NOT DESIGNATED FOR PUBLICATION

No. 125,063

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

AMY D. STUTZMAN,
Appellant.

MEMORANDUM OPINION

Appeal from Marion District Court; BENJAMIN J. SEXTON, judge. Opinion filed September 22, 2023. Affirmed.

Kelley N. Reynolds and *Charles A. O'Hara*, of O'Hara & O'Hara LLC, of Wichita, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., COBLE and PICKERING, JJ.

PICKERING, J.: While walking towards a truck occupied by a three-man survey crew, Amy D. Stutzman fired multiple gunshots into the ground and in the direction of the crew. She was charged and convicted of three counts of aggravated assault. On appeal, she first asserts that the evidence was insufficient because she never pointed the gun directly at the surveyors and, therefore, they could not have a reasonable apprehension of immediate bodily harm. Second, she contends that her three counts are multiplicitous because she engaged in a single course of conduct, despite there being three individuals in the proximity of her gunshots. And third, she challenges the

prosecutor's closing arguments, claiming the prosecutor's statements that she was "shooting at" the victims amounted to arguing facts not in evidence, was outside the wide latitude afforded prosecutors, and deprived her of a fair trial. Our review shows no reversible error, and we affirm Stutzman's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2019, a survey crew of three men was working near the intersection of 110th and Pawnee in Marion County, Kansas, when a woman, later identified as Stutzman, began shouting at them. She was cursing and yelling at them—that they were "not allowed to be there" and that they "work with the wind farm." She yelled, "[F]uck the wind, fuck you guys." The crew chief, Alex Henson, overheard the commotion and approached the woman in his work truck. She was putting up a sign at the intersection that read "no trespassing", "violators will be shot", and "survivors will be shot again." Stutzman denied yelling at the men.

Henson got out of the truck and asked Stutzman what the problem was. She replied that they were to stay off her property. Henson explained that they would be working within the county right-of-way with no intention of entering her property. Stutzman said, "I own the road." Henson again told Stutzman that they would be on the county road within the right-of-way. "[S]tay within 50 feet of that road," she said and walked back to her house. Stutzman testified that she headed back to her house because she needed to check on a dessert she was baking in the oven. As she walked back to her house, she testified that one of the men said, "That's right, bitch, go back to your house, leave us alone."

About 30 seconds later, the crew heard a gunshot. When crew members Jackson Craft and Austin Smith heard the gunshot, they were very startled. Each man looked to see if he was hit or if anything was out of the ordinary around him.

Henson instructed the two crewmen to get in the truck and then began driving slowly down Pawnee looking for the source of the gunshot. When the truck was even with Stutzman's residence, he saw Stutzman about 150-200 feet away. She had a handgun pointed at the ground in front of her, and she was walking toward the truck, firing the handgun into the ground as she walked. Henson testified, "We are in direct line with where she has the pistol pointed. And she's firing in the ground four to five feet in front of her. Which I thought was very dangerous, a ricochet could kill her or me, either one."

Stutzman then shouted from the top of the hill, "I told you to get out of here." She walked towards the men, firing the handgun into the ground, until she was within about 50 feet of the truck. If she had raised her arm, the firearm would have been aimed directly at Henson and the crew. Henson thought, "Oh, my God." He testified moments later, "I'm thinking she might blow my head off."

Stutzman testified that she had merely been target shooting at a coffee can on the ground in her pasture. She said when she came out of her house, she fired two shots. She said that the truck then pulled up beside her and stopped. Stutzman said she was clearing the last round, which had jammed in the slide, from her firearm. At that point, Henson asked her, "[W]hy won't you allow us to do our work here?" And she replied, "I'm not stopping you. Are you scared? Go ahead."

One of the crew members had a program disclosing the name of the property owner. Henson asked, "[A]re you Amy Stutzman?" and she replied, "I'm done talking to you." Henson testified that she turned and began shooting the firearm into the ground in front of her until she emptied her clip. Henson took off in the truck. According to Stutzman, she reloaded and fired two shots when the driver of the pickup truck hollered at her, "Fuck you, bitch, that's chicken shit," and drove away.

Henson went back to town and made a police report. The men testified that the encounter left them frightened, nervous, and shaken up. The State charged Stutzman with three counts of aggravated assault, one count for each of the three survey crewmen.

The jury found Stutzman guilty of all three charges of aggravated assault. She was sentenced to a controlling prison term of 24 months, with the sentences for counts I and II to run consecutive to each other and the sentence for count III to run concurrent with counts I and II. The district court made a finding that the person felonies were committed with a deadly weapon, which made the sentence presumptive prison, but the court placed Stutzman on an 18-month probation term.

