IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KENG HER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12155 Trial Court No. 3AN-13-10564 CR MEMORANDUM OPINION No. 6701 — September 19, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Larry D. Card, Judge.

Appearances: Elizabeth D. Friedman, Law Office of Elizabeth D. Friedman, Redding, California, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Timothy W. Terrell, 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.

Following a jury trial, Keng Her was convicted of first-degree assault and first-degree misconduct involving weapons after he discharged a firearm from a moving vehicle and caused serious physical injury to another person.

On appeal, Her argues that: (1) the trial court committed plain error by failing to instruct the jury on the affirmative defense of necessity; (2) Alaska's double jeopardy clause requires merger of his convictions for first-degree assault and first-degree weapons misconduct; and (3) the trial court mistakenly concluded that it was required to impose some portion of consecutive incarceration for his weapons misconduct conviction.

For the reasons explained in this opinion, we affirm Her's convictions, but we remand his case to the trial court for reconsideration of his sentence.

Underlying facts and prior proceedings

In the early morning hours of September 29, 2013, in Anchorage's Mountain View neighborhood, Chuada Chang crashed his car into a dumpster in an alleyway outside Mark Harms's apartment building. After hitting the dumpster and pushing it against the apartment building, Chang then drove his car into a light pole at the end of the alleyway.

Harms was in the process of renovating the building, and he was responsible for maintaining the dumpster. Upon hearing the loud noise from the collision with the dumpster, Harms and a number of other residents went outside to investigate. Shortly thereafter, Keng Her arrived in a white SUV and attempted unsuccessfully to push Chang's car from the light pole. Chang exited his vehicle and got into the passenger seat of Her's SUV, and the two drove away from the scene.

Ten to fifteen minutes later, Her and Chang returned in Her's SUV. Witnesses saw Her attempt to hook a tow rope onto Chang's crashed vehicle. Harms approached Her and Chang and told them that the police were on the way and that they should not move the vehicle.

In response, Her threw $3 in crumpled bills at Harms. When Harms went to pick up the money, Her lunged at Harms and tried to punch him, but Harms blocked the punch. Harms threatened Her but did not swing at him.

Harms noticed Chang return to his car, retrieve something from the glove box, and hand it to Her. Her and Chang then got into Her's SUV and began to drive away, and Harms turned to walk inside.

However, Her and Chang turned the car around and drove back down the alleyway toward Harms. Harms was afraid that Her was trying to run him over, so he began running toward the street. As Her's SUV approached, Harms saw Her driving with his left hand and holding a gun in his right hand. Harms then saw flashes from the gun, heard several shots, and realized that Her was shooting at him.

Harms was shot once in the foot and once in the lower spine. Harms estimated that Her shot him from approximately ten to twelve feet away.

In a subsequent interview with the police, Her said that he had shot Harms because he thought Harms was reaching into his waistband for a gun.

A grand jury indicted Her on one count of first-degree assault, one count of second-degree assault, and two counts of third-degree assault, as well as one count of first-degree misconduct involving weapons for discharging a firearm from a propelled vehicle while the vehicle was being operated.[1]

Her asked the court to instruct the jury on self-defense as to all of the counts, and additionally, on the affirmative defense of necessity as to the first-degree weapons misconduct charge only. But Her withdrew his request for a necessity

[1] AS 11.41.200(a)(1), AS 11.41.210(a)(1), AS 11.41.220(a)(1)(A) & (a)(1)(B), and AS 11.61.190(a)(2), respectively.

instruction when it became clear that the court would instruct the jury on self-defense as to all the charges.

The jury subsequently found Her guilty as charged.

Prior to sentencing, Her argued that merger of all the counts was required. The State acknowledged that merger was required as to all of the assault verdicts, which represented different degrees of the same assaultive conduct. But the State opposed merger of the assault with the first-degree weapons misconduct.

At sentencing, the court agreed with the State, merging all of the assault counts into a single conviction for first-degree assault but declining to merge the single assault conviction with the first-degree weapons misconduct conviction. The court sentenced Her to entirely concurrent sentences with the exception of a single day.

Why we affirm the trial court's decision not to give a necessity instruction

Prior to closing arguments, Her proposed several jury instructions. Most of these instructions involved self-defense or defense of others. But Her also proposed a necessity instruction, applicable only to the first-degree weapons misconduct charge.

During the parties' subsequent discussion of jury instructions, the prosecutor agreed that Her was entitled to a jury instruction on self-defense as to all the counts, including the charge of weapons misconduct. Given the prosecutor's position, Her's attorney stated that the necessity instruction might not be required. In particular, Her's attorney said, "I don't know that [a necessity instruction] will be necessary if we can reach agreement on the other one" — *i.e.*, if everyone agreed that self-defense did, in fact, apply to all the counts.

