# STATE V. BUNTON



**STATE OF NEW MEXICO,**
**Plaintiff-Appellee,**
**v.**
**GERALD BUNTON,**
**Defendant-Appellant.**

No. A-1-CA-36388

COURT OF APPEALS OF NEW MEXICO

December 3, 2018

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, Jerry H. Ritter Jr., District Judge

## COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, M. Victoria Wilson, Assistant Attorney General, Albuquerque, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Kathleen T. Baldridge, Assistant Appellate Defender, Santa Fe, NM, for Appellant

## JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, J. MILES HANISEE, Judge

**AUTHOR:** LINDA M. VANZI

## MEMORANDUM OPINION

**VANZI, Chief Judge.**

**{1}** In this appeal, Defendant Gerald Bunton argues that the evidence was insufficient to support his conviction by a jury of aggravated assault with a deadly

weapon contrary to NMSA 1978, Section 30-3-2(A) (1963).[1] Specifically, he maintains that there was insufficient evidence that he brandished a weapon and that the alleged victim, Jeryl Keith, was in fear of an imminent battery. We affirm.

## BACKGROUND

**{2}** The parties do not dispute the following facts. Keith was at home when a neighbor knocked on his door and told him that she had seen a man with a knife lurking near the neighbor's mobile home. Keith started to walk the neighbor home, but on the way, another neighbor, Michelle Padilla, called out to Keith, saying that the man was now in her mobile home. Keith entered the home and found Defendant, wearing only sweatpants. Defendant had a knife in his waistband and was agitated and scared. Padilla was trying to calm him.

**{3}** Keith also tried to calm Defendant by walking with him around Padilla's home, showing Defendant that there was no one in the home trying to hurt him. At some point, Padilla left the home and closed the front door. Keith testified that he realized shortly after entering the home that Defendant had a knife on him. While they were looking around, Defendant pulled the knife partly out of his waistband several times, but put it back when Keith told him to. At some point, Defendant took a bottle of bleach from a cabinet. He started to unscrew the top of the bottle several times, but stopped when Keith told him not to open the bottle. When Keith asked Defendant if Defendant planned to throw bleach in his face, Defendant said "nah." After the tour of the home, Defendant, with the knife and bleach bottle, crouched down next to a chair near the front door, and Keith waited in the kitchen until the police arrived. Additional facts are included in our discussion of Defendant's arguments.

## DISCUSSION

**{4}** In order to frame Defendant's arguments, we begin with the elements of aggravated assault. In relevant part, the assault statute defines "assault" as "any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery[.]" NMSA 1978, § 30-3-1(B) (1963). As relevant here, aggravated assault consists of "unlawfully assaulting or striking at another with a deadly weapon[.]" Section 30-3-2(A). Thus, "[t]he offense of aggravated assault requires proof that [the] defendant threatened or engaged in menacing conduct with a deadly weapon toward a victim, causing the victim to believe he or she was about to be in danger of receiving an immediate battery." *State v. Bachicha*, 1991-NMCA-014, ¶ 10, 111 N.M. 601, 808 P.2d 51; *see* § 30-3-1(B); § 30-3-2(A). The state is not required to prove that the defendant intended to cause physical harm or bodily injury to a specific person. *Bachicha*, 1991-NMCA-014, ¶ 10 ("Proof of general criminal intent is also a necessary element of the offense of aggravated assault.").

At trial, the district court instructed the jury as follows:

> For you to find [D]efendant guilty of aggravated assault by use of a deadly weapon as charged in Count 1, the [S]tate must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [D]efendant brandished a knife and/or bleach;
>
> 2. [D]efendant's conduct caused . . . Keith to believe [D]efendant was about to intrude on . . . Keith's bodily integrity or personal safety by touching or applying force to . . . Keith in a rude, insolent or angry manner;
>
> 3. A reasonable person in the same circumstances as . . . Keith would have had the same belief;
>
> 4. [D]efendant used a deadly weapon. [D]efendant used a knife and/or bleach. A knife and/or bleach is a deadly weapon only if you find that a knife and/or bleach, when used as a weapon, could cause death or great bodily harm;
>
> 5. This happened in New Mexico on or about the 4th day of September, 2014.

*See* UJI 14-305 NMRA. The State requested this instruction, and Defendant did not object to it, except to argue that bleach was not a deadly weapon, an argument the district court rejected. On appeal, Defendant does not argue that the instruction was improper.

**{5}** Instead, Defendant argues that the evidence presented at trial was insufficient in two ways. First, he contends that the evidence is insufficient to support his conviction because there was insufficient evidence that Defendant brandished either the knife or bleach bottle as stated in the first element of the jury instruction. Second, he argues that a reasonable jury could not have found that Keith feared that Defendant was about to intrude on his "bodily integrity" or "personal safety" as required in the second element of the jury instruction.