Stutzman now appeals.

I. SUFFICIENT EVIDENCE SUPPORTS STUTZMAN'S THREE CONVICTIONS

Stutzman challenges the sufficiency of the evidence to support the convictions of aggravated assault when she did not point the gun directly at the victims but continuously fired multiple rounds into the ground in front of her as she walked towards them.

Standard of review

"'When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.'" *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). We do not "'reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses.'" 313 Kan. at 209.

Analysis

In Kansas, one form of aggravated assault is defined as "knowingly placing another person in reasonable apprehension of immediate bodily harm . . . [w]ith a deadly weapon." K.S.A. 2019 Supp. 21-5412(a), (b)(1). "Assault contains both a subjective apprehension by the victim, i.e., whether the victim had an apprehension of immediate bodily harm, as well as an objective determination that the apprehension was reasonable." *State v. Holmes*, No 120,368, 2019 WL 4725206, at *3 (Kan. App. 2019) (unpublished opinion).

On appeal, Stutzman argues that the facts do not fulfill the immediacy requirement in the Kansas aggravated assault statute. Stutzman does acknowledge that the survey crew members all testified that "they were afraid or startled." She then argues: "However, it is clear from the testimony that they were afraid that Ms. Stutzman may point the gun at them and fire in the future." Stutzman contends that the crewmen were frightened of a potential future action—her possibly raising the gun and pointing it at them—which does not support the "immediate" harm element necessary for an aggravated assault conviction.

In support, Stutzman points to *State v. Warui*, No. 120,088, 2019 WL 4892084, at *3 (Kan. App. 2019) (unpublished opinion), where another panel of this court found that the Kansas crimes of assault and battery are not comparable to a 2012 Florida robbery statute. Stutzman cites to this case for the proposition that a Kansas assault has an immedia5412cy requirement. But *Warui* does not shed any further light on the immediacy required for an assault conviction.

As noted in the State's brief, assaults in Kansas require "'only an apparent ability, not a present ability, to do bodily harm.' *State v. Deutscher*, 225 Kan. 265, 270, 589 P.2d 620 (1979)." *State v. Luarks*, No. 73,708, 1996 WL 35070055, at *1 (Kan. App. 1996)

(unpublished opinion). In *Luarks*, the defendant was standing up and through the car's sunroof and shooting at an apartment complex. The victim testified that she was scared but also testified that she did not think she would get shot. Luarks argued that the evidence was insufficient to find that the victim was in immediate apprehension of bodily harm. The panel rejected Luarks' argument and held no rational fact-finder would conclude that "an individual standing in a car near an apartment complex firing a weapon at the apartment complex is not displaying the required 'apparent ability' to do bodily harm." 1996 WL 35070055, at *1.

Here, in proving its case against Stutzman, the State never shied away from the statute's requirement of "immediate bodily harm." Contrary to Stutzman's argument, there was an immediate harm that the bullets she fired could have ricocheted and hit the crewmen. The State's testimonial evidence was that Stutzman was walking directly towards them while also firing in their direction and into the ground. For that reason, a reasonable fact-finder could find the risk of harm to be immediate.

Similarly, no rational fact-finder would conclude that Stutzman did not display the apparent ability to do immediate harm. In a short timeframe, she behaved belligerently by yelling at the crewmen and posted a threatening sign that read, "no trespassing", "violators will be shot", and "survivors will be shot again." In addition to yelling and posting a sign about shooting trespassers, she repeatedly fired a weapon into the ground while walking directly towards the crewmen. Based on all the evidence in a light most favorable to the State, a reasonable fact-finder could find that risk of harm was immediate.

Stutzman further contends that there was no objective apprehension of immediate bodily harm to the crewmen to support her convictions of aggravated assault. As noted above, assault contains both the subjective apprehension by the victim, i.e., whether the

victim had an apprehension of immediate bodily harm, and "an objective determination that the apprehension was reasonable." *Holmes*, 2019 WL 4725206, at *3.

In this case, the parties agree that the crewmen had a subjective apprehension of harm. Stutzman, however, argues that their fear was objectively unreasonable. She cites no caselaw in support of her argument that walking directly towards persons while shooting a firearm into the ground—after yelling at them and posting a threatening sign warning of shooting trespassers—cannot objectively create an apprehension of immediate bodily harm.