The court expressed its view that a jury finding of self-defense would be a "total justification for every action." The court then questioned whether "we need this [necessity] instruction." Her's attorney responded, "We don't, Your Honor."

Her's attorney articulated a single reservation — that the jury might find self-defense applicable to the assault count but not to the weapons misconduct count: "I'd just be concerned if [the jury] somehow came back not guilty on every assault count, and then did find him guilty of [weapons misconduct]. That would be an inconsistent verdict, I think." The court agreed that this outcome would present inconsistent verdicts and that "we'd have to deal with that." With that, Her's counsel said, "Well, if the court can agree to that, we don't have to instruct them" on necessity. The court agreed that the necessity instruction should not be given.

On appeal, Her argues that he presented "some evidence" of each element of the necessity defense and that the trial court committed plain error when it did not give the instruction. But Her's actions in the trial court are inconsistent with his claim of error on appeal.

We have previously characterized a claim almost identical to Her's as "invited error" and declined to decide it.[2] In *Frankson v. State*, the defense attorney initially proposed an instruction on necessity but later conceded that Frankson had failed to demonstrate her entitlement to the instruction.[3] When the trial court asked if it should remove the necessity instruction from the instruction packet, the defense attorney responded affirmatively.[4] We concluded that the defense attorney's affirmative decision to tell the judge that the necessity instruction was not necessary constituted invited error and that Frankson's case did not present an exceptional situation requiring reversal.[5]

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[2] *Frankson v. State*, 282 P.3d 1271, 1274 (Alaska App. 2012).

[3] *Id.* at 1273.

[4] *Id.*

[5] *Id.* at 1273-74.

Her attempts to distinguish his case from *Frankson*, arguing that his attorney only acquiesced to the trial judge's intention and did not affirmatively invite the removal of the necessity instruction. For this reason, Her contends that plain error review applies.

We need not decide whether Her's actions constituted invited error because Her's claim fails even as a matter of plain error. Plain error is an error that: (1) was not the result of intelligent waiver or a tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial.[6] Aside from reciting this four-part test, and contesting characterization of his claim as "invited error," Her does not explain how his claim satisfies each of the elements of plain error review. Rather, Her argues conclusorily that the court's failure to give the necessity instruction undermined "the fundamental fairness of the trial."

Her's claim is implicitly that, in the face of his acquiescence to removal of the necessity instruction, the court nonetheless had a duty to instruct on necessity *sua sponte*. But Her's actions constitute the type of intentional waiver discussed by the Alaska Supreme Court in *Moreno v. State*.[7] Here, Her's attorney proposed, and then withdrew, the necessity instruction — deliberately waiving the opportunity to further argue the point and insist on the instruction.[8] Her does not discuss *Moreno* or

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[6] *Adams v. State*, 261 P.3d 758, 764 (Alaska App. 2011).

[7] *Moreno v. State*, 341 P.3d 1134, 1146 (Alaska 2015).

[8] *See Moss v. State*, 620 P.2d 674, 677-78 (Alaska 1980) (concluding that, where defense counsel initially asked for a witness to be held in contempt for refusing to testify but then failed to renew his request to have the witness testify following a recess in which counsel conferred with the witness, counsel made an intentional choice that was "inconsistent with the present claim of error"); *Gafford v. State*, 440 P.2d 405, 410 (Alaska 1968) (counsel's decision to decline a curative instruction foreclosed the defendant from arguing (continued...)

sufficiently explain why his trial attorney's actions do not amount to intentional waiver that forecloses plain error review.

Even if the actions by Her's trial attorney did not waive his claim regarding the necessity instruction, Her has failed to establish that he was prejudiced by an obvious error. As noted earlier, the jury was fully instructed on self-defense — a defense that the State bore the burden of disproving beyond a reasonable doubt. Although the elements of a self-defense instruction and a necessity instruction differ, Her does not explain how, under the facts of this case, the absence of an instruction on the affirmative defense of necessity — a defense for which *Her* bore the burden of proof — prejudiced him. Indeed, Her's attorney withdrew the necessity instruction precisely because the court had agreed to instruct the jury on self-defense.

