

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

DARREN LEONARD EDWIN,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12926
Trial Court No. 4FA-16-00829 CR

MEMORANDUM OPINION

No. 6928 — March 17, 2021

Appeal from the Superior Court, Fourth Judicial District,
Fairbanks, Matthew C. Christian, Judge.

Appearances: Brooke Berens, Assistant Public Advocate, and
James Stinson, Public Advocate, 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 ALLARD.

Darren Leonard Edwin was convicted, following a jury trial, of first-degree robbery and concealment of merchandise.¹ Edwin raises three claims of error on appeal.

¹ AS 11.41.500(a)(2) and AS 11.46.220(c)(2)(B), respectively.

First, Edwin argues that there was insufficient evidence to convict him of first-degree robbery. For the reasons explained here, we find no merit to this claim.

Next, Edwin argues that the superior court committed plain error when it failed to *sua sponte* intervene to correct several improper statements made by the prosecutor during closing arguments. Although we agree with Edwin that the prosecutor made improper statements, we do not find that the comments rise to the level of plain error.

Lastly, Edwin argues that the trial court erred in failing to *sua sponte* find the statutory mitigating factor that Edwin's conduct was "among the least serious conduct included in the definition of the offense" of first-degree robbery.² We agree with Edwin that the record supports such a finding.

Accordingly, we affirm Edwin's convictions, but we remand his case to the superior court for application of the statutory mitigator under AS 12.55.155(d)(9) and resentencing, as appropriate.

Background facts

In April 2016, Edwin walked into a small, local convenience store in Fairbanks that also sold liquor. Once there, Edwin put a bottle of vodka in his pants and then took a second bottle off the shelf. The store's manager, Angela Washington, observed Edwin conceal the liquor on the store's security footage, and she confronted him before he left the store.

Edwin refused to put the liquor back. Instead, he reached into his coat pocket and pulled out a can of bear spray. Edwin pointed the can of bear spray at

² See AS 12.55.155(d)(9).

Washington with his finger on the trigger and threatened to use it on her if she tried to take the bottles from him.

After brandishing the bear spray, Edwin moved toward the store's exit. Washington's husband, Victor, shut and blocked the exit door and asked Edwin to return the bottles of liquor. Edwin handed the bottles to Victor but was still holding the can of bear spray in his hand.

At this time, another customer entered the store, Isaac Hairston, who was familiar with the Washingtons and worked at the barbershop next door. Hairston was also familiar with Edwin and, upon seeing the commotion, immediately restrained Edwin and took him out of the store. During this altercation, the bear spray deployed and got on Hairston's face and hands. Washington then called the police, and Edwin was arrested and charged with robbery and concealment of merchandise.

Why we conclude that there was sufficient evidence to convict Edwin of first-degree robbery

On appeal, Edwin argues that the State presented insufficient evidence of first-degree robbery because, according to Edwin, the State had to prove that Edwin "used" the bear spray during the robbery, or in immediate flight thereafter, in order to convict him of first-degree robbery. Edwin acknowledges that he threatened Angela Washington with the bear spray, but he argues that is not enough. According to Edwin, the State was required to show that Edwin actually deployed the bear spray in order to convict him of first-degree robbery.

We find no merit to this argument. To convict Edwin of first-degree robbery, the State was required to prove, beyond a reasonable doubt, that Edwin committed second-degree robbery and that, in the course of committing that robbery or in immediate flight thereafter, Edwin "use[d] or attempt[ed] to use a dangerous

instrument or defensive weapon *or represent[ed] by words or other conduct that . . . [he was] armed with a dangerous instrument or a defensive weapon.*”³

Alaska Statute 11.81.900(b)(20) defines “defensive weapon” as “an electric stun gun, or a device to dispense mace or a similar chemical agent, that is not designed to cause death or serious physical injury.” The parties agree that bear spray qualifies as a “defensive weapon” under this definition.

When we review a claim of insufficiency, we are required to view all the evidence presented at trial — and all reasonable inferences that can be drawn from that evidence — in the light most favorable to upholding the jury’s verdict.⁴ Here, the testimony at trial established that, when Washington walked toward Edwin to try to retrieve the liquor, Edwin reached into his jacket, pulled out a can of bear spray, and then held his finger on the trigger of the bear spray while directly warning Washington, “Get back. Get back or I’m going to spray you.” On appeal, Edwin attempts to distinguish between “threatened use” of the bear spray from actual “use” or “attempted use” of the bear spray. But, regardless of the merits of this argument, the fact remains that the evidence at trial was more than sufficient to show, beyond a reasonable doubt, that Edwin “represent[ed] by words or other conduct that . . . [he] was armed with . . . a defensive weapon.”⁵

Accordingly, we find no merit to Edwin’s claim that the evidence was insufficient to convict him of first-degree robbery.