Although not directly on point, another panel of this court has held that a victim who heard gunshots, but never saw a gun, could reasonably be in apprehension of immediate bodily harm. *State v. Bauman*, No. 86,030, 2003 WL 22990118, at *2 (Kan. App. 2003) (unpublished opinion). In *Bauman*, the defendant challenged his conviction on appeal, asserting that the evidence presented at trial only showed that the victim was apprehensive *after* the alleged incident of shooting at his truck. The victim testified that while he was driving past Bauman's residence, he could see the defendant's truck in the driveway. The victim then heard "'something that sounded like fireworks.'" 2003 WL 22990118, at *1. Something hit his truck and he realized that they were gunshots. He looked back and could see Bauman standing by his truck. He then "ducked down in his seat and sped away to avoid further gunfire" and later found a bullet hole in his truck. 2003 WL 22990118, at *1.

The panel disagreed with Bauman, noting that the victim had "testified that he was afraid he was going to be shot when he heard gunshots." 2003 WL 22990118, at *2. The panel found there was sufficient evidence and upheld the aggravated assault conviction. 2003 WL 22990118, at *2.

Similarly, in *Holmes*, the State's witnesses testified that the defendant was "acting strangely and screaming at [the victim] while holding a dandelion picker [a gardening tool] down by her side in a clenched fist." 2019 WL 4725206, at *1. The victim testified that she was scared and fearful that the defendant would hurt her with the gardening tool, which hung down by the defendant's side. The defendant looked "'like she was ready at any point in time" to harm the victim because "[a]ll she had to do was lift her hand.'" 2019 WL 4725206, at *1. The *Holmes* panel held that a rational fact-finder could find that the defendant's actions in acting oddly and belligerently, while advancing upon the victim with a garden tool, supported a finding that the victim's apprehension of immediate bodily harm was reasonable. 2019 WL 4725206, at *3.

Likewise, in this case, Stutzman's threatening actions would support a finding that the three crewmen's apprehension of immediate bodily harm was reasonable. Stutzman had been acting belligerently and yelling at the men, and at one point she yelled out to them, "Scared?" She also posted a no trespassing sign that threatened trespassers would be shot and advanced upon the three men in their truck, firing her pistol into the ground as she walked towards them.

Additionally, the State correctly argues that a fact-finder can infer from circumstantial evidence that the crewmen were objectively under the apprehension of immediate bodily harm. A verdict may be supported by circumstantial evidence so long as "it permits the factfinder to draw a reasonable inference regarding the fact(s) in issue." *State v. Banks*, 306 Kan. 854, 859, 397 P.3d 1195 (2017).

To be sufficient, circumstantial evidence need not exclude every other reasonable conclusion. "'A conviction of even the gravest offense can be based entirely on circumstantial evidence and the inferences fairly deducible therefrom. If an inference is a reasonable one, the jury has the right to make the inference.'" *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021).

Here, as the crewmen were working, they saw Stutzman hanging a threatening sign at the intersection where they were standing. At the same time, she was screaming and cursing at them. She told the crew chief, "[Y]ou're to stay off of my property." She then walked towards them with a firearm, shooting the gun into the ground in front of her. Given all the testimonial evidence, the jury could have inferred that the crewmen were in apprehension of immediate bodily harm. We uphold the convictions because a rational fact-finder could have found the defendant guilty beyond a reasonable doubt based on the State's evidence.

II. STUTZMAN'S THREE COUNTS OF AGGRAVATED ASSAULT ARE NOT MULTIPLICITOUS

Stutzman argues that her three counts of aggravated assault are multiplicitous because her actions constituted a "single course of conduct."

Standard of review

"'Questions involving multiplicity are questions of law subject to unlimited appellate review.'" *State v. Davis*, 306 Kan. 400, 419, 394 P.3d 817 (2017).

Analysis

Multiplicity occurs when a single offense is charged in more than one count of a complaint. "The principal danger of multiplicity is that it creates the potential for multiple punishments for a single offense, which is prohibited by the Double Jeopardy Clauses of the Fifth Amendment to the United Sates Constitution and § 10 of the Kansas Constitution Bill of Rights." *State v. Thompson*, 287 Kan. 238, 244, 200 P.3d 22 (2009).

"When analyzing whether sentences relating to two convictions that arise from unitary conduct result in a double jeopardy violation, the test to be applied depends on whether the convictions arose from the same statute or multiple statutes." *State v. Eckert*, 317 Kan. 21, Syl. ¶ 4, 522 P.3d 796 (2023). When the double jeopardy issue arises from the defendant's convictions for multiple violations of a single statute, we apply the "unit of prosecution test." 317 Kan. 21, Syl. ¶ 4.

