

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ALLEN WALTER GRAY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13112
Trial Court No. 3KN-16-01432 CR

MEMORANDUM OPINION

6920 — January 27, 2021

Appeal from the Superior Court, Third Judicial District, Kenai,
Anna M. Moran, Judge.

Appearances: Paul E. Malin, under contract with the Public
Defender Agency, Anchorage, and Samantha Cherot, Public
Defender, Anchorage, for the Appellant. Terisia K. Chleborad,
Assistant Attorney General, Office of Criminal Appeals,
Anchorage, and Clyde “Ed” Sniffen, Acting Attorney General,
Juneau, for the Appellee.

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

Judge ALLARD.

Under both common law and Alaska’s statutory definition of third-degree
fear assault, a victim’s fear of injury must be reasonable.¹ We acknowledged this

¹ *Wyatt v. State*, 778 P.2d 1169, 1170 (Alaska App. 1989).

requirement in *Wyatt v. State*, but we concluded that a trial court’s failure to directly instruct on this implicit element did not create reversible error because the reasonableness of the victim’s fear was already subsumed in the statutory requirement that the defendant act “recklessly” with regard to the victim’s fear.² As we explained in *Wyatt*:

Before finding that Wyatt acted recklessly, the jury would have had to have been convinced that he was aware of and consciously disregarded a substantial and unjustifiable risk that his conduct would place another person in fear of imminent serious physical injury. . . . Had the jury been in doubt as to the reasonableness of the victim’s fear, it would have had no basis for finding that Wyatt’s conduct created a substantial and unjustifiable risk of placing his victim in fear.^[3]

We therefore concluded that there was “no need for a special instruction that reasonable fear was an element of third-degree assault” under these circumstances — *i.e.*, given that nothing had prevented Wyatt from arguing this point to the jury.⁴

In the current case, Allen Walter Gray was charged with third-degree assault for recklessly placing a police officer in fear of imminent serious physical injury by means of a dangerous instrument.⁵ At trial, the prosecutor erroneously asserted that the State did not need to prove that the officer’s fear was reasonable. Gray’s attorney

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ AS 11.41.220(a)(1)(A). Gray was also charged with reckless endangerment, resisting arrest, fifth-degree weapons misconduct, and fourth-degree assault based on the same incident. At trial, the jury convicted Gray of third-degree assault and reckless endangerment. Gray does not challenge his reckless endangerment conviction on appeal.

immediately objected, but the objection was overruled. The trial court did not correct the prosecutor's legal mistake nor did the court provide any instructions that would have corrected the misimpression created by the prosecutor's statements.

On appeal, the State concedes that the prosecutor was incorrect when he told the jury that the State was not required to prove that the officer's fear was reasonable, but the State argues that this error was harmless. The State's concession of error is well-founded but we disagree that the error was harmless.⁶ As the State recognizes, the prosecutor affirmatively misrepresented the law when he claimed that the State did not have to prove that the officer's fear was reasonable. In the face of such a misrepresentation, the trial court was obligated to take steps to ensure that the jury properly understood the applicable law.⁷ Merely informing the jury that it should follow the court's instructions if the attorney's arguments differed from the instructions was insufficient. Because the reasonableness of the officer's fear was a disputed issue at trial, and because the jury may have convicted Gray under the erroneous impression that Gray could act "recklessly" even if the jury found that the officer's fear was unreasonable, we conclude that Gray's conviction for third-degree assault must be reversed.

⁶ See *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (explaining that, when the State concedes error in a criminal case, the appellate court must independently assess whether the State's concession is well-founded).

⁷ See Alaska R. Crim. P. 30(b).

Gray raises two other arguments regarding his trial.⁸ Because the State may choose to retry Gray on the third-degree assault charge, we address those arguments here.

First, Gray argues that the superior court erred when it allowed the State to introduce evidence of an officer safety advisory, which informed Trooper Steven Pohl, the responding officer, that Gray had previously threatened to kill law enforcement. Gray argues that the court should have limited Trooper Pohl's testimony to his awareness of the existence of the officer safety advisement, without reference to Gray's specific threats to kill law enforcement that comprised the substance of the advisement.

But Gray's specific threat to kill law enforcement — and Trooper Pohl's awareness of that threat — was highly probative to whether Pohl experienced fear, and to whether that fear was reasonable. Notably, the trial court did not allow the State to introduce any evidence regarding the underlying domestic violence incident that formed the basis for the officer safety advisement. Instead, the court properly limited the evidence to what was known to Pohl from hearing the officer safety advisement. We conclude that the trial court did not abuse its discretion when it found that the probative value of this evidence was not outweighed by the risk of unfair prejudice.⁹

Second, Gray argues that the evidence was legally insufficient to support his conviction for third-degree assault. If we agreed with Gray, then double jeopardy

⁸ Gray also points out that, during sentencing, the superior court failed to properly redact two factual assertions from the presentence report. The State agrees that this was error. This concession is well-founded, and the court should correct this error on remand, regardless of the future status of the presentence report. *See* Alaska R. Crim. P. 32.1(f)(5).

⁹ *See Howard v. State*, 239 P.3d 426, 429 (Alaska App. 2010) (“When we review a trial judge’s weighing of probative value versus potential for unfair prejudice under Evidence Rule 403, we review the judge’s ruling under the ‘abuse of discretion’ standard.”).

would attach, and the State would not be permitted to retry Gray on the third-degree assault charge.¹⁰

When we review a claim of insufficient evidence, we are required to view the evidence (and all reasonable inferences to be drawn from that evidence) in the light most favorable to upholding the verdict.¹¹ We then determine whether, viewing the evidence in this light, a fair-minded juror could find that the State had met its burden of proving each essential element of the crime beyond a reasonable doubt.¹²

The third-degree assault charge in this case arose out of an altercation between Trooper Pohl and Gray when Pohl attempted to execute a warrant for Gray's arrest. When Pohl approached Gray's car and informed him of the warrant, Gray told Pohl to "fuck off" and refused to get out of his car.

Trooper Pohl was aware from the officer safety advisory that Gray had recently threatened to kill law enforcement. When Pohl asked Gray if he had any weapons, Gray informed him that he had a gun. Gray then proceeded to reach down and touch the gun despite Pohl repeatedly yelling instructions at Gray not to touch the gun.

Gray removed the magazine from the gun and picked up the gun with two fingers. Despite the fact that Trooper Pohl had drawn his gun and was yelling at Gray to put the gun on the dashboard, Gray ignored Pohl and tried to give the gun to a passenger in the backseat. When the passenger in the backseat refused to take the gun, Gray placed the gun on the dashboard but still refused to get out of the car. Officers had to resort to pepper spray to get Gray out of the car and under arrest.

¹⁰ See *Miller v. State*, 648 P.2d 1015, 1017 (Alaska 1982).

¹¹ *Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).

¹² *Id.*

Viewing all this evidence — including the cell phone video of this altercation — in the light most favorable to upholding the verdict, we conclude that a fair-minded juror could find that Trooper Pohl reasonably feared imminent serious physical injury by means of a dangerous instrument and that Gray acted recklessly with regard to that fear.¹³

Conclusion

For the reasons explained above, we REVERSE Gray's conviction for third-degree assault and REMAND this case for a new trial.

¹³ AS 11.41.220(a)(1)(A) (defining elements of third-degree assault).