DA 18-0074

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 212N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT GENE CLIFT,

Defendant and Appellant.

APPEAL FROM: District Court of the Nineteenth Judicial District,
In and For the County of Lincoln, Cause No. DC 16-94
Honorable Matthew Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Gregory Hood, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Marcia Boris, Lincoln County Attorney, Libby, Montana

Submitted on Briefs: August 14, 2019

Decided: September 3, 2019

Filed:

Clerk

Justice Ingrid Gustafson 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 Robert Gene Clift (Clift) appeals from the Order denying his motion to sever issued by the Nineteenth Judicial District Court, Lincoln County, on January 24, 2017. We affirm.

¶3 Clift was originally charged with two felony offenses—Aggravated Assault and Unlawful Restraint. Approximately three months later, the State added a third felony charge—Tampering with Witnesses and Informants. Clift sought to sever the Tampering charge from the offenses originally charged, arguing that trying the charges together prejudiced him by violating his right to testify. The District Court denied the motion based on *State v. Bingman*, 229 Mont. 101, 745 P.2d 342 (1987), resulting in this appeal.

¶4 We review a district court's denial of a motion to sever for an abuse of discretion. *State v. Kirk*, 2011 MT 314, ¶ 10, 363 Mont. 102, 266 P.3d 1262. "An abuse of discretion occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason." *State v. Essig*, 2009 MT 340, ¶ 14, 353 Mont. 99, 218 P.3d 838.

¶5 Here, Clift asserts he suffered prejudice as he wished to testify on the Tampering charge but wished to remain silent on the other two charges. Clift asserts the failure to sever foreclosed his option to testify as to the Tampering offense "by exposing him to the risk that waiving his silence could compel him to answer State questioning on the other

two charges." The State contends Clift made only a general assertion that his right against self-incrimination would be implicated, but failed to prove how he was unfairly prejudiced. The State argues, pursuant to *State v. Riggs*, 2005 MT 124, ¶ 34, 327 Mont. 196, 113 P.3d 281, it is insufficient for Clift to prove he faced some prejudice or stood a better chance of acquittal with separate charges, but rather he has the burden to prove that not severing the charges resulted in unfair prejudice to him—which he failed to do.

¶6 Although the State also asserts this Court has previously held that a witness tampering charge is properly joined with the charges from which it flowed, such is an overbroad interpretation of *Bingman.* Our holding in *Bingman* required balancing prejudice to the defendant with judicial economy regardless of whether the subsequent charge flowed from the original charges. "Determining whether there has been prejudicial joinder involves weighing the prejudice incurred by the defendant because of a joint trial against the judicial economy resulting from a joint trial. This balancing process is left to the sound discretion of the trial judge. Absent a showing of abuse of that discretion, an appellate court should not substitute its judgment for that of the trial court." *Bingman*, 229 Mont. at 110 (quoting *State v. Campbell*, 189 Mont 107, 120-21, 615 P.2d 190, 198 (1980)).

¶7 From our review of the record, the District Court did not abuse its discretion in denying Clift's motion to sever. Clift asserts that joinder of the charges "foreclosed [his] *option* to testify in the Tampering by exposing him to the *risk* that waiving his silence could compel him to answer State questioning on the other two charges" (emphasis added). He does not elaborate as to how his testimony would have resulted in a different outcome or how he could not have presented his defense through other witnesses, such as his father.

As recognized by Clift, he could have testified limiting the scope of his direct only to the alleged Tampering offense, potentially limiting the scope of cross-examination. He did not testify. Perhaps had he testified he may have been able to establish the prejudice he asserts would have occurred—inappropriate cross-examination with regard to the other charges.

¶8 While the District Court could have more thoroughly articulated its balancing pursuant to *Bingman*; on the record before us, we agree Clift has not distinguished his situation from that of any other defendant properly charged with multiple counts or identified any prejudice which prevented him a fair trial. The District Court did not abuse its discretion in denying Clift's motion to sever.

¶9 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.

¶10 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR