

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CARL TIMOTHY FORESTER,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12047
Trial Court No. 1SK-13-26 CR

MEMORANDUM OPINION

No. 6637 — May 30, 2018

Appeal from the Superior Court, First Judicial District, Juneau,
Philip M. Pallenberg, Judge.

Appearances: Jane B. Martinez, Law Office of Jane B. Martinez, LLC, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. June Stein, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg,
Judges.

Judge WOLLENBERG.

Carl Timothy Forester appeals his conviction for first-degree assault for an incident in which, while threatening suicide, Forester shot his girlfriend in the shoulder. On appeal, Forester contends that the trial court erred in admitting evidence of a prior suicide attempt by Forester in which he shot himself in the leg. For the reasons

explained in this opinion, we uphold the trial court's admission of this evidence and affirm Forester's conviction.

Forester also challenges a probation condition restricting his association with his girlfriend. We remand this condition for reconsideration.

Underlying facts and proceedings

In November 2013, Forester lived in Skagway with his girlfriend of four years, Elisabeth Rankin, in a home that Forester had purchased. Forester was having a hard time coming to terms with the impending loss of his home due to foreclosure.

One day that month, Rankin observed that Forester was behaving oddly. He seemed unaware of his surroundings and was speaking "gibberish." Forester went into a spare bedroom alone; when Rankin joined him, Forester began discussing suicide, and he pointed a shotgun at his head. Rankin attempted to talk Forester down, and she tried to contact several people to assist her. Rankin reached Forester's mother, who remained on the line during the entire incident.

Forester was lying on the floor, with Rankin kneeling next to him, when he fired the shotgun into a wall. This unnerved Rankin. Both Rankin and Forester's mother spent the next hour or so talking with Forester and trying to get him to put the gun down. When Forester spoke, his words did not make sense. Forester placed the muzzle of the shotgun in his mouth two or three times during that hour.

Rankin decided that she needed to knock Forester out so that she could leave the room to get help. Rankin picked up another gun in the room, which she described as having a "soft" buttstock, and she used the buttstock of that rifle to strike Forester two or three times on the right side of his head. Rankin believed she had succeeded in knocking Forester unconscious.

Rankin testified that she then stood up and turned to leave. However, as she did, the shotgun that Forester was holding discharged, and the shotgun pellets struck Rankin’s shoulder. Rankin later testified that she was shot “within seconds” of hitting Forester with the gun — ten seconds or less.

After Rankin was shot, she sought the help of a neighbor, reporting that Forester had threatened suicide and that she had struck him in an effort to get him under control. Forester reported the same to a different neighbor outside his house. When the police responded, Forester said repeatedly that he had wanted to commit suicide that night, and he provided various explanations for what had happened. He said at one point that “the cocksucker went off”; at another point, he said that he did not know what had happened; and finally, he asserted that he was attacked first and “shouldn’t have attacked back.”

At the police station, Forester told officers he had been taking “nips” from a whiskey bottle that he and Rankin had been sharing. The police smelled alcohol on Forester but did not test his breath or blood for alcohol.

Rankin was ultimately transferred to Seattle for further care. The shotgun blast destroyed Rankin’s clavicle and much of the surrounding muscle. Rankin underwent multiple surgeries and long-term physical therapy; at the time of trial, she was uncertain whether she would regain full use of her arm.

The State charged Forester with first-degree assault for recklessly causing serious physical injury to Rankin with a dangerous instrument¹ and fourth-degree misconduct involving a weapon for possessing a firearm while impaired by alcohol.²

¹ AS 11.41.200(a)(1). The State also charged Forester with separate counts of second-degree and third-degree assault for the same incident; the jury’s guilty verdicts on these counts later merged with Forester’s conviction for first-degree assault.

² AS 11.61.210(a)(1).

At trial, Forester argued that when Rankin hit him in the head, he involuntarily pulled the trigger of the shotgun. Forester also argued that he was not under the influence of alcohol.

The prosecutor contested Forester's characterization of the shooting, noting that the facts showed that Forester did not instantaneously fire the shotgun after Rankin hit him.

Litigation surrounding the admission of testimony regarding Forester's prior suicide attempt

Prior to trial, the State sought permission to introduce evidence of an incident in 2010 in which Forester, who had been drinking and arguing with his then-girlfriend (a woman named Tanya Callaway), shot himself in the leg. For this conduct, Forester was convicted of fourth-degree misconduct involving a weapon (possessing a gun while impaired by alcohol). The State argued that this was another example of Forester's "reckless gunplay," and that the prior incident was relevant to establishing that Forester was on notice of the dangers of handling firearms while consuming alcohol. The State also argued that the prior incident undermined Forester's characterization of the current incident as an "accident."

Forester's attorney responded that the facts of the two incidents were too dissimilar to warrant admission of the evidence. Forester maintained that the prior shooting was an accident that occurred while he was unloading a weapon.

The court deferred ruling on this issue pending the receipt of more information from the State regarding the prior incident and the other evidence expected at trial.

The State subsequently located Tanya Callaway, who described the prior incident as a suicide attempt by Forester, rather than as an accident.

The parties questioned Callaway outside the presence of the jury. Callaway testified that in 2010, she was in a relationship with Forester, and the two lived together. She and Forester were in the process of breaking up when she came home from work around 2:00 a.m. to find Forester passed out from consuming alcohol.

Forester got up and began arguing with Callaway. He retrieved a gun and pointed it at himself, threatening suicide. Callaway kneeled next to Forester and tried to calm him down. Forester then pointed the gun at his leg, said “watch this,” and shot himself. The bullet grazed his thigh, ricocheted, and lodged in his ankle.

Callaway testified that she told police at the time that the shooting was an accident, but she declared that her prior account was untrue.

Following the voir dire of Callaway, the parties presented arguments regarding the admission of the prior incident. The State argued that the prior incident occurred under distinctly similar circumstances and was relevant to establishing that Forester knowingly pulled the trigger on the current occasion.

Forester’s attorney argued that the two incidents were too dissimilar. Forester’s attorney underscored the limited evidence that had been presented as to Forester’s intoxication in the current case. Forester’s attorney also suggested that shooting oneself was distinctly different than shooting another person, and he noted that on the current occasion, Forester had not been arguing with Rankin. Finally, Forester’s attorney argued that the State was using the prior incident as propensity evidence, and further suggested that any valid probative value would be outweighed by unfair prejudice.

The superior court granted the State’s request to introduce evidence of the 2010 incident for the limited purpose of showing absence of mistake or accident. The court found that the two incidents were “remarkably similar.” The court recognized the difficulty of ensuring that jurors did not use the evidence for an improper propensity

purpose, but the court concluded that, under the circumstances, admission of the prior incident would not cause unfair prejudice under Alaska Evidence Rule 403. The court also offered to (and ultimately did) instruct the jury as to the limited purpose of the evidence.

Callaway testified before the jury consistently with her voir dire testimony. The jury convicted Forester of first-degree assault but acquitted him of weapons misconduct (possessing a gun while under the influence).

Why we uphold the admission of the evidence of Forester’s prior act

Under Alaska Evidence Rule 404(b)(1), evidence of a defendant’s other acts is not admissible to prove the defendant’s character for committing such acts and to show that, on the occasion in question, the defendant acted in conformity with that character. But the rule allows evidence of other acts to be admitted for other purposes.

The State charged Forester with recklessly causing serious physical injury to Rankin by means of a dangerous instrument. The State did not contend that Forester aimed the gun at Rankin and intentionally shot her. Rather, the State argued that Forester knowingly shot the gun and that, even if he intended to shoot over Rankin’s shoulder into the wall, he acted recklessly as to the risk of injuring Rankin.³

In response, Forester primarily argued that his act of shooting was an involuntary response to being struck on the head by Rankin. He also argued that his conduct in general was not reckless because he initially entered the bedroom alone and could not foresee that Rankin would strike him on the head.

³ See AS 11.81.900(a)(3) (providing that a person acts “recklessly” when “the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists”).

In this context, evidence that Forester intentionally shot a gun under substantially similar circumstances was relevant for the purpose of rebutting Forester’s defense that he acted involuntarily. We recognize that the mere fact that a person previously discharged a firearm intentionally does not mean that a person could not later discharge a firearm accidentally. But here, as in the 2010 incident, the evidence showed that Forester was facing a difficult moment with his significant other, he took possession of a loaded gun when he had been drinking (even if he was not intoxicated), and he threatened suicide before the gun discharged. In both instances, Forester and Forester’s girlfriend claimed that the shooting was an accident, but Callaway later testified that the earlier shooting was in fact intentional. As the trial court recognized, the two events were so similar in manner and circumstances as to render the prior act relevant to whether Forester acted consciously in pulling the trigger on this occasion.⁴

Although not directly analogous, the Alaska Supreme Court’s decision in *Adkinson v. State* provides a useful comparison.⁵ Adkinson was convicted of manslaughter for shooting a man who had trespassed on his property.⁶ Witnesses claimed that Adkinson pointed his gun at the victim shortly before it discharged.⁷ In contrast, Adkinson testified that the weapon was pointed to the side of the victim and that it discharged only when the victim attempted to grab the weapon from Adkinson’s hands,

⁴ See *Oksoktaruk v. State*, 611 P.2d 521, 525 (Alaska 1980) (holding that evidence of a prior act may be admissible when the act is “so related to the crime charged in point of time or circumstances that the evidence thereof is significantly useful in showing the defendant’s intent in connection with the crime charged”) (internal quotations omitted).

⁵ *Adkinson v. State*, 611 P.2d 528 (Alaska 1980).

⁶ *Id.* at 530.

⁷ *Id.* at 531.

thereby pulling it towards himself.⁸ The supreme court upheld the admission of evidence of two prior incidents in which Adkinson had pointed a gun directly at people who had trespassed on his property.⁹ The court held that this evidence was relevant to showing that Adkinson’s act of pointing his shotgun at the victim of the homicide was not accidental or inadvertent.¹⁰

We acknowledge that in this case, the prior incident involved Forester shooting himself, rather than another person, and that the State did not argue that Forester intentionally pointed his gun at Rankin. But we agree with the trial court that evidence that Forester contended on a prior occasion, under similar circumstances, that he had accidentally pulled the trigger in the face of testimony that he did not, had some probative value to evaluating his claim that he pulled the trigger unwittingly on this occasion.

Given this non-propensity relevance, the remaining question is whether the evidence should have been excluded under Alaska Evidence Rule 403. As noted above, there were some dissimilarities between the incidents — most notably, on the prior occasion, Forester shot himself, as opposed to his significant other. But the trial court acknowledged that the incidents were not precisely identical, and after evaluating the record as a whole, we cannot say that the trial court abused its discretion in determining that the probative value of the prior incident outweighed the potential unfair prejudice of its admission.

Moreover, the trial court instructed the jury that it could only consider evidence of the 2010 incident “for the limited purpose of determining whether it tends

⁸ *Id.*

⁹ *Id.* at 532.

¹⁰ *Id.*

to show absence of mistake or accident” and further precluded the jury from using the evidence “to inform your opinion of Mr. Forester’s character, that he routinely acts in a certain way, or that he acted consistently with any inherent character trait.” The court also instructed the jury that it could not convict Forester on the basis of the prior act alone. These instructions lessened the potential prejudice from the admission of the 2010 incident.

We therefore reject Forester’s challenge to the admission of the 2010 incident.

Why we direct the superior court to reconsider the probation condition limiting contact between Forester and Rankin

Prior to Forester’s sentencing, the Department of Corrections issued a presentence report. In the report, the author recommended a condition of probation precluding Forester from having contact with Rankin without the approval of a probation officer and the state-approved batterers’ intervention program provider.

At sentencing, Rankin asked the court not to impose this condition. She reiterated that she was trying to help Forester, that she hit him on the head, and that he accidentally shot her. Rankin also expressed her frustration with the way the case had been prosecuted, given Forester’s need for mental health assistance. Rankin reminded the court that she and Forester had lived together for several years, and she described him as her “family.”

Following Rankin’s statement, Forester’s attorney asked the court to strike the no-contact provision from the presentence report; he expressed particular concern about Rankin’s ability to visit Forester while he was incarcerated.

The State suggested that, in light of the mental health counseling that Forester would likely be ordered to attend, input from Forester’s counselors “as to what’s

most therapeutic for Mr. Forester” would be appropriate. The State asked the court for “a modification [of the presentence report recommendation] along those lines” so as to not undermine Forester’s treatment. The State indicated that it did not want the “no-contact” provision to serve as punishment for either Rankin or Forester.

