

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

KYLE H. MEAD,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13030  
Trial Court No. 3KO-16-00347 CR

MEMORANDUM OPINION

No. 6924 — February 24, 2021

Appeal from the Superior Court, Third Judicial District, Kodiak,  
Steve W. Cole, Judge.

Appearances: Laurence Blakely, (opening brief), and Megan R. Webb, (reply brief), Assistant Public Defenders, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

Kyle H. Mead was convicted of one count of second-degree assault, two counts of third-degree assault, and two counts of fourth-degree assault, following an altercation with a crew member aboard Mead’s commercial fishing vessel.<sup>1</sup>

Mead raises four claims on appeal. His first claim of error relates to one of his third-degree assault convictions, for making repeated threats to cause death or serious physical injury with intent to place another person in fear.<sup>2</sup> Mead argues that the trial court committed plain error in providing the jury with a dictionary definition of “threat,” rather than the definition enacted by the legislature and mandated by our case law. For the reasons explained in this opinion, we conclude that the trial court’s erroneous reliance on the dictionary definition and omission of the legal definition amounted to plain error and that Mead’s conviction on this count therefore must be reversed and remanded for retrial.

Mead also argues that: (1) his judgment mistakenly cites the wrong subsection for one of his third-degree assault convictions; (2) four of his five convictions should have merged because they were based on the same underlying conduct; and (3) his presentence report does not reflect changes the trial court made at sentencing. The State concedes error on all three of these issues. We have independently reviewed the record, and we find the State’s concessions to be well-founded.<sup>3</sup> We accordingly remand

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<sup>1</sup> AS 11.41.210(a)(1), AS 11.41.220(a)(1)(A), AS 11.41.220(a)(1)(B), AS 11.41-.230(a)(1), and AS 11.41.230(a)(3), respectively.

<sup>2</sup> AS 11.41.220(a)(2).

<sup>3</sup> See *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess whether a concession of error “is supported by the record on appeal and has legal foundation”).

this case for the trial court to correct the judgment, merge the convictions that were based on the same underlying conduct, and issue an amended presentence report.<sup>4</sup>

*Background facts and procedural history*

During the summer of 2016, Kyle Mead captained a commercial fishing vessel in the waters near Kodiak Island. At the beginning of the fishing season, Mead hired Richard Bender as a member of his crew. Along with two other crew members, Mead and Bender fished together starting in June and continuing through late August. According to Bender, Mead was prone to periodic “rants,” which escalated over the course of the summer to include threats to “kick [Bender’s] ass,” shoot Bender, or put Bender in a crab pot and throw him overboard while at sea, which Mead referred to as “suitcasing.” Mead denied ever threatening Bender but admitted to being dissatisfied with Bender’s work performance. Another crew member described the relationship between Mead and Bender as “unhealthy, to say the least.”

In late August, there was a physical altercation between the two men. Mead fired Bender and confined him to his bunk, but shortly thereafter apologized and invited Bender to continue fishing with him. Later that day, however, while the ship was still at sea, Bender declined to perform any additional work. A second physical altercation then ensued between Bender and Mead, although the men disagreed as to who first resorted to violence. According to Bender, Mead punched him and strangled him after Bender announced that he no longer wished to work for Mead. By contrast, Mead claimed that Bender had strangled *him* after Mead attempted to wake Bender from a nap, and that Mead acted in self-defense in subsequently hitting Bender.

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<sup>4</sup> Resentencing is not necessary because the trial court imposed jail time only for Mead’s second-degree assault conviction. It imposed no jail time for the remaining counts.

One of the third-degree assault charges against Mead alleged that he had made repeated threats to cause death or serious physical injury to Bender, with intent to place Bender in fear of death or serious physical injury.<sup>5</sup> During the jury’s deliberations, the jury expressed considerable confusion about the elements of this offense, asking four separate questions about the instructions regarding this charge.

At the close of its deliberations, the jury rejected Mead’s self-defense claim and convicted him of assaulting Bender under five different theories: three theories of physical assault, one theory of fear assault, and one assault based on repeated threats of death or serious physical injury.

*The trial court erred in instructing the jury on a dictionary definition of “threat,” rather than the statutory and constitutionally mandated definition*

As we have explained, one of the third-degree assault charges against Mead alleged that, with intent to place Bender in fear of death or serious physical injury, Mead “made repeated threats to cause death or serious physical injury” to Bender.<sup>6</sup> Under AS 11.81.900(b)(65), a “threat” is defined, in relevant part, as “a menace, however communicated.”<sup>7</sup> In addition, we have previously held that, because a conviction for assault under a repeated-threats theory potentially implicates a defendant’s constitutionally protected right to free speech, the State must prove that the defendant’s conduct amounted to a “true threat,” *i.e.*, a threat so “unequivocal, unconditional,

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<sup>5</sup> AS 11.41.220(a)(2).

