In the Court of Appeals of the State of Alaska

Patrick Dale Burton-Hill,

Appellant,

v.

State of Alaska,

Appellee.

Trial Court Case No. **4FA-18-00521CR**

Court of Appeals No. **A-13223**

Jerald Dwayne Burton,

Appellant,

v.

State of Alaska,

Appellee.

Trial Court Case No. **4FA-18-00520CR**

Court of Appeals No. **A-13262**

Marcus Djuan Howard,

Appellant,

v.

State of Alaska,

Appellee.

Trial Court Case No. **4FA-18-00525CR**

Court of Appeals No. **A-13263**

Order

for the Filing of Supplemental Briefs

Date of Order: **September 1, 2021**

Before: Allard, Chief Judge, Wollenberg, Judge, and Mannheimer, Senior Judge.[*]

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

This Court has read and discussed the briefs filed in these three related appeals. The defendants in these cases raise several issues that hinge, either directly or implicitly, on the definition of the offense of riot as codified in AS 11.61.100(a):

- whether this statutory definition of riot is unconstitutionally vague;
- whether Alaska law allows a defendant to be found guilty of riot under the theories of vicarious liability codified in AS 11.16.110(2),
- whether the evidence presented at the defendants' trial was legally sufficient to establish all the necessary elements of riot; and
- whether riot and criminal mischief committed during a riot should be deemed the same offense for purposes of Alaska's double jeopardy clause.

Under AS 11.61.100(a), a person commits the crime of riot if:

> while participating with five or more others, the person engages in tumultuous and violent conduct in a public place and thereby causes, or creates a substantial risk of causing, damage to property or physical injury to a person.

This wording suggests that the government must prove the following elements to establish that a riot occurred:

- at least six persons, who were "participating" with each other,
- engaged in "tumultuous" and "violent" conduct
- in a "public place" (a term that is defined in AS 11.81.900(b)(54))

  and that, as a result of their conduct, the participants either
- caused damage to property or injury to a person, or created a substantial risk that property would be damaged or a person injured.

We now ask the parties to file supplemental briefs on the following issues:

1. What is the meaning of "tumultuous" as that term is used in the riot statute?

The superior court instructed the jurors that "tumultuous" meant "loud, excited, and chaotic". On its face, this definition seemingly includes conduct that consists solely of speech, even when this speech is not of such a nature as to incite or provoke immediate acts of violence or aggression. Was the superior court's definition of "tumultuous" conduct overbroad because it includes speech of this type?

The Oregon riot statute — which, according to our Tentative Draft, is one of the direct sources of Alaska's riot statute — likewise requires proof that the defendant "engage[d] in tumultuous and violent conduct". *See* Oregon Statute 166.015. The Commentary to the Oregon riot statute does not explain what these two terms mean.

However, these same two terms are used in Oregon's accompanying "disorderly conduct" statute, ORS 166.025(1)(a). This section of the Oregon disorderly conduct statute makes it a crime to engage in "violent, tumultuous, or threatening behavior". And the Oregon Commentary to the disorderly conduct statute indicates that this language was intended to express the same concept as the language found in the Model Penal Code's definitions of "riot" and "disorderly conduct" — because the Commentary declares that the phrase "violent, tumultuous, or threatening behavior" was intended to reach the conduct that was formerly encompassed within "the traditional

common-law concept of breach of the peace". *See* Commentary to the Final Draft of the Oregon Criminal Code (1970), Section 220 ("Disorderly Conduct"), p. 214.[1]

In *State v. Atwood*, 98 P.3d 751 (Or. App. 2004), and in *State v. Cantwell*, 676 P.2d 353 (Or. App. 1984), the Oregon Court of Appeals declared that the phrase "violent, tumultuous, or threatening behavior" should be construed as referring "only to physical acts of violence" or "physical acts of aggression" — *i.e.*, "physical conduct which is immediately likely to produce the use of [physical] force." *Atwood*, 98 P.3d at 754, quoting *Cantwell*, 676 P.3d at 357. The court emphasized that the Oregon disorderly conduct statute "punishes only physical acts of aggression, not speech". *Atwood* at 756, quoting *Cantwell*, 676 P.3d at 356.

