

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ADRIAN DERON LEWIS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11611
Trial Court No. 3AN-12-9227 CR

MEMORANDUM OPINION

No. 6373 — August 31, 2016

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael R. Spaan, Judge.

Appearances: Jane B. Martinez, Anchorage, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge MANNHEIMER.

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Adrian Deron Lewis appeals his convictions for second-degree assault (two counts), fourth-degree assault, second-degree failure to stop at the direction of a peace officer, and misdemeanor driving under the influence.¹

Lewis contends that the evidence presented at his trial was legally insufficient to support these convictions. For the reasons explained in this opinion, we conclude that the evidence was sufficient to support Lewis's convictions.

Lewis also argues that the superior court should have merged his two convictions for second-degree assault — entering only one conviction based on the two jury verdicts. The State concedes that the convictions should merge, and we agree.

Lewis also appeals his sentence on two grounds: With respect to his sentence for second-degree assault, Lewis claims that the superior court erred when it rejected his proposed mitigator, AS 12.55.155(d)(9) — *i.e.*, that his conduct was among the least serious included in the definition of second-degree assault. And with respect to his composite sentence, Lewis argues that this sentence is excessive. For the reasons explained in this opinion, we reject both of these sentencing claims.

Underlying facts

When a defendant challenges the sufficiency of the evidence to support a criminal conviction, this Court is required to view the evidence (and all reasonable inferences to be drawn from the evidence) in the light most favorable to the jury's verdict.² We therefore present the evidence in Lewis's case in that light.

¹ AS 11.41.210(a), AS 11.41.230(a), AS 28.35.182(b), and AS 28.35.030(a), respectively.

² See, e.g., *Eide v. State*, 168 P.3d 499, 500 (Alaska App. 2007); *Tipkin v. Anchorage*, 65 P.3d 899, 901 (Alaska App. 2003).

Lewis was convicted of assaulting two people: his ex-girlfriend, Jessica Miller, and Miller's boyfriend, Ivan Kerns.

Lewis and Miller ended their relationship in 2011, and Lewis had moved to Texas. But in early September 2012, Lewis began to call and text Miller. Then, on the morning of September 4, 2012, Lewis showed up at Miller's place of work in Anchorage. He told Miller that he had come "for his family, and for what was his". When Miller insisted that Lewis leave, he did so, but he continued to text Miller throughout that day and into the next day, telling Miller that he wanted the two of them to get back together.

Miller responded by telling Lewis, "Leave me alone, stop texting, stop calling, stop coming by my job — just leave me alone." But toward the end of the workday on September 5th, Lewis again showed up at Miller's workplace. He appeared to have been drinking, and Miller asked him to leave.

When Miller's work ended that day, she picked up her young daughter and her boyfriend, Ivan Kerns. On their way home, they stopped at a store. While they were there, Lewis called Miller, but she did not answer her phone. Lewis left a voice mail in which he stated that he was waiting for Miller at her house.

Not long after this call, Lewis called again. This time, Kerns answered Miller's phone. Lewis told Kerns that he was looking for him.

When Miller and her daughter and Kerns arrived at Miller's house, Lewis was parked across the street. Lewis got out of his car, sneaked up behind Miller (unseen), and attacked her without warning. Lewis yanked Miller by the hair, hit her, and knocked her to the ground.

Kerns, who had entered the house ahead of Miller, came back outside when he realized that Lewis was attacking Miller. When Kerns tried to help Miller, Lewis

punched Kerns in the face, then slammed him against a parked vehicle. (Lewis was taller than Kerns and outweighed him by about 50 pounds.)

Trying to defend himself, Kerns bit Lewis on the nose — at which point, Lewis grabbed Kerns by the neck, pushed him against a fence, and started to strangle him. Miller testified that when Lewis was strangling Kerns, Kerns's eyes rolled back in his head and he began to gurgle. Lewis also bit Kerns repeatedly: he bit Kerns's finger, chin, and ear — biting completely through the ear and severing a piece of it, resulting in permanent disfigurement of the ear.

