

DA 17-0060

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 46N

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD RYAN OSTRANDER,

Defendant and Appellant.

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APPEAL FROM: District Court of the Eighteenth Judicial District,  
In and For the County of Gallatin, Cause No. DC 16-54B  
Honorable Mike Salvagni, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Kristen L. Peterson, Assistant  
Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy A. Hinderman,  
Assistant Attorney General, Helena, Montana

Marty Lambert, Gallatin County Attorney, Bozeman, Montana

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Submitted on Briefs: January 16, 2019

Decided: February 19, 2019

Filed:



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Clerk

Justice James Jeremiah Shea 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 Defendant Donald Ryan Ostrander appeals from the judgment and sentence of the Eighteenth Judicial District Court, Gallatin County, finding him guilty of Assault with a Weapon, in violation of § 45-5-213, MCA. We affirm.

¶3 On March 2, 2016, the State charged Ostrander with two counts of felony Assault with a Weapon: (1) for stabbing Michael Goodman with a knife, and (2) for cutting Valen Murnion with a knife. Ostrander pled not guilty and gave notice of his intent to rely on a defense of justified use of force. Ostrander did not dispute that he used a knife against Murnion and Goodman but argued he reasonably used the knife to defend himself against their ambush.

¶4 On October 25-28, 2016, the District Court presided over a four-day jury trial. During the trial, witnesses described the following events: in June 2015, Murnion and two other men got into a physical altercation with Ostrander. The three men came to Ostrander's apartment, following a dispute over money, and one of the men threatened Ostrander. Ostrander testified the man told him, "[y]ou're lucky we're not packing," and "[n]ext time we come back we'll be strapped." Ostrander interpreted this as a statement that they would bring guns to their next encounter. A neighbor called the police. Police

interviewed Ostrander and the other men, but none of the parties involved pressed charges. Murnion testified he did not remember the incident. In November 2015, Ostrander was out to dinner at a local restaurant with his girlfriend, Ashley Cornelius. Murnion was seated at a table nearby, and Ostrander testified Murnion began making lewd remarks about Cornelius and boasting to his friends about beating up Ostrander. Surveillance footage from the restaurant's security camera showed Ostrander got up from his table, walked toward Murnion, and punched Murnion in the face. Murnion did not fight back or retaliate. Murnion later reported the incident to police and ultimately pressed charges against Ostrander.<sup>1</sup>

¶5 In December 2015, Ostrander and Goodman were living in the same apartment complex in Bozeman. Ostrander and Cornelius lived in an upstairs unit, while Goodman and five others, including Goodman's girlfriend, Summer Walraven, lived downstairs. Ostrander and Goodman did not know each other well but had a few run-ins, mostly over parking spaces. Goodman and Murnion were childhood friends.

¶6 On December 18, 2015, the night of the incident, Ostrander testified he came home from work to find the downstairs tenants' cars parked in his spots. Ostrander testified he saw Walraven outside and told her, "You need to stop fucking parking in my spots," and, Walraven testified he angrily said, "Can you just move the fucking truck," before going upstairs. Walraven's mother then knocked on Ostrander's door and confronted him about

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<sup>1</sup> Ostrander pled guilty to assaulting Murnion at the restaurant.

how he had spoken to Walraven. Ostrander testified Walraven yelled threats that Goodman was going to “kick [Ostrander’s] ass.” Later, Goodman called Ostrander, and the two argued over the phone. Goodman testified that he called Murnion and said that his neighbor was “being hostile,” and that Goodman might “need some backup” in case anything went wrong, so Murnion came to Goodman’s apartment.

¶7 Shortly thereafter, Goodman knocked on Ostrander’s door. Ostrander answered the door with a knife in his hand. The two men agreed the best way to resolve the conflict was a one-on-one fight, but Ostrander told Goodman he was afraid of being jumped by the group of people who had been hanging around the downstairs apartment. Goodman testified he told Ostrander not to worry. Ostrander then gave Cornelius the knife to hold, and both Ostrander and Cornelius went downstairs.