2. What is the meaning of "violent" as that term is used in the riot statute?

In the cases presently before this Court, the superior court instructed the jurors that "violent" meant "using or involving physical force intended to hurt, damage, or kill someone or something" — *i.e.*, physical force intended to damage property or intended to hurt or kill someone.

This definition appears to cover acts of physical aggression — *i.e.*, the exertion of force against people or property. However, when the superior court ruled on the defense motions for judgement of acquittal, the court adopted a more expansive view of this definition. The court declared that "violent conduct" encompassed not only acts of physical force applied aggressively against another person or against property, but

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[1] The final draft of the revised Oregon Criminal Code and its accompanying Commentary is available at:
https://digital.osl.state.or.us/islandora/object/osl%3A7643

also *non-forcible* acts which might be expected to lead to injury to a person or property — for example, the act of spilling water on a floor for the purpose of impeding the progress of law enforcement officers. The trial judge explicitly denied the defendants' motions for judgement of acquittal on this basis. *See* Tr. 1374–75.

At the conclusion of the evidence, the prosecutor relied on the judge's interpretation of "violent conduct" to argue that making verbal threats, erecting barricades, and creating hazardous conditions all constituted acts of "violence" that would support a finding of "riot". *See* Tr. 1468, 1470–1480, 1484–85 (opening argument); Tr. 1619, 1620–21, 1622–23 (rebuttal argument).

In fact, at one point in his summation, the prosecutor appeared to argue that even if the inmates had done nothing other than simply refuse to obey the officers' orders to vacate the wing of the jail, *their refusal to obey orders* would have qualified as "violent conduct" — because the inmates "knew [that] pepper spray, CS gas, and other force would be used to remove [the inmates]. They wanted that force to be used, and they created a risk that, when it was used, even they [themselves] could be injured." *See* Tr. 1486–87. The prosecutor returned to this theme in his rebuttal argument — telling the jurors that the inmates were guilty of riot because they "intentionally forced [the corrections officers] to remove them from a place [where] they had entrenched themselves." *See* Tr. 1618 and 1623.

Was the superior court correct in ruling, and was the prosecutor correct in arguing, that, for purposes of the Alaska riot statute, "violent conduct" includes the intentional performance of any act tending to create a hazardous condition for the actor or for others? Is this the proper interpretation of the statute? Or, in accordance with the Oregon Court of Appeals' decisions in *State v. Atwood*, 98 P.3d at 754, and *State v.*

Cantwell, 676 P.2d at 357, should the phrase "violent conduct" be limited to the aggressive use of physical force against other people or property (or the threat to immediately use aggressive force against other people or property)?

3. What is the meaning of "participate" as that term is used in the riot statute?

According to AS 11.61.100(a), even when people are engaged in tumultuous and violent conduct, there is no riot unless six or more people of these people are "participating" with each other.

In the present case, the superior court instructed the jurors that this element would be established if the jury found (1) that the defendant was acting tumultuously and violently in a public place, and (2) that the defendant was reckless as to whether at least five other people were likewise acting tumultuously and violently in that same public place. *See* Record at 326.

In other words, according to the jury instructions in this case, and under the definition of "recklessly" found in AS 11.81.900(a)(3), the superior court told the jurors that a riot was taking place if at least six people were engaged in tumultuous and violent conduct, and at least six of these people were aware of, and consciously disregarded, a substantial and unjustifiable risk that five or more other people were likewise engaged in tumultuous and violent conduct at that same place (or these people would have been aware of this substantial and unjustifiable risk if not for their own voluntary intoxication).

The superior court's interpretation of the phrase "participating with five or more others" is a substantial departure from the common law, and also a substantial

departure from the sources of our riot statute: Oregon Statute § 166.015 and its source, Model Penal Code § 250.1.