A neighbor who observed all of this called 911. When Lewis heard the approaching police sirens, he stopped his assault, returned to his car, and drove away.

Police vehicles began to arrive on the scene just after Lewis drove away. The police were quickly able to locate Lewis, and one officer caught up to Lewis's car and activated his overhead lights, signaling Lewis to stop. Lewis slowed down, looked back at the officer, and came to a stop. But almost immediately after stopping, Lewis resumed driving forward. The officer turned on his siren and followed Lewis. A second officer passed both vehicles and pulled in front of Lewis, but Lewis did not stop. Instead, he continued driving forward and collided with the second police car. This collision brought Lewis to a stop.

When the police removed Lewis from his car, they noticed that his speech was slurred, and they could smell alcohol on his breath. Lewis failed the horizontal gaze nystagmus test. A later breath test showed that his blood alcohol content was .10 percent.

Based on this episode, Lewis was convicted of two counts of second-degree assault — one for biting off a piece of Kerns's ear, and one for strangling him. He was also convicted of fourth-degree assault for his attack on Miller. In addition, Lewis was

convicted of driving under the influence and of failing to stop at the direction of a peace officer.

Lewis's arguments that the evidence was insufficient to support his convictions

On appeal, Lewis argues that the evidence at his trial was not sufficient to support either of his second-degree assault convictions. He argues that the evidence was insufficient to establish that he used his teeth as a “dangerous instrument” (an essential element of one of the second-degree assault charges), and that it was also insufficient to establish that he impeded Kerns’s breathing (an essential element of the other second-degree assault charge). In addition, Lewis argues that, as a matter of law, the evidence established a reasonable possibility that Lewis acted in self-defense.

All of these arguments hinge on viewing the evidence in the light most favorable to Lewis. But as we explained earlier, the law requires us to view the evidence in the light most favorable to the jury’s verdicts. Viewed in that light, the evidence was sufficient to convince fair-minded jurors that there was no reasonable possibility that Lewis acted in self-defense, and that the State had proved the two second-degree assault charges beyond a reasonable doubt. The evidence was therefore legally sufficient to support the jury’s second-degree assault verdicts.

Lewis also argues that the evidence was insufficient to establish that he caused physical injury to Miller (an essential element of the fourth-degree assault charge). But again, Lewis’s argument hinges on viewing the evidence in the light most favorable to Lewis. When the evidence is viewed in the light most favorable to the jury’s verdict, it is sufficient to support the fourth-degree assault conviction.

The same is true with respect to Lewis's arguments that the evidence was insufficient to establish (1) that he was under the influence of alcohol, and (2) that he failed to stop within a reasonable time after being signaled to do so by a police officer.

For these reasons, we reject Lewis's various claims that the evidence was legally insufficient to support his convictions.

Lewis should only have received one conviction for second-degree assault

After the jury returned its verdicts finding Lewis guilty of two counts of second-degree assault, Lewis's attorney argued that these convictions should merge because they both arose from the same assault. The prosecutor did not oppose the defense attorney's request. But instead of entering one conviction based on the jury's two verdicts, the judge issued a judgement stating that Lewis had received two convictions, but that he was only being sentenced on one of these convictions.

As the State concedes on appeal, this was not the correct procedure. Lewis's judgement should recite the jury's two guilty verdicts, but the judgement should clearly state that Lewis received only one conviction for second-degree assault based on those two verdicts. *See Moore v. State*, 218 P.3d 303, 306 (Alaska App. 2009); *Hunter v. State*, 182 P.3d 1146, 1154 (Alaska App. 2008); *Hurd v. State*, 107 P.3d 314, 322 (Alaska App. 2005).

We therefore direct the superior court to correct the judgement.

