IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JACOB NOHEA LEE VIERRA, Appellant, v. MUNICIPALITY OF ANCHORAGE, Appellee.	Court of Appeals No. A-13155 Trial Court No. 3AN-17-02060 CR MEMORANDUM OPINION No. 6901 — October 21, 2020

Appeal from the District Court, Third Judicial District, Anchorage, Gregory J. Motyka, and Leslie Dickson, Judges.

Appearances: Matthew A. Michalski, Attorney at Law, Anchorage, for the Appellant. Sarah E. Stanley, Municipal Prosecutor, and Rebecca A. Windt Pearson, Municipal Attorney, Anchorage, for the Appellee.

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

Judge ALLARD.

Jacob Nohea Lee Vierra and his brother were each convicted, following a joint jury trial, of one count of assault for assaulting Chad Hudson, a bouncer at the Anchorage bar Chilkoot Charlie's.[1] Vierra now appeals his conviction.

Vierra and his brother were initially charged separately. But prior to trial the Municipality asked the district court to accept an amended information joining Vierra and his brother as co-defendants in a single case. Vierra responded by filing a motion stylized as a "motion for relief from prejudicial joinder." The district court, without providing an explanation, granted the Municipality's motion and accepted the joinder of Vierra and his brother as co-defendants, thereby implicitly rejecting Vierra's motion seeking relief from joinder.

On appeal, Vierra argues that in rejecting his motion, the district court violated Alaska Criminal Rule 42(h), which requires courts to set forth the reasons for denying unopposed motions with specificity. This argument is meritless. Vierra's motion seeking relief from joinder was *itself* a response — *i.e.*, an opposition — to the Municipality's motion seeking approval of the joinder. Given this context, Vierra's motion was not "a motion to which no opposition has been filed" within the meaning of Rule 42(h).

Vierra also argues that, as a substantive matter, the district court erred in denying his motion. Under Alaska Criminal Rule 14, a trial court should grant severance "[i]f it appears that a defendant or the state is prejudiced by a joinder . . . of defendants." We review a trial court's decision to deny severance for an abuse of discretion.[2] We have reviewed the record and conclude that the district court did not abuse its discretion when it found that Vierra would not be prejudiced by the joinder.

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[1] Anchorage Municipal Code (AMC) 08.10.010(B)(1).

[2] *Erickson v. State*, 824 P.2d 725, 732 (Alaska App. 1991).

Vierra next argues that the evidence was insufficient to support his conviction. When we evaluate the sufficiency of the evidence to support a conviction, we view the evidence — and the inferences arising from that evidence — in the light most favorable to the verdict and ask whether a reasonable juror could have concluded that the defendant was guilty beyond a reasonable doubt.[3] We have reviewed the evidence in this case, and we readily find that a reasonable juror could have concluded that Vierra was guilty beyond a reasonable doubt.[4] In particular, we note that a video recording of the assault was admitted into evidence at trial and that the victim affirmatively identified Vierra as one of the two men who assaulted him.

Finally, Vierra argues that the district court denied him his right to a verdict by a unanimous jury. Vierra makes this argument in two ways. First, he argues that the jurors were never instructed that they needed to consider each defendant individually and find that each defendant committed an assault. Second, he argues that the jurors were never instructed that they had to agree on which defendant committed which assaultive act. Vierra did not request any such jury instructions below, and he therefore must establish plain error. To establish plain error, Vierra must show, *inter alia*, that an obvious error occurred and that it caused him prejudice.[5]

With respect to Vierra's first argument — that the jurors were never instructed that they needed to consider each defendant individually — there was no plain error. It is true that the jury instructions could have more clearly distinguished between Vierra and his brother. For example, the jury instruction explaining the elements of assault stated, "The defendants Russell Vierra and Jacob Vierra in this case have been

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[3] *Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).

[4] *See Collins v. State*, 977 P.2d 741, 747-48 (Alaska App. 1999).

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

charged with the crime of Assault." Standing alone, such an instruction could mislead the jury into believing that it should consider the defendants collectively, rather than individually. But the jury was also instructed that its verdicts had to be unanimous, and the verdict form provided to the jury clearly distinguished between Vierra and his brother. Given these additional facts, we conclude that any error, even if obvious, was not prejudicial.

With respect to Vierra's second argument — that the jurors were never instructed that they had to agree on which defendant committed which assaultive act — we question whether any such instruction was required. The Municipality alleged that Vierra and his brother simultaneously assaulted the victim over a period of a few seconds. We have serious doubts as to whether, given this theory, the jury had to be unanimous as to which defendant threw which punches, so long as each juror concluded that each defendant recklessly caused physical injury to the victim.[6]

But even if a factual unanimity instruction was required, the prosecutor specifically argued to the jury that Vierra punched the victim and broke the victim's jaw, and that Vierra's brother pushed the victim and broke the victim's knee. Given this argument, there was little risk that the jury was not unanimous as to which defendant committed which act. We therefore conclude that Vierra has failed to show prejudice and therefore failed to show plain error.

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[6] *Cf. Erdmann v. State*, 2018 WL 3933550, at *2 (Alaska App. Aug. 15, 2018) (unpublished) (concluding that no factual unanimity instruction was required when the jury might have convicted a defendant either on the defendant's own act of kicking the victim or his co-defendant's act of hitting the victim with a hammer, under an accomplice liability theory, because the State presented the events as a "single unitary criminal episode" and did not argue that the defendant or any of the other participants had "committed multiple assaults 'at clearly separate times and in clearly separate incidents.'") (quoting *S.R.D. v. State*, 820 P.2d 1088, 1092-93 (Alaska App. 1991)).

Before concluding our analysis of this case, we must address one additional issue. As we noted above, video of the assault was introduced into evidence at trial. In his appellate brief, Vierra's attorney repeatedly expresses doubt as to whether this Court reviews video evidence in evaluating appeals, and even goes so far as to suggest that we should decline to review the video in Vierra's case and should instead rule on Vierra's insufficiency claim based solely on the transcript of Vierra's trial. Vierra's attorney appears to be concerned that if appellate courts review audio or video recordings, they will "ultimately reweigh evidence."

In light of this argument, we take the time to clarify: any exhibits admitted into evidence are considered part of the trial court record and therefore available to this Court on appeal.[7] We are not only permitted to review these trial exhibits, we are *required* to do so when the exhibits are relevant to an issue being raised on appeal.

But that does not mean we "reweigh evidence." Exhibits are treated no differently than witness testimony. If a trial court has made factual findings based in whole or in part on an exhibit, we review the exhibit, and any relevant testimony, to determine if the trial court's findings were clearly erroneous. Similarly, when we evaluate the sufficiency of the evidence to support a jury verdict, we review the evidence — *all* the evidence — in the light most favorable to the jury's verdict and ask whether a reasonable juror could have concluded that the defendant was guilty beyond a reasonable doubt.[8] That is what we have done in this case.

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[7] *See, e.g.*, *Augustine v. State*, 355 P.3d 573, 587-90 (Alaska App. 2015) (concluding that the State's evidence was insufficient to support a conviction after reviewing a video admitted into evidence).

[8] *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in (continued...)

The judgment of the district court is AFFIRMED.

[8] (...continued)
the light most favorable to the prosecution.") (emphasis in original).