In its sentencing remarks, the court expressed its uncertainty regarding exactly what had transpired, and the court questioned Rankin’s version of events. The court also expressed concern about the possibility that Forester “may pose a danger to Ms. Rankin in the future” — a possibility that would depend on whether Forester was complying with his treatment. The court expressed hope that Forester would succeed in treatment, and the court “[left] open the potential” for contact. But given these uncertainties, the court precluded Forester from having contact with Rankin without the written permission of a probation officer. The court ruled, however, that it did not intend for this condition to preclude the Department of Corrections from allowing contact while Forester was in custody.

The court later advised Forester that if his probation officer was unreasonably refusing contact, Forester could ask the court to review that decision.

The court also imposed conditions requiring Forester, at the direction of his probation officer, to obtain a mental health evaluation and undergo a substance abuse assessment and participate in recommended counseling and treatment. The court required Forester, upon the direction of a probation officer, to enroll in and successfully complete a batterers’ intervention program.

Forester now challenges the condition precluding him from having contact with Rankin without his probation officer’s permission.

A sentencing court generally has broad discretion to impose conditions of probation so long as those conditions are “reasonably related to the rehabilitation of the

offender and the protection of the public and [are] not unduly restrictive of liberty.”¹¹ But when a condition implicates constitutional rights, the court must apply special scrutiny to the condition to ensure that it is “narrowly tailored to avoid unnecessary interference” with a defendant’s constitutional rights.¹² The court must “affirmatively consider and have good reason for rejecting lesser restrictions.”¹³

Here, the condition restricting Forester’s contact with Rankin implicates Forester’s right to freedom of association (as well as Rankin’s right to freedom of association).¹⁴ But it is not clear to us from the record whether the trial court applied the necessary heightened scrutiny.

While the State has a compelling interest in protecting victims of domestic violence, the facts of this case were somewhat unusual. At sentencing, the prosecutor acknowledged that Forester had been “profoundly depressed,” and he did not question that Forester had been genuinely suicidal. The prosecutor explained that the State did not believe that Forester had feigned suicidal gestures to cover up “a more garden-variety domestic violence assault” in which he shot Rankin with the intent to injure her. Thus, while the prosecutor contended that the offense should be formally designated a “crime involving domestic violence” under Alaska Criminal Rule 32(e), he also noted that the State “never couched this as domestic violence.” Rather, the prosecutor maintained, “[t]his is a truly reckless assault.”

¹¹ *Thomas v. State*, 710 P.2d 1017, 1019 (Alaska App. 1985) (quoting *Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977)) (internal quotation marks omitted).

¹² *See Simants v. State*, 329 P.3d 1033, 1039 (Alaska App. 2014) (internal quotations omitted).

¹³ *Peratrovich v. State*, 903 P.2d 1071, 1079 (Alaska App. 1995); *Dawson v. State*, 894 P.2d 672, 680-81 (Alaska App. 1995).

¹⁴ U.S. Const. amends. I, XIV; Alaska Const. art. I, §§ 6, 7.

We note too that neither the prosecutor nor the presentence report writer suggested that there was any past history of violence between Forester and Rankin. Forester has no prior felony convictions and no prior convictions for a crime against a person. Aside from the weapons misconduct conviction in connection with the 2010 incident, Forester had only three other prior convictions, all for driving offenses.

The trial court was understandably concerned that Forester might pose a danger to Rankin in the future if he was not compliant with his treatment. But given Rankin's request for contact with Forester, and given their longstanding intimate relationship, the court did not explain why lesser restrictions were insufficient to promote Forester's rehabilitation and protect Rankin and the public. If Forester does not comply with his recommended mental health and substance abuse treatment and counseling, the probation officer can take action to revoke his probation or return to court to seek a modification of Forester's probation. The court could also condition Forester's contact with Rankin on her own written approval.

We therefore direct the superior court to reconsider Probation Condition No. 17.

Conclusion

We REMAND Forester's case to the superior court for reconsideration of Probation Condition No. 17 consistent with this opinion. We otherwise AFFIRM the judgment of the superior court.