At common law, the government was required to prove that there was an *agreement* among the rioters to break the public peace — although this agreement could occur on the spur of the moment, and it did not have to be expressed verbally. *See* Rollin Perkins and Ronald Boyce, *Criminal Law* (3rd edition, 1982), p. 484.

The Model Penal Code riot provision, § 250.1, appears to be the first statutory formulation to use the term "participates with" rather than "acts in agreement with" or "acts in concert with" (or some other such phrase). However, in the accompanying Commentary to MPC § 250.1, the drafters of the Model Penal Code repeatedly use language which clarifies that the Model Penal Code retained the element of agreement among the rioters.

On page 318, the Model Penal Code Commentary describes the offense of riot as occurring "when numerous persons confederate against the public peace". And on page 321, the Commentary clarifies that the rioters must be engaged in a joint activity:

> [The government] must show that the accused and at least two other persons were involved in a common disorder. It is not sufficient to show a mere unlawful assembly. Nor will it suffice that three or more individuals were engaged in similar but unrelated activities.

In a footnote that accompanies this Commentary (footnote 38), the Model Penal Code drafters approvingly cite *Aron v. City of Wausau*, 74 N.W. 354 (Wis. 1898), where the Wisconsin Supreme Court held that thirty people who were simultaneously and unlawfully disrupting the public peace by setting off fireworks on the Fourth of July did not constitute a "riot". The Wisconsin court explained, "[To] constitute [an]

unlawful assembly [*i.e.*, the legal precursor to a riot under common law], the three or more persons must have a common purpose to do the act complained of, and [only] if they commit [that] act with such [a] common purpose or intent, ... are [they] to be deemed guilty of a riot." *Id.* at 355.

In this same footnote, the drafters also approvingly cite *State v. Abbadini*, 192 A. 550, 551–52 (Del. General Sessions 1937):

> A riot [is] defined as a tumultuous disturbance of the peace by three or more persons, assembled and acting with a common intent, either [to execute either] a lawful ... [or an] unlawful enterprise in a violent and turbulent manner. To render persons guilty[,] they must act in concert and there must be a common intent or purpose to do the act complained of. It is not necessary, however, that the parties shall have deliberated or exchanged views with each other before entering upon the execution of their common purpose; [rather,] concert of action, and a common intent or purpose, may be inferred from the manner in which the act is done.

The Model Penal Code Commentary also cites *Loomis v. State*, 51 S.E.2d 33, 44 (Ga. App. 1948) ("[It] is well settled that in riot cases there must be present [a] common intent and [a] concert of action in the furtherance of [that] intent."); and *Proctor v. State*, 115 P. 630, 632 (Okla. Crim. App. 1911) (reversing the defendants' riot convictions because "there [was] a total absence of testimony that the defendants ... ever assembled or confederated to violate the law, or that they acted in concert, or acted together")

This same requirement — agreement or concert of purpose — is echoed in the Commentary to the Oregon riot statute. This Commentary declares: "It must be shown that the rioters were involved in a common disorder; it is not enough to show that

numerous individuals were engaged in similar unrelated activities." *See* Commentary to the Final Draft of the Oregon Criminal Code (1970), Section 218 ("Riot"), p. 212.)

For more recent cases, see *Commonwealth. v. Abramms*, 849 N.E.2d 867, 876 (Mass. App. 2006) ("[We] conclude that the term "unlawful assembly" should be defined [for purposes of our statute] as any gathering ... the members of which have formed a common intent to engage in a common cause ... to be accomplished with violence and in a tumultuous manner, or through force and violence, ... where there is an imminent danger of violence.") (citations and internal quotation marks omitted); *People v. Barnes*, 89 N.E.3d 969, 978–79 (Ill. App. 2017) ("[The offense] of riot ... [was] designed to address the heightened threats posed to public safety and law enforcement when numerous persons confederate against the public peace ... , when a group of people acts together toward a common violent or illegal end." (citing Model Penal Code § 250.1 and accompanying Commentary at 317-18.); *City of Newark v. Essex County*, 366 A.2d 727, 731 (N.J. Trial Ct. 1976), *reversed on other grounds*, 388 A.2d 1311 (N.J. App. 1978), *affirmed*, 402 A.2d 916 (N.J. 1979) ("A riot is ... a tumultuous disturbance of the peace by a group of three or more persons having a common purpose who act in concert to accomplish their purpose through force or violence ... [if] the disturbance operate[s] to the terror of the people."); *Commonwealth v. Crawford*, 483 A.2d 916, 918 (Pa. App. 1984) ("The essential element of a riot is group action.") [2]