Lewis's proposed mitigator

At sentencing, Lewis argued that his second-degree assault upon Kerns was mitigated under AS 12.55.155(d)(9) — *i.e.*, he argued that his conduct was among the

least serious within the definition of that offense. Lewis contended that his offense was among the least serious because he bit off only a “small portion” of Kerns’s ear, and that his act of strangling Kerns caused only a “brief” impediment to Kerns’s breathing. The sentencing judge rejected the proposed mitigator, ruling that Lewis’s conduct was within the “heartland” of the definition of the offense.

The evidence showed that Lewis lay in wait for Miller and Kerns, and that his attack on them was completely unprovoked. Lewis did not cease his assault until he heard the police sirens approaching, and his attack left Kerns with a permanent disfigurement. Given these circumstances, we conclude that Lewis’s conduct was not among the least serious within the definition of second-degree assault.³

Lewis’s argument that his composite sentence is excessive

For the second-degree assault on Kerns, Lewis received 3 years’ imprisonment with 1 year suspended (*i.e.*, 2 years to serve). For the fourth-degree assault on Miller, Lewis received a consecutive 180 days’ imprisonment with 60 days suspended (*i.e.*, 120 days to serve).

Lewis also received a concurrent 30 days to serve for failing to stop at the direction of a peace officer, and a consecutive 30 days with 27 days suspended (*i.e.*, 3 days to serve) for driving under the influence.

All told, Lewis received terms of active imprisonment totaling 2 years and 123 days — about 2 years and 4 months.

³ See *Michael v. State*, 115 P.3d 517, 519 (Alaska 2005) (holding that it is an issue of law whether, under the facts found by the sentencing judge, a defendant’s conduct qualifies as “among the least serious” for purposes of mitigating factor AS 12.55.155(d)(9)).

Lewis asserts that, compared to the 30-day sentence he received for an earlier misdemeanor assault, the composite sentence in this case represents “a dramatic increase in jail time”. Lewis also argues that the superior court did not give enough weight to Lewis’s potential for rehabilitation.

With respect to Lewis’s first claim — that his sentence in the present case represents a significant increase over the 30-day sentence he received for an earlier misdemeanor assault — we note that Lewis was sentenced for both felony assault and misdemeanor assault in this case, as well as two other offenses. In light of this, the fact that Lewis received a significantly shorter sentence for a prior misdemeanor assault has little significance.

As for Lewis’s second claim — that the sentencing judge failed to give sufficient weight to Lewis’s potential for rehabilitation — we note that, under Alaska law, sentencing judges have substantial discretion when assessing the relative priority of the various sentencing goals codified in AS 12.55.005 and the weight these factors should receive under the facts of a particular case.⁴

Here, the superior court expressly considered the goal of rehabilitation, but the court concluded that Lewis’s prospects for rehabilitation were “guarded”. The record supports this finding. The pre-sentence report shows that Lewis has three prior domestic violence assault convictions. The facts of two of these prior cases bear significant similarity to the facts of the present case. In one of the prior assaults, Lewis grabbed his then-wife by the hair, dragged her on the ground, and hit her. And in another of these prior assaults, Lewis attacked both his ex-wife and her boyfriend.

The superior court also concluded that, given the facts of Lewis’s case, isolation, deterrence, and community condemnation were important sentencing goals.

⁴ *Asitonia v. State*, 508 P.2d 1023, 1026 (Alaska 1973).

Again, the record supports the superior court's assessment of the case. Lewis had a record of domestic violence, and the superior court could reasonably infer, from Lewis's statement to the court, that Lewis had no remorse for his attacks on Miller and Kerns.

Given this record, Lewis's sentence is not clearly mistaken, and we therefore uphold it.⁵

Conclusion

The superior court is directed to amend Lewis's judgement so that it reflects a single conviction for second-degree assault, based on the jury's guilty verdicts on the two counts of second-degree assault. In all other respects, the judgement of the superior court is AFFIRMED.

⁵ See *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974) (an appellate court is to affirm a sentencing decision unless the decision is clearly mistaken).