<sup>6</sup> *Id.*

<sup>7</sup> At the time of Mead’s offense, this definition was contained in AS 11.81.900(b)(63). Although the subsection has since been renumbered, the definition is otherwise unchanged.

immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.”<sup>8</sup>

The trial court did not provide these definitions to the jury. Initially, the trial court did not provide *any* definition of “threat” to the jury. During deliberations, however, the jury asked for a “legal definition” of the term “threat.” In discussing the jury’s request, the trial court apparently overlooked both the statutory definition and the definition of “true threat” quoted above. Although the prosecutor briefly referenced the statutory definition, both he and Mead’s attorney ultimately agreed that the trial court should instead instruct the jury in accordance with the following dictionary definition of “threat:” “(1) an expression of an intention to inflict something harmful, (2) an indication of impending danger or harm, (3) one regarded as a possible danger; menace.” With the parties’ agreement, the judge so instructed the jury.

Shortly thereafter, the jurors asked for clarification of this definition — specifically, whether they needed to find that all three prongs of the definition applied, or if a single part of the definition was sufficient. Again, with the consent of the parties, the judge replied that the jury need find only one of the three potential definitions applied, but that the jurors had to be unanimous as to whichever part of the definition they believed applied.

On appeal, Mead argues that the trial court’s answers to these jury questions were legally deficient. Specifically, he argues that the answers failed to inform the jury of the requirements of imminence, specificity, and unequivocalness that constitute a “true threat.” For instance, Mead argues that while the second portion of the definition clearly conveys the imminence requirement, the third portion of the definition would have

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<sup>8</sup> *Powell v. State*, 12 P.3d 1187, 1190-91 (Alaska App. 2000) (quoting *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976)).

allowed the jury to convict after finding only that Mead’s statements related to a “possible danger.”

As Mead admits, however, he did not object to this definition in the trial court. Thus, to obtain relief, Mead must establish plain error: error that (1) was not the result of intelligent waiver or a tactical decision not to object; (2) was obvious or apparent to any competent judge or lawyer; (3) affected substantial rights; and (4) was prejudicial.<sup>9</sup>

We conclude that Mead has met this burden. The error in this case was obvious. The legal definition of “threat” is not debatable — it is clearly and unequivocally set out in statute and by established case law.<sup>10</sup> In fact, the prosecutor alerted the judge to the statutory definition of threat when the parties were discussing the proper response to the jury question. Neither the trial judge nor the parties were free to alter by stipulation the statutory definition of an essential element of an offense.

While we acknowledge the role the parties’ agreement played in the error that occurred here, it is ultimately the trial judge’s duty to accurately “instruct the jurors on all matters of law that they need to make their decision.”<sup>11</sup> This duty is only heightened under the circumstances of Mead’s case, where the jurors asked multiple questions about the legal definition of “threat,” thus demonstrating confusion about one of the essential elements of the offense and the importance of this definition to their deliberations.<sup>12</sup>

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<sup>9</sup> *Adams v. State*, 261 P.3d 758, 764, 773 (Alaska 2011).

<sup>10</sup> AS 11.81.900(b)(65); *Powell*, 12 P.3d at 1190-91.

<sup>11</sup> *Roth v. State*, 329 P.3d 1023, 1026 (Alaska App. 2014).

<sup>12</sup> *See Des Jardins v. State*, 551 P.2d 181, 190 (Alaska 1976) (“When a jury makes  
(continued...)”)

Moreover, the error was prejudicial. The question of what Mead said to Bender, and whether those statements constituted threats of death or serious physical injury, was contested at trial. The answer to this question was not only crucial to determining Mead's guilt on this third-degree assault charge, but also potentially implicated his constitutionally protected right to free speech.<sup>13</sup> During the course of deliberations, the jury asked multiple questions about how to determine whether Mead's statements constituted a threat. Given the apparent centrality of the definition to the jury's verdict, we conclude that the trial court's erroneous reliance on a dictionary definition of "threat," and its failure to provide the jury with the correct legal definition, requires reversal of Mead's conviction on the third-degree assault charge related to repeated threats.<sup>14</sup>

*The trial court must correct the clerical error in the judgment with regard to Count III*

The State originally charged Mead with six assault offenses, including three theories of third-degree assault: that Mead (1) placed Bender in fear of physical injury by means of a dangerous instrument; (2) caused physical injury by means of a dangerous

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<sup>12</sup> (...continued)  
explicit its difficulties, a trial judge should clear them away with concrete accuracy.”).

