has repeatedly held, “[w]hether multiple punishments have been imposed in violation of a defendant's fundamental right to be free from double jeopardy brings into question the fundamental fairness of the proceedings and the integrity of the judicial process.” *State v. Brown*, 1999 MT 31, ¶ 12, 293 Mont. 268, 975 P.2d 321; *State v. Whitehorn*, 2002 MT 54, ¶¶ 18 & 19, 309 Mont. 63, 50 P.3d 121; *State v. Weitzel*, 2000 MT 86, ¶ 43, 299 Mont. 192, 998 P.2d 1154; *State v. Roullier*, 1999 MT 37, ¶ 25, 293 Mont. 304, 977 P.2d 970; *State v. Aguilar*, 1999 MT 159, ¶ 13, 295 Mont. 133, 983 P.2d 345.

Swanson raises a double jeopardy claim that, although not raised below, this Court should review under the plain error doctrine. Failing to review Swanson's claim would undermine the fundamental fairness of his proceedings and the integrity of the judicial process.

II. Justin Swanson’s right against double jeopardy was violated when his charges were elevated for using force, defined here as his use of a weapon, and then his sentence was enhanced, again, for using the same weapon.

The Montana Constitution reads, “[n]o person shall be again put in jeopardy for the same offense previously tried in any jurisdiction.” Mont. Const. art. II, § 25. Montana’s double jeopardy protections are greater than the protections guaranteed by the United States Constitution. *Brown*, ¶ 12. The right against double jeopardy is explicit in the Montana Declaration of Rights and, therefore, it is a fundamental right. *Brown*, ¶¶ 11 & 12. As a fundamental right, the protection against double jeopardy must be jealously guarded, because without it “other constitutionally guaranteed rights would have little meaning.” See *State v. Bird*, 2001 MT 2, ¶ 25, 308 Mont. 75, 43 P.3d 266.

The “fundamental principle embodied in double jeopardy” is “the legal and moral concept that no person should suffer twice for a single act.” *Guillaume*, ¶ 17. Montana’s double jeopardy clause prohibits a defendant from being punished twice for a singular act. *Guillaume*, ¶ 17.

In *Guillaume*, the defendant illegally entered a garage and when the resident came to investigate, Guillaume held up a hammer and

said, “I will kill you.” *Guillaume*, ¶ 3. Guillaume swung the hammer, missing the resident’s head, but hitting his hand. *Guillaume*, ¶ 3.

Guillaume’s threat to kill the resident while brandishing the hammer was the same fact used to prove both an element of felony assault and the weapon enhancement. *Guillaume*, ¶¶ 3 & 18.

Guillaume’s right against double jeopardy, as applied to the facts of his case, was violated because he was punished twice for threatening the resident with a hammer. *Guillaume*, ¶ 18. First, his charge was elevated from a misdemeanor assault, punishable by only six months in jail and small fine, to a felony assault, where he received a 10-year prison sentence. *Guillaume*, ¶ 9. Then, the district court imposed a weapon enhancement of an additional five years in prison that was also based on him swinging the hammer. *Guillaume*, ¶¶ 4 & 18. Because Guillaume’s punishment was increased to a felony charge and then increased again under the weapon enhancement statute, he was punished twice for the singular act in violation of his heightened right against double punishment. *Guillaume*, ¶ 18.

- A. Swanson’s right against double punishment was violated when his charge was elevated from SIWOC to aggravated SIWOC and his sentence was enhanced 10 years under § 46-18-221 because he threatened England with a gun.**

The elements of SIWOC include knowingly having sexual intercourse with another person without consent. Mont. Code Ann. § 45-5-503(1). The penalty for SIWOC is not more than 20 years and a \$50,000 fine. Mont. Code Ann. § 45-5-503(2). SIWOC is elevated to aggravated SIWOC if a person uses force while knowingly having sexual intercourse with another person without consent. Mont. Code Ann. § 45-5-508(1). The penalty for aggravated SIWOC increases to either life imprisonment or imprisonment for not less than 10 years or more than 100 years and fine of up to \$50,000. Mont. Code Ann. § 45-5-508(2).