¶8 Once downstairs, Ostrander and Goodman squared off to fight. Ostrander testified he thought that roughly ten other people encircled him, and he recognized Murnion leading the pack. Ostrander testified it did not appear that Murnion was armed. Nevertheless, Ostrander grabbed the knife from Cornelius. Ostrander testified he ran at Murnion but stopped short of attacking him. Ostrander testified Murnion then grabbed a glass bottle, swung it at Ostrander, and hit Ostrander twice on the head, eventually breaking the bottle. Ostrander and Murnion then began fighting. Ostrander testified that, several people jumped on him, including Goodman, and wrestled him to the ground. Ostrander testified that, believing he was outnumbered and would be “beat[en] to death [by] . . . everybody,” he stabbed Goodman twice in the back with his knife. Ostrander testified that several

people then held him down and kicked and hit him, and that Murnion grabbed the knife from Ostrander and stabbed Ostrander in the hand.

¶9 Ostrander's brother, Andrew, arrived at the scene. Andrew testified that he saw a group of people standing around with objects in their hands, including a shovel. Andrew testified he saw a man holding Ostrander down on the ground while others kicked and screamed at him. Andrew testified he ran into the fray and attempted to pull people off Ostrander, and that he was attacked as well. The brothers were eventually able to get to Andrew's car. Cornelius called the police, as did Andrew's girlfriend.

¶10 Goodman, Walraven, Walraven's mother and brother, and the other downstairs tenants recounted a different version of events. Goodman testified that although he contacted Murnion before the fight, he did not work with Murnion to ambush Ostrander. Most of the downstairs tenants admitted to being at the scene of the fight. However, they disputed Ostrander's account that a larger crowd gathered. Walraven, Murnion, Goodman, and the other tenants testified generally that when Ostrander saw Murnion, Ostrander became upset, grabbed the knife from Cornelius, and ran at Murnion. They testified that Murnion seemed to retreat, and the two men wrestled. Walraven and her brother testified that Goodman then ran up behind Ostrander and attempted to separate the two. Goodman and Walraven's brother testified Goodman slipped on the ice and fell, and Ostrander proceeded to stab Goodman twice in the back. No other witnesses, besides Ostrander, testified that Murnion hit Ostrander with a bottle or other weapon during the fight. Walraven and Goodman testified that they heard the sound of glass breaking, but not until after Ostrander stabbed Goodman. Murnion testified that after Ostrander stabbed

Goodman, Murnion was able to wrestle the knife away from Ostrander, cutting Ostrander's hand in the process.

¶11 Ostrander had numerous injuries from the fight, including a swollen and bruised face, rib fractures, internal organ bruising, cuts on his hand, and a break in his spine. Goodman had two stab wounds in his back, including a life-threatening wound that punctured his lung. Walraven drove Goodman to the hospital, and he survived due to emergency care. Murnion suffered a cut to his hand and abdomen that required stitches.

¶12 At the close of arguments, Ostrander proposed the following jury instruction, modeled off § 45-3-102, MCA:

A person is justified in the use of force or threat to use force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force. However, a person is justified in the use of force which is intended or likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself *or the commission of a forcible felony*.

(Emphasis added.)

¶13 The State objected to the proposed instruction, arguing Ostrander failed to produce any evidence of “a forcible felony beyond fear of imminent death or serious bodily injury.” Ostrander responded that the jury was presented with evidence that justified the instruction, including that Ostrander was assaulted with a weapon (the bottle), and that there could have been an aggravated assault (a forcible felony). The District Court refused Ostrander's proposed instruction and instead instructed the jury as follows:

A person is justified in the use of force or threat to use force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.

However, a person is justified in the use of force which is intended or is likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself.

¶14 The District Court reasoned that although “there may be evidence that [Ostrander] believed that force was necessary to prevent imminent death or serious bodily injury to himself,” there was not “any evidence . . . [of] the commission of a forcible felony.” Further, the District Court concluded the forcible felony instruction would confuse and mislead the jury.

¶15 On October 28, 2016, the jury returned a guilty verdict as to Count One, stabbing Goodman, and not guilty as to Count Two, cutting Murnion. On December 12, 2016, the District Court sentenced Ostrander to fifteen years at the Montana State Prison, with thirteen years suspended. Ostrander appeals.