<sup>13</sup> See *Powell*, 12 P.3d at 1191.

<sup>14</sup> Mead raises a second plain error claim with respect to the trial court's response to a separate, but related, jury question regarding how to assess whether Mead's statements amount to legal threats. Because we conclude that we must reverse Mead's conviction on this count for the reasons explained above, we do not reach the merits of Mead's second plain error claim.

instrument; and (3) made repeated threats to inflict death or serious physical injury on Bender, with intent to place Bender in fear.<sup>15</sup>

Mead proceeded to trial on all six offenses. Prior to submitting the case to the jury, however, Mead moved to dismiss Count III, *i.e.*, the third-degree assault charge for placing Bender in fear by means of a dangerous instrument. The State did not oppose Mead’s motion, and the trial court subsequently dismissed Count III. The jury convicted Mead of all remaining counts.

Mead’s judgment, however, mistakenly states that he was convicted of the fear assault in Count III, and that Count IV — the count alleging repeated threats — was dismissed. Both parties agree this was error. We have independently reviewed the record, and we too agree that the judgment does not accurately reflect Mead’s convictions.<sup>16</sup>

We therefore remand this case with directions for the trial court to amend the judgment to properly reflect the dismissal of the fear assault in Count III.<sup>17</sup>

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<sup>15</sup> AS 11.41.220(a)(1)(A), AS 11.41.220(a)(1)(B), and AS 11.41.220(a)(2), respectively.

<sup>16</sup> *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972). The State asserts that the judgment inaccurately describes two additional convictions. But the State’s argument is premised on a misunderstanding of the order in which the judgment lists Mead’s convictions. The judgment orders the convictions according to the charge tracking number, or “CTN,” associated with each offense — a designation different than the numbered counts presented to the jury. Having reviewed the record, we conclude that the only error in the judgment is the one Mead identified, *i.e.*, transposing the outcome of Count III (CTN 002) with that of Count IV (CTN 003).

<sup>17</sup> *See Alaska R. Crim. P. 36; Alaska R. App. P. 519.*



*Mead's convictions for third-degree injury assault and both fourth-degree assaults must merge with his conviction for second-degree assault*

In closing argument, the prosecutor told the jury that the second-degree assault charge for intentionally injuring Bender, and the third-degree assault charge for recklessly injuring Bender, were based on “the same behavior,” *i.e.*, placing Bender in a choke hold. Similarly, the prosecutor told the jury that it could rely on this same behavior to convict Mead of both counts of fourth-degree assault.

On appeal, Mead argues that because these four offenses were based on the same underlying conduct, the verdicts must merge into a single conviction for second-degree assault. The State agrees with Mead’s analysis. Having independently reviewed the record, we agree with the parties that, on remand, the trial court must amend Mead’s judgment to reflect the fact that the jury’s verdicts for third-degree physical injury assault and both counts of fourth-degree assault merge with his conviction for second-degree assault.<sup>18</sup>

*The trial court must correct the presentence report*

Finally, Mead notes that the trial court made several changes and redactions to his presentence report at the sentencing hearing. As the State concedes, the written presentence report does not reflect the trial court’s verbal modifications.

We have independently reviewed the record, and we again agree with the State’s concession.<sup>19</sup> In accordance with Alaska Criminal Rule 32.1(f)(5), the trial court

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<sup>18</sup> See *Marks*, 496 P.2d at 67-68; *Cronce v. State*, 216 P.3d 568, 570 (Alaska App. 2009).

<sup>19</sup> See *Marks*, 496 P.2d at 67-68.

must amend the written presentence report to incorporate the changes made at sentencing.<sup>20</sup>

### *Conclusion*

For the reasons explained in this opinion, we REVERSE Mead's conviction for third-degree assault based on repeated threats. We REMAND Mead's case to the trial court for retrial on this charge, as well as to correct the clerical error in the judgment, to merge the convictions for fourth-degree assault and the third-degree injury assault with the conviction for second-degree assault, and to modify the written presentence report to reflect the changes made at sentencing.

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<sup>20</sup> See *Davison v. State*, 307 P.3d 1, 3 (Alaska App. 2013).