As used in aggravated SIWOC, force is defined as,

- (a) the infliction, attempted infliction, or threatened infliction of bodily injury or the commission of a forcible felony by the offender; or
- (b) the threat of substantial retaliatory action that causes the victim to reasonably believe that the offender has the ability to execute the threat.

Mont. Code Ann. 45-5-501(2). “A threat made while in possession of a deadly weapon accompanied with the apparent power to carry out the

threat, is most certainly the *equivalent* of force or actual violence.” *State v. Walker*, 139 Mont. 276, 278–79, 362 P.2d 548, 550 (1961) (emphasis added).

Like Guillaume, whose assault was elevated from a misdemeanor to a felony for threatening the resident with a hammer, Swanson’s SIWOC charge was elevated from a felony to an aggravated felony because he threatened England with a pistol. As a result, his punishment increased from a maximum of 20 years in prison with no mandatory minimum to a maximum of life imprisonment and a mandatory minimum of 10 years.

To prove that Swanson threatened physical force, the State needed to establish that Swanson had the ability to carry out his threat under the circumstances. Mont. Code Ann. 45-5-501(2); *State v. Lance*, 222 Mont. 92, 104, 721 P.2d 1258, 1266–67 (1986). As such, Swanson admitted during his colloquy that he had a pistol. The fact that Swanson had a pistol in his possession is what made his threat to shoot England reasonably possible. *See Walker*, 139 Mont. at 278–79, 362 P.2d at 550. Swanson’s threat to shoot England while brandishing a

pistol “is most certainly the *equivalent* of force or actual violence.”

Walker, 139 Mont. at 278–79, 362 P.2d at 550.

Then, also for threatening England with a gun, Swanson’s sentence was enhanced another 10 years under § 46-18-221(1). During the allocution, Swanson admitted that he “committed the offense of aggravated sexual intercourse without consent when [he] used a handgun to threaten [England] and forced her to have penile/ vaginal sexual intercourse without consent” and he did it purposely or knowingly. (Change of Plea Tr. at 13–15.) He did not provide a separate factual basis for the force element or the weapon enhancement because it was one singular fact—threatening England with a gun—that satisfied both.

Swanson was punished twice for threatening England with a weapon in violation of his right against double punishment because his charge was enhanced from SIWOC to aggravated SIWOC and then enhanced for a second time under § 46-18-221. The double punishment violates Montana’s heightened protections, and, as such, the 10-year weapon enhancement must be stricken from the sentence.

B. Swanson’s right against double punishment was violated because the singular act of tasing England elevated his charge from misdemeanor unlawful restraint to felony kidnapping and then the same act served as the basis of the § 46-18-221 sentence enhancement.

The elements of unlawful restraint include, “knowingly or purposely and without lawful authority restrain[ing] another so as to interfere substantially with the other person’s liberty.” Mont. Code Ann. § 45-5-301(1). The penalty for unlawful restraint is up to a \$500 fine, 6 months in jail, or both. Mont. Code Ann. § 45-5-301(2). The elements of felony kidnapping include: “knowingly or purposely and without lawful authority restrain[ing] another person by...using or threatening to use physical force.” Mont. Code Ann. § 45-5-302(1). The penalty for kidnapping is not less than two years or more than ten years and a fine of not more than \$50,000. Mont. Code Ann. § 45-5-302(2). Misdemeanor unlawful restraint is elevated to felony kidnapping if there is an allegation of “using or threatening to use physical force.” *Compare* Mont. Code Ann. § 45-5-301 *with* § 45-5-302; *see also State v. Brummer*, 1998 MT 11, 287 Mont. 168, 953 P.2d 250. Kidnapping can be elevated to an aggravated felony, if, in addition, the purpose of restraining the individual was to inflict bodily injury. Mont. Code Ann. § 45-5-303(1)(c).