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[2] Note, however, that on page 322 of the Model Penal Code Commentary, the drafters clarify that people who oppose each other — for instance, members of rival political parties or rival gangs — can commit the offense of riot if they agree to engage in tumultuous and violent conduct against each other: "Section 250.1 [of the Model Penal Code] reaches all persons who actually participate in a [common] course of disorderly conduct ... even if the participants are opponents rather than allies."

To sum up this discussion: The statutory source of Alaska's riot statute, as well as the Model Penal Code and the predecessor common law, all agree that one essential element of the offense of riot is a commonality of purpose among the rioters. This is contrary to the way the superior court instructed the jurors on the meaning of "participate" in the present cases.

The superior court did not require the jurors to find that the defendants were acting in concert with five or more other people who were engaged in the disruption at the prison. Rather, the superior court instructed the jurors that the defendants in this case were guilty of "participating" with five or more other people if the defendants acted *recklessly* with respect to the possibility that five or more other people were independently engaged in tumultuous and violent conduct in that same place.

Was the superior court's jury instruction correct? And if not, does the error in the jury instruction require reversal of the defendants' convictions?

4. One of the issues presented in these appeals is whether, under Alaska law, a person can be convicted of riot as an "accomplice" — that is to say, convicted in whole or in part based on the actions of other people for which the defendant is vicariously accountable under the provisions of AS 11.16.110(2). [3]

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[3] Under the terminology of the common law, if the three defendants in these cases were vicariously liable for the disturbance at the prison, they would still be "principals" — principals in the second-degree — because they were present at the scene. *See Andrew v. State*, 237 P.3d 1027, 1033 (Alaska App. 2010): "Principals in the second degree were people who were present at the scene of the crime and either aided or encouraged the commission of the offense or were immediately available to aid the commission of the offense."

But even if we assume, for purposes of argument, that this Court will decide that Alaska law allows the State to prove a person's vicarious liability for the offense of riot under the provisions of AS 11.16.110(2), must the State nevertheless establish that there was, in fact, a riot — *i.e.*, prove that there were at least six people participating together in tumultuous and violent conduct that created a substantial risk of injury to persons or damage to property?

If so, then was the superior court mistaken to give an accomplice liability instruction which declared that it was the State's burden to prove "[that] each element of the crime of riot ... was committed by *some person or persons*"? Did this instruction allow the jury to find a "riot" even if the State failed to prove that at least six people personally engaged in tumultuous and violent conduct?

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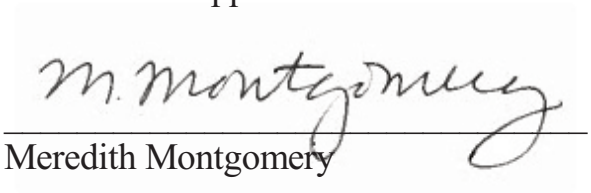
The parties shall file formal briefs — *i.e.*, briefs conforming to Appellate Rule 212 — addressing these issues. These briefs shall be filed according to the following schedule:

1. The briefs of the three defendants shall be filed by October 19, 2021.
2. The State's brief shall be filed 30 days thereafter.
3. These filing dates may be extended for good cause.
4. No reply briefs will be allowed unless ordered by this Court.

Entered at the direction of the Court.

Clerk of the Appellate Courts



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