2 "[T]he question of sufficiency of the evidence to support a conviction may be raised for the first time on appeal." *State v. Stein*, 1999-NMCA-065, ¶ 9, 127 N.M. 362, 981 P.2d 295.

2

**{6}** Defendant's arguments require us to consider "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to" the challenged elements. *State v. Flores*, 2010-NMSC-002, ¶ 2, 147 N.M. 542, 226 P.3d 641 (internal quotation marks and citation omitted). When reviewing claims of insufficient evidence, we "resolve all disputed facts in favor of the [s]tate, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary." *State v. Smith*, 2016-NMSC-007,

¶ 19, 367 P.3d 420 (internal quotation marks and citation omitted). Then, we determine "whether the evidence, viewed in this manner, could justify a finding by any rational trier of fact that each [challenged] element of the crime charged has been established beyond a reasonable doubt." *State v. Lozoya*, 2017-NMCA-052, ¶ 17, 399 P.3d 410 (internal quotation marks and citation omitted), *cert. denied*, 2017-NMCERT-___ (No. S-1-SC-36449, May 31, 2017).

**{7}** Relying on the Merriam-Webster Dictionary definition of "brandish," Defendant first argues that the State failed to show that he "sh[ook] or wave[d]" or "exhibit[ed the knife or bleach bottle] in an ostentatious or aggressive manner." *See Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/ brandished (last visited November 27, 2018) (defining "brandish" as "to shake or wave (something, such as a weapon)" or "to exhibit in an ostentatious or aggressive manner"). Defendant also points to cases in which a person "brandished" a weapon and argues that they stand for the proposition "that brandishing a deadly weapon means, at the very least, . . . displaying the weapon in a rude, insolent or angry manner."

**{8}** Defendant does not dispute that the knife, which Keith described as a hunting knife, was visible in his waistband and that he started to pull it out several times. He does not dispute that he picked up the bleach bottle and started to open it several times. He does not dispute that throughout the episode he was acting "agitated, scared and confused." We conclude that this undisputed evidence, viewed in the light most favorable to the verdict, is sufficient to permit a reasonable jury to conclude that Defendant brandished the knife and bleach bottle.

**{9}** Defendant next argues that the evidence does not support the jury's finding that his conduct caused Keith to fear an imminent battery. *See State v. Arrendondo*, 2012-NMSC-013, ¶ 15, 278 P.3d 517 (stating that "[o]ur law of assault generally requires evidence that the victim actually, subjectively comprehended that he or she was going to receive unwelcome physical contact"). Viewing the record in favor of the jury's verdict, as we must, we conclude to the contrary that the jury could have reasonably concluded from the evidence presented that Keith was in fear of a battery by Defendant.

**{10}** Keith testified that while Defendant never actually withdrew the knife from his waistband, "he kept reaching for it and [Keith] kept asking him to please leave it, don't pull the knife." He stated that he told Defendant not to withdraw the knife because Keith was "a little scared" and "uncomfortable." After Defendant obtained the bleach bottle, Keith asked him "at least a couple of times, . . . you're not planning on throwing that bleach in my face are you?" The jury could reasonably infer from this question that Keith was worried that Defendant would in fact throw the bleach at him. Although Keith stated that Defendant said "nah" in reply, the fact that Keith repeated the question several times indicates that he remained concerned about what Defendant might do with the bleach. Keith stated that as the encounter continued, he kept backing away from Defendant because he did not want a confrontation. When Defendant crouched by the door, Keith stayed in the kitchen, ten to twelve feet way, because he did not feel comfortable going past Defendant to get to the front door. He stated that he did not think

he could get to the front door without being in “arms reach” of Defendant and that he did not think he could “get out without maybe getting hurt.” Finally, Keith stated that, although Defendant complied with his requests to put the knife back in his waistband and put the cap on the bleach bottle, he remained “concerned” and “felt a little threatened.” This evidence is sufficient for the jury to find that Keith was in fear of an imminent battery by Defendant.

**CONCLUSION**

**{11}** We conclude that the evidence was sufficient to permit the jury to reasonably find that Defendant brandished the knife and/or bleach bottle and that Keith feared that Defendant would injure him with one or both of those items. Defendant raises no other arguments on appeal. Therefore, we affirm.

**{12} IT IS SO ORDERED**.

**LINDA M. VANZI, Chief Judge**

**WE CONCUR:**

**MICHAEL E. VIGIL, Judge**

**J. MILES HANISEE, Judge**

---

1 Defendant was also convicted of resisting, evading, or obstructing an officer, contrary to NMSA 1978, Section 30-22-1(D) (1981). Defendant does not appeal this conviction.