Finally, as a matter of law, it is not clear that Her was entitled to an instruction on the defense of necessity. Under AS 11.81.320(a), a defendant may defend on the basis of necessity to the extent permitted by common law only when Title 11 or the statute defining the offense does not otherwise provide "exemptions or defenses dealing with the justification of necessity in the specific situation involved." Although the Alaska courts have not yet interpreted the scope of this provision, courts in other jurisdictions have held that a general necessity instruction (or other equivalent

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[8] (...continued)
on appeal that the absence of the instruction constituted error), *overruled on other grounds by Fields v. State*, 487 P.2d 831, 836 (Alaska 1971). Both *Moss* and *Gafford* are discussed in *Moreno*, 341 P.3d at 1141, 1142-43.

instruction) is precluded in situations where self-defense is otherwise applicable.[9] We therefore cannot say that the trial court's ruling, to the extent it was error, was obvious.

We therefore reject Her's claim regarding the failure to instruct on the defense of necessity.

Why we affirm the trial court's decision declining to merge the assault and weapons misconduct counts

At sentencing, the court denied Her's request to merge the first-degree assault and first-degree weapons misconduct convictions. The court essentially found that the two statutes served separate societal interests and purposes under the facts of this case. The court noted that the shooting occurred in a high-density residential area, with several surrounding apartments, and that Her fired multiple shots beyond just the two that hit Harms. The court also noted the increased dangerousness of firing from a moving vehicle — and, in particular, the dangerousness of firing a handgun, which is not as stable or accurate as a long gun.

On appeal, Her argues that under the double jeopardy clause of the Alaska Constitution (article I, section 9), he could not lawfully receive separate convictions for first-degree assault and first-degree misconduct involving weapons. Her asserts that the legislative history of the weapons misconduct statute demonstrates that it was enacted to punish gang-related drive-by shootings and that Her's conduct does not fall within this

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[9] *See, e.g.*, *State v. Smith,* 984 P.2d 1276, 1289 (Haw. App. 1999) (finding that the choice of evils defense was inapplicable when self-defense applied); *State v. Crocker*, 506 A.2d 209, 211 (Me. 1986) (holding that the existence of a specific defense, such as self-defense or defense of others, precludes resorting to more general provisions such as the competing harms defense and noting that the general provisions were not intended as an overlay to self-defense).

intended purpose. Additionally, Her argues that, under the facts of this case, his assault and weapons misconduct charges encompass the same conduct and mens rea.

(Although Her suggests in the title of this section of his brief that the imposition of separate convictions violated his rights under the federal double jeopardy clause, Her does not independently brief a claim under the United States Constitution. To the extent Her intended to raise such a claim, we conclude that it is inadequately briefed.)[10]

In *Whitton v. State*, the Alaska Supreme Court established the test for determining whether two crimes constitute a single offense for double jeopardy purposes under the Alaska Constitution.[11] Under *Whitton*, a court must compare the different statutory provisions as applied to the facts of the case and evaluate any differences in intent or conduct in light of the societal interests to be vindicated.[12] If the differences in intent or conduct are "insignificant or insubstantial" in relation to the societal interests, the court may only enter a single conviction and sentence.[13]

The State charged Her with first-degree assault under AS 11.41.200(a)(1) — recklessly causing serious physical injury to Harms by means of a dangerous instrument. The State charged Her with first-degree misconduct involving weapons under AS 11.61.190(a)(2) — discharging a firearm from a propelled vehicle while the

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[10] *See Wilkerson v. State, Dep't of Health and Soc. Serv.*, 993 P.2d 1018, 1021 (Alaska 1999) (noting that "superficial briefing and failing to cite any authority constitute abandonment of a point on appeal").

[11] *Whitton v. State*, 479 P.2d 302, 312 (Alaska 1970).

[12] *Id.*

[13] *Id.* at 312, 314; *see also Rofkar v. State*, 273 P.3d 1140, 1143 (Alaska 2012).

vehicle was being operated and under circumstances manifesting a substantial and unjustifiable risk of physical injury to a person or damage to property.

The first-degree assault statute protects against acts of armed violence that are directed against individual victims and result in serious harm.[14] In contrast, the weapons misconduct statute encompasses conduct that poses a broader *risk* of injury to one or more persons or damage to property.

In *Young v. State*, we examined the legislative history of the weapons misconduct statute.[15] We noted that the purpose of the statute was to prohibit a particular reckless activity — a drive-by shooting — "that, in and of itself, creates a generalized public danger."[16] We explained that the legislature viewed this conduct as inherently dangerous, regardless of whether any person was actually injured, or was even placed in fear by the shooting.[17] Notably, we concluded that "the legislature did not view the

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[14] *See Marker v. State*, 692 P.2d 977, 981 (Alaska App. 1984); *see also Ames v. State*, 1987 WL 1358652, at *4 (Alaska App. Jan. 28, 1987) (unpublished).