Here, the unit of prosecution test applies because Stutzman's convictions arose from multiple violations of a single statute. "In a unit of prosecution case, the court asks how the legislature has defined the scope of conduct composing one violation of a statute. Under this test, the statutory definition of the crime determines what the legislature intended as the allowable unit of prosecution." *Thompson*, 287 Kan. at 245. Our Supreme Court also explained that "[t]here can be *only one conviction* for each unit of prosecution." (Emphasis added.) 287 Kan. at 245.

State v. Schoonover, 281 Kan. 453, Syl. ¶ 8, 133 P.3d 48 (2006), the landmark case that set forth the tests for determining multiplicity, stressed: "The key to determining the allowable unit of prosecution is legislative intent." As recently noted by the Kansas Supreme Court: "In ascertaining this intent, a court begins with the plain language of the statute, giving common words their ordinary meaning. " *Eckert*, 317 Kan. 21, Syl. ¶ 6. A court should not speculate about the legislative intent when a statute's language is clear, "and it should refrain from reading something into the statute that is not readily found in its words." 317 Kan. 21, Syl. ¶ 6.

Our analysis begins with the language of K.S.A. 2019 Supp. 21-5412, which defines aggravated assault:

"(a) Assault is knowingly placing another person in reasonable apprehension of immediate bodily harm;

"(b) Aggravated assault is assault, as defined in subsection (a), committed:

(1) With a deadly weapon."

Another panel of this court considered the predecessor statute for assault—K.S.A. 21-3408 (Furse 1995)—and applied the unit of prosecution test in *Brown v. State*, No. 105,592, 2012 WL 651862, at *3-4 (Kan. App. 2012) (unpublished opinion). While the current version of the statute replaced the word "intentionally" with the word "knowingly," both versions use the language "placing another person in reasonable apprehension of immediate bodily harm."

The defendant in *Brown* fired multiple shots at three individuals, and all three convictions for aggravated assault were upheld as not multiplicitous. The *Brown* panel found that the "unambiguous reference to the victim in terms of the singular 'another person' rather than the plural 'other persons'" indicated that the Legislature intended to designate the unit of prosecution for assault as placing a single person "'in reasonable apprehension of immediate bodily harm.'" 2012 WL 651862, at *4. See also *United States v. Baugh*, 583 F. Supp. 3d 321, 327-28 (D. Mass. 2022) (analyzing similar "another person" language in federal stalking statute and holding unit of prosecution is each individual victim).

In *State v. Mendoza*, 41 Kan. App. 2d 996, 1004, 207 P.3d 1072 (2009), the defendant challenged his two battery convictions as being multiplicitous when he was convicted for harming a single individual in two places on his body. The *Mendoza* panel analyzed the battery statute—which also uses the "another person" language like the assault statute—and found those convictions to be multiplicitous. 41 Kan. App. 2d at 1004. While the facts in *Mendoza* are not analogous to our case, the panel found the

"another person" language to be the critical indicator of the Legislature's intent for the unit of prosecution to be "the person harmed." 41 Kan. App. 2d at 998, 1004.

Stutzman cites *State v. King*, 297 Kan. 955, 305 P.3d 641 (2013), in support of her argument that a single course of conduct should be a single offense, despite the presence of multiple victims. In *King*, the jury convicted King of three counts of making a criminal threat for communicating a single threat to kill a group of three people. The Kansas Supreme Court applied the unit of prosecution test to the criminal threat statute, K.S.A. 2005 Supp. 21-3419, which defined criminal threat as:

> "(a) A criminal threat is any threat to:
>
> (1) Commit violence communicated with intent to terrorize another, or to cause the evacuation of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such terror or evacuation;
>
> (2) adulterate or contaminate any food, raw agricultural commodity, beverage, drug, animal feed, plant or public water supply; or
>
> (3) expose any animal in this state to any contagious or infectious disease."

Under the unit of prosecution test, the *King* court concentrated on the words, "'[a] criminal threat is any threat," and held that the focus is on the accused's behavior and not the number of his victims. 297 Kan. at 974-75. As a result, "a communicated threat constitutes only one offense even if it is perceived and comprehended by multiple victims." 297 Kan. 955, Syl. ¶ 5. The *King* court held that "there can only be one conviction for a single communicated threat, regardless of the number of victims who perceive and comprehend the threat." 297 Kan. at 957.