³ AS 11.41.500(a)(2) (emphasis added); *see also* AS 11.41.510(a) (listing elements of second-degree robbery).

⁴ *Chaney v. State*, 478 P.3d 222, 226 (Alaska App. 2020) (citing *Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012)).

⁵ *See* AS 11.41.500(a)(2).

Why we conclude that the prosecutor's improper statements at closing did not amount to plain error

Edwin claims that the prosecutor made several improper statements during closing argument that prejudiced his right to a fair trial. Edwin's attorney did not object to any of these statements and Edwin must therefore show plain error on appeal. To show plain error, Edwin must show that the errors (1) were not the result of intelligent waiver or tactical decision not to object; (2) were obvious; (3) affected substantial rights; and (4) were prejudicial.⁶

During closing argument, the prosecutor stated, "As far as defense counsel's reiteration of the law to you, they conveniently glossed over the fact that simply being armed with a defensive weapon was enough to find the fourth prong of robbery in the [first] degree, okay?" Edwin contends that this statement unfairly disparaged the defense and misstated the law.

Edwin is correct that the prosecutor's description of the law was not quite accurate. Under AS 11.41.500(a)(1), a defendant is guilty of first-degree robbery if the defendant is armed with a *deadly* weapon, even if the defendant does not "represent[] by words or other conduct that either that person or another participant is so armed."⁷ This is not true, however, with dangerous instruments and defensive weapons. A defendant can only be convicted of first-degree robbery under AS 11.41.500(a)(2) if the defendant "uses or attempts to use" a dangerous instrument or a defensive weapon or if the defendant "represents by words or other conduct that either that person or another

⁶ See *Hess v. State*, 435 P.3d 876, 880 (Alaska 2018) (citing *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011)).

⁷ See AS 11.41.500(a)(1) (stating that a defendant is guilty of first-degree robbery if the defendant commits second-degree robbery, and, in the course of the robbery or in immediate flight thereafter, the defendant "is armed with a deadly weapon *or* represents by words or other conduct that either that person or another participant is so armed" (emphasis added)).

participant is armed with a dangerous instrument or a defensive weapon.” In other words, simply being armed with a dangerous instrument or a defensive weapon is not enough if the defendant has not otherwise communicated that fact to the victim.

The prosecutor was therefore not exactly correct when he asserted that being armed with a defensive weapon was enough to convict a defendant of first-degree robbery. But we do not find this misstatement of the law prejudicial in the context of this case. As just explained, it was essentially undisputed that Edwin represented to Washington that he had bear spray. Additionally, the jury was instructed on the correct law and is presumed to follow those instructions.⁸ And, except for this slight misstatement, the prosecutor’s descriptions of the law were accurate. Accordingly, we find no plain error in the superior court’s failure to *sua sponte* intervene to correct this slight misstatement of the law.

Edwin also argues that the prosecutor improperly vouched for Angela Washington, the State’s primary eyewitness, in his attempt to counter the defense’s argument that Washington was vindictively out to get Edwin because she had let an earlier shoplifter go. The prosecutor stated:

He talks about picking and choosing who she enforces the law against and then tries to portray him — portray her as a criminal because she picks and chooses. . . . She had every right to call it good and move on with her day. And she did. Does that look like a vindictive person to you? *It doesn’t seem vindictive to me.* I’d ask you to ask yourself that question. Is this somebody who’s now cooking up some type of scheme to trump up a charge against Mr. Edwin after she let the first person go? Come on.^[9]

⁸ See *Goldsbury v. State*, 342 P.3d 834, 839 & n.35 (Alaska 2015).

⁹ Emphasis added.

We agree with Edwin that the prosecutor should not have referred to his own opinion regarding Washington's lack of vindictiveness. But we also conclude that, in context, this was a minor error and primarily a problem with phrasing rather than an actual attempt to improperly vouch for a witness. And immediately after the comment, the prosecutor invited the jury to decide for itself whether it thought Washington was vindictive. Accordingly, we find that the statement does not amount to plain error, standing alone or in combination with the other statements.

Lastly, Edwin argues that the prosecutor engaged in improper witness counting. In response to the defense attorney's argument that the evidence was incomplete because it lacked surveillance footage, the prosecutor stated the following.