¶16 We review jury instructions in a criminal case to determine whether the district court abused its discretion. *State v. Zlahn*, 2014 MT 224, ¶ 14, 376 Mont. 245, 332 P.3d 247. We review the jury instructions as a whole to determine whether they fully and fairly instruct the jury on the applicable law. *State v. Kaarma*, 2017 MT 24, ¶ 7, 386 Mont. 243, 390 P.3d 609. A district court has broad discretion when it instructs a jury, *State v. Schaeffer*, 2014 MT 47, ¶ 12, 374 Mont. 93, 321 P.3d 809, but must still instruct the jury “on each theory which is supported by the record,” *State v. Archambault*, 2007 MT 26, ¶ 25, 336 Mont. 6, 152 P.3d 698. Reversible error occurs only where the instructions prejudicially affect the defendant’s substantial rights. *Archambault*, ¶ 14.

¶17 Justifiable use of force in defense of a person is an affirmative defense. Section 45-3-115, MCA; *State v. Erickson*, 2014 MT 304, ¶ 25, 377 Mont. 84, 338 P.3d 598. Thus, a defendant bears the burden of producing evidence that he was not the aggressor, and that his use of force was justified. *State v. Miller*, 1998 MT 177, ¶ 23, 290 Mont. 97, 966 P.2d 721 (citing §§ 45-3-102, -105, MCA); *see also Erickson*, ¶ 25.

Montana law provides in relevant part:

A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the conduct is necessary for self-defense or the defense of another against the other person's imminent use of unlawful force. However, a person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to the person or another or to prevent the commission of a forcible felony.

Section 45-3-102, MCA.

¶18 A forcible felony is “any felony which involves the use or threat of physical force or violence against any individual.” Section 45-3-101(2), MCA; § 45-2-101(24), MCA. A person is justified in using such force in two instances: (1) defense of self or another, or (2) prevention of serious crimes. Section 45-3-102, MCA. The force used by a person to defend himself or others must be to “a degree commensurate with the threat of harm a person faces.” *Archambault*, ¶ 15 (internal quotations omitted) (citing *State v. Stone*, 266 Mont. 345, 347, 880 P.2d 1296, 1298 (1994); § 45-3-102, MCA).

¶19 In *State v. Lackman*, a defendant requested the jury be instructed that lethal force could be used to “prevent the commission of a forcible felony.” *State v. Lackman*, 2017 MT 127, ¶ 6, 387 Mont. 459, 395 P.3d 477. We affirmed a district court's refusal to



give the instruction because the defendant failed to present evidence of a forcible felony “other than the attack on [the defendant] personally,” and the defendant’s proposed instruction had the potential to confuse the jury. *Lackman*, ¶¶ 6, 16-17.

¶20 Here, Ostrander argues he presented the jury with ample evidence that he actually and reasonably believed it was necessary to stab Goodman to prevent the commission of the forcible felony of “assault[] with a weapon with the use of the bottle” by Murnion and Goodman, who Ostrander believed were acting in concert to ambush him. Ostrander argues the District Court erred when it refused to instruct the jury that preventing a forcible felony can justify the use of force. We disagree.

¶21 Ostrander testified that Murnion hit him twice with a bottle, Goodman jumped him, and others kicked and punched him. The only “forcible felony” for which Ostrander presented evidence was the alleged assault by Murnion, Goodman, and the others against Ostrander himself. Ostrander’s defense theory regarding these alleged assaults was encompassed by the District Court’s jury instruction on justifiable use of force to prevent imminent death or serious bodily injury. *See Lackman*, ¶¶ 6, 16-17. Accordingly, the justifiable use of force instructions fully and fairly instructed the jury regarding the applicable law. *See Lackman*, ¶ 17; § 45-3-102, MCA; *Kaarma*, ¶ 7. The District Court did not abuse its discretion when it instructed the jury on Ostrander’s justifiable use of force defense without including the “forcible felony” component. *See Lackman*, ¶ 17; *Zlahn*, ¶ 14.

¶22 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the

Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We affirm.

/S/ JAMES JEREMIAH SHEA

We concur:

/S/ INGRID GUSTAFSON

/S/ LAURIE McKINNON

/S/ DIRK M. SANDEFUR

/S/ JIM RICE