The State notes that unlike the criminal threat statute, the assault statute does not contain the "any threat" language. Rather, the assault statute focuses on the victim's apprehension. And as stated earlier, the Kansas Legislature has intended to "impose both an objective and subjective requirement" that a defendant's actions had placed the victim

in apprehension of immediate bodily harm. *State v. Bulk*, No. 114,462, 2016 WL 7494359, at *5 (Kan. App. 2016) (unpublished opinion). Therefore, the Legislature intended that injury to each victim be charged and punished.

Here, all three men from the survey crew, Henson, Craft, and Smith, individually testified that the encounter left them frightened, nervous, and shaken up. At the time of his encounter with Stutzman, Henson, the survey chief, thought, "Oh, my God…I'm thinking she might blow my head off." Craft testified that he saw Stutzman with her pistol "walking towards us while she's firing" several gunshots. While this was happening, he felt shaken, nervous and "startled." And finally, Smith testified how Stutzman was cursing and yelling at them. He then saw her point the gun "at a 45-degree angle down towards the ground in line with the truck" they were sitting in. He testified that if she had raised her gun, she would have been pointing right at them. He was feeling "pretty scared" for himself. At the time, he "didn't know if anybody was going to get hurt or what was going to happen." The bullets Stutzman fired also could have ricocheted and hit any one of the three crewmen. After they left the scene, they drove straight into town to make a police report.

The three counts of aggravated assault are not multiplicitous.

III. THE PROSECUTOR'S STATEMENTS DID NOT AMOUNT TO PROSECUTORIAL ERROR

Stutzman argues the prosecutor's statements that she was "shooting at" the victims fell outside the wide latitude afforded prosecutors and deprived her of a fair trial. She asserts that the State's evidence merely showed that she shot her pistol a few feet in front of where she stood and the firearm "was pointed at the ground."

Standard of review

The appellate court uses a two-step process to evaluate claims of prosecutorial error: error and prejudice.

> "First, the court decides whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. Then, if the court finds error, it next determines whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, the court adopts the traditional constitutional harmlessness inquiry—prosecutorial error is harmless if the State can demonstrate beyond a reasonable doubt that the error did not affect the outcome of the trial in light of the entire record, which is to say, there is no reasonable possibility that the error contributed to the verdict." *State v. Fraire*, 312 Kan. 786, 791-92, 481 P.3d 129 (2021).

Stutzman objects to three statements made by the prosecutor in closing argument:

- "Walking and shooting in their direction."
- "Scared of you, and your gun, shooting at them."
- "Three people came in here and testified that they were scared while somebody was firing a gun in their direction."

Contrary to Stutzman's assertion that these statements contain facts not in evidence, all three statements refer directly to testimony in the trial. Henson testified, "We are in direct line with where she has the pistol pointed." He repeatedly affirmed on direct examination that Stutzman was firing the gun into the ground but pointing it in his direction. On cross-examination, Henson stated that Stutzman "[p]ointed it my direction, and discharged it about four or five feet in front of her, yes."

Craft testified, "She starts walking from around her house towards our direction, firing her weapon at the ground towards us." He affirmed as much during this colloquy:

> "Q: And that initial time while she has a firearm, the first time you see her shooting at you, you said shooting in the ground but in your direction. Is that accurate?
> "A: Yes."

On cross-examination Craft stated that Stutzman was firing the gun "[i]nto the ground in our direction."

Mason Hinz, a deputy with the Marion County Sheriff's office, received the shooting report. Hinz testified, "The report that we received was that a surveying crew was out doing their job when an individual, a female, began shooting at them . . . ." Defense counsel followed up with this colloquy:

> "Q: . . . Now, these guys said that she was shooting at them.
> "A: Mm-hmm.
> "Q: Correct?
> "A: Mm-hmm.
> "Q: Yes?
> "A: Yes.
> . . . .
> "Q: Shooting at them.
> "A: That's what they've stated, yes."

A prosecutor "is given wide latitude in language and in manner or presentation of closing argument as long as the argument is consistent with the evidence." *State v. Scott*, 271 Kan. 103, 114, 21 P.3d 516 (2001). In this case, the prosecutor's statements were consistent with the evidence. The prosecutor stated that Stutzman was walking and shooting in the victims' direction, and the victims so testified. The victims used the language of being "shot at," and the prosecutor's statements simply reiterated that fact.

And all three men testified that the encounter left them frightened, nervous, and shaken up. Because the prosecutor referenced facts in evidence, there is no error.

Affirmed.