[15] *Young v. State*, 331 P.3d 1276 (Alaska App. 2014).

[16] *Id.* at 1284. Although Senate Bill 194 — the 1996 bill containing this weapons-misconduct provision — was aimed at responding to the "rapid escalation of violent gang-related crime in Anchorage and throughout Alaska," an early draft of the bill that would have limited the weapons-misconduct provision to gang-related violence was removed before the bill was finalized. *See* Sponsor Statement by Senator Tim Kelly on SB 194; *compare* SB 194 Version K, § 2 (introduced Jan. 8, 1996), *with* SLA 1996, ch. 60, § 3. *See also* Minutes of Senate Judiciary Committee (Feb. 23, 1996), Statement by Anchorage Police Department Supervisor Michael Grimes in response to questioning by Senator Green (noting that the proposed statute would apply to anyone shooting from a vehicle).

[17] *Young*, 331 P.3d at 1284.

drive-by shooting law as an alternative or aggravated form of assault. The crime is the act of shooting itself, even when there is no victim."[18]

Thus, as a general matter, the two crimes are sufficiently distinct to constitute separate offenses for double jeopardy purposes. This remains true when we examine how the two statutes apply to the particular facts of Her's case.

There is no question that both of Her's convictions arose from his act of firing his handgun at Harms. But Her's conviction for first-degree assault rested on the fact that some of Her's bullets struck and seriously injured Harms. In contrast, Her's weapons misconduct conviction rested on evidence that Her fired several other bullets that did not strike Harms but rather flew into the neighborhood.

In particular, the prosecutor argued in closing that the shooting occurred in a densely populated neighborhood where single-family homes and multi-dwelling units were located close together. The prosecutor relied on a photograph showing two people in the alleyway, in order to establish that the alleyway was not wide and that there was a risk that the bullets from Her's firearm could have penetrated the walls of a residential structure and potentially hit another person.

We note that, at the time of the shooting, both Harms's girlfriend and another resident were still outside in the alleyway. And although Her told the police that he only fired his gun twice, witnesses heard five or six shots, and police officers subsequently located seven spent shell casings in Her's vehicle.

The risk of injury to people other than Harms was further increased by the fact that Harms was standing approximately ten to twelve feet from Her's vehicle and was running away — *i.e.*, he was a moving target being fired upon from a moving vehicle. Additionally, Her's conduct not only created an unjustifiable risk of physical

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[18] *Id.*

injury to the people in the immediate vicinity, but it also created a risk of damage to the property in the neighborhood.

In other words, Her's conviction for weapons misconduct was not based merely on the risk that Harms might suffer injury; rather, it was based on the fact that Her's actions created a significantly broader risk of harm to other people and property in the area. We therefore conclude that the trial court correctly refused to merge the assault conviction and the weapons misconduct conviction.

Why we remand for reconsideration of Her's partially consecutive sentences

Finally, Her argues that the trial court mistakenly believed that it was required to impose some portion of the sentence for the first-degree weapons misconduct conviction consecutively to the sentence for the assault conviction. The State concedes that the trial court had the discretion to make Her's sentences fully concurrent and, consequently, that this Court should remand Her's case to the trial court to reconsider the court's imposition of one day of consecutive time.

The State's concession is well-founded. Under AS 12.55.127(b), a court may impose fully concurrent terms of imprisonment for two or more crimes in a single judgment, except as provided in subsection (c). Subsection (c) sets out two situations in which sentences must be at least partially consecutive: (1) where the defendant is being sentenced for escape in addition to the underlying crime; and (2) where the defendant is being sentenced for two or more specified crimes under AS 11.41. Neither of these exceptions apply to Her, as Her was sentenced for one crime under AS 11.41 (first-degree assault) and one crime under AS 11.61 (first-degree weapons misconduct). The court therefore had the discretion to make Her's sentences fully concurrent.

The court indicated that it would "effectively moot" the statutory dispute by imposing only one day consecutively. But, as the State rightfully acknowledges, even one day of improperly imposed imprisonment is sufficient to render an issue a live controversy.

We therefore remand Her's case to the superior court to reconsider the imposition of a single day of consecutive time.[19]

Conclusion

We AFFIRM Her's convictions, but we REMAND this case for reconsideration of Her's partially consecutive sentence.

[19] *See Tucker v. State*, 721 P.2d 639, 644-45 (Alaska App. 1986) (remanding the case to clarify whether the original sentence should be altered when the sentencing judge operated under the erroneous belief that the sentences must be consecutive).