Because bodily injury is an extra element that elevates kidnapping to aggravated kidnapping, bodily injury cannot be equivalent to force. Otherwise, the kidnapping and aggravated kidnapping would not have a distinguishing element. *Compare* Mont. Code Ann. § 45-5-301 *with* § 45-5-302.

Force is related to inflicting or attempting to inflict bodily injury, but it is not the actual injury. *State v. Haser*, 2001 MT 6, ¶ 54, 304 Mont. 63, 20 P.3d 100 (overturned on other grounds). Rather, force is the circumstance that restrains the individual, creates the bodily injury, or, when the force is a threat, it is the “circumstances which reasonably tend[s] to produce a fear that the threat will be carried out.” Mont. Code Ann. § 45-5-302; *see also Lance*, 222 Mont. at 104, 721 P.2d at 1266–67. Whereas bodily injury is the effect, force is the cause of the injury or fear that prevents the person from leaving. Mont. Code Ann. § 45-5-302; *see also Walker*, 139 Mont. at 278–79, 362 P.2d at 550.

Like in *Guillaume*, where the accused’s charge was elevated from a misdemeanor assault to a felony assault because he threatened the resident with a hammer, here, Swanson’s charge was elevated from misdemeanor unlawful restraint to felony kidnapping because he tased

England. As a result, his punishment was increased from six months in jail to 10 years in prison.²

Swanson was charged with aggravated kidnapping under § 45-5-303(1)(c); therefore, both the elements of physical force and bodily injury needed to be established. (D.C. Doc. 3.) To prove force, Swanson admitted that he used a taser. (Change of Plea Tr. at 15.) During Swanson's allocution, he admitted that he "restrained [England] by using threat or physical force with the purpose to inflict bodily injury by tasing her multiple times and holding her for approximately over six hours" and he did that purposely or knowingly. (Change of Plea Tr. at 15.) It was Swanson's possession of the taser that established physical force.

Then, like in *Guillaume*, Swanson's sentence was enhanced another 10 years under § 46-18-221(1) for, again, using a taser. During his allocution, Swanson did not distinguish between using force and

² Swanson ultimately received a 54-year sentence for aggravated kidnapping. However, the element of using physical force is the precursor for elevating the offense from a misdemeanor to a felony, which is punishable by a maximum of 10 years.

using a weapon because it was one singular fact—using a taser—that satisfied both the force element and the sentence enhancement.

Swanson was punished twice for using a taser in violation of his right against double punishment when his charge was enhanced from a misdemeanor to a felony and then enhanced for a second time under § 46-18-221. The double punishment violates Montana’s heightened protections, and, as such, the 10-year weapon enhancement must be stricken from the sentence.

III. The remedy for the double jeopardy violations is to remand Swanson’s case to the district court for the limited purpose of striking the two weapon enhancements.

When a sentence enhancement violates double jeopardy, this Court “remand[s] to the District Court for revision of that sentence in that limited respect.” *Aguilar*, ¶ 14. In *Aguilar*, the defendant’s right against double jeopardy was violated when he was sentenced for felony assault and then his sentence was enhanced for using a weapon. *Aguilar*, ¶ 12. The State conceded that the sentence enhancement violated Aguilar’s right against double jeopardy but argued the case should be remanded for the district court to reconsider his entire sentence. *Aguilar*, ¶ 9. This Court held, “the illegal sentence

enhancement should simply be stricken and the judgment amended to that extent.” *Aguilar*, ¶ 10; *Roullier*, ¶ 26 (reversing the district court’s imposition of a sentence enhancement and remanding the case for the limited purpose of striking the sentence enhancement). Here, like in *Aguilar*, the remedy is to remand Swanson’s case to district court to retain the 54-year commitments but strike the illegal 10-year sentence enhancements.

CONCLUSION

Justin Swanson respectfully requests that this Court remand this case to the district court with an order to strike the two weapon enhancements from the Sentencing Order.

Respectfully submitted this 29th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary 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 3,360, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Carolyn Gibadlo
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APPENDIX

Sentencing OrderApp. A

CERTIFICATE OF SERVICE

I, Carolyn Marlar Gibadlo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-29-2023:

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