The State called seven witnesses. None of them would support that this man did not commit these crimes. . . . And the one witness they called had six prior crimes of dishonesty. . . . That's their one witness. . . . Folks, [we] rebutted the presumption that what was on that video would have benefitted him. We called seven witnesses that all offer[ed] some evidence of guilt in some way, shape, or form whether it's through corroboration of a location, whether it's through an eyewitness account of his conduct.

We agree with Edwin that this statement comes close to improper witness counting, and a curative instruction would have been proper if the argument had been objected to. But the jury essentially received such a curative instruction in their jury instructions, and the jury was therefore aware that it was not to decide the case simply

through the process of counting the number of witnesses on each side.¹⁰ Accordingly, we find no plain error.

Why we conclude that the superior court’s findings at sentencing support the legal conclusion that Edwin’s conduct was “among the least serious” conduct included in the definition of first-degree robbery

As a third felony offender, Edwin was subject to a presumptive range of 13 to 20 years’ imprisonment for the first-degree robbery conviction.¹¹ Edwin’s defense attorney did not file a sentence memorandum or give notice of any statutory mitigators that might apply.

At sentencing, the prosecutor acknowledged that Edwin’s conduct fell toward “the lower end” of first-degree robbery because the defensive weapon that was used was bear spray. The prosecutor therefore argued for a sentence of 14 years — a sentence at the low end of the presumptive range — noting that Edwin’s attorney had not argued for the “among the least serious” mitigator to apply.

¹⁰ Edwin’s jury was instructed as follows:

You are not bound to decide in conformity with the testimony of a greater number of witnesses, which does not convince you, as against the testimony of a lesser number of witnesses which appeals to your mind with more convincing force. Thus, you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not the relative number of witnesses, but the relative convincing power of the evidence.

This instruction closely follows Alaska Criminal Pattern Jury Instruction 1.13 (2011).

¹¹ See former AS 12.55.125(c)(4) (2016). Edwin had four prior felony convictions, including second-degree theft, first-degree burglary, felony DUI, and second-degree theft.

Edwin's defense attorney told the court:

I looked for mitigators. I could not find one that I thought would apply in my judgment to this case. The least serious mitigator[,] which everyone does have some concern about, at least in my opinion I juggled with that one. And I just didn't see it going for that. I just didn't see with the facts of the case and, you know, based on some research I did with the least serious mitigator that this would apply, at least in my sound opinion.

In his sentencing remarks, the sentencing judge noted that "this is not a typical classical robbery":

Mr. Edwin did not walk into Garden Island [Grocery], brandish the bear spray and spray someone in the face, then go get whatever he wanted, rather than the reverse. He went in, tried to get what he wanted, and when he got caught, tried to brandish it in an effort to get out. . . . He did not use a more dangerous weapon such as a knife or firearm[,] which would carry with it higher community condemnation as those are more — far more lethal weapons and not a nonlethal weapon such as a defensive spray.

The judge also found that Edwin's conduct "tilt[ed] toward the property end of a robbery offense [rather than] an assault end of a robbery offense."

Based on these findings, the judge found that a sentence at the lowest end of the presumptive range was appropriate, and he sentenced Edwin to 13 years to serve. However, the judge did not directly consider whether Edwin's conduct qualified for the "among the least serious" statutory mitigator under AS 12.55.155(d)(9). That section gives a sentencing court the authority to impose a sentence below the presumptive range if the court finds that "the conduct constituting the offense was among the least serious conduct included in the definition of the offense."

On appeal, Edwin argues that the superior court should have *sua sponte* found the "among the least serious" mitigator even though his defense attorney declined

to ask for it. We have previously held that when a sentencing judge sees potential mitigating factors in a presumptive sentencing case, the judge “must consider these factors even if the parties have not recognized their applicability or argued their importance.”¹²

“The existence or non-existence of an aggravating or mitigating factor is a mixed question of law and fact.”¹³ There is a two-step process to determine whether a defendant’s conduct is “among the least serious.”¹⁴ First, the court must make a factual finding regarding “the nature of the defendant’s conduct,” and second, the court must make a legal determination regarding “whether that conduct falls within the statutory standard of ‘among the least serious conduct within the definition of the offense.’”¹⁵ We review the court’s findings of fact under a clearly erroneous standard of review; however, we review *de novo* the legal question of whether those facts qualify for the statutory mitigator.¹⁶

Here, the sentencing court made numerous factual findings that strongly suggest that it believed that Edwin’s conduct fell at the very low end of conduct that qualifies for first-degree robbery. Indeed, in many ways, Edwin’s conduct resembled an aggravated form of shoplifting more than it did the classic first-degree robbery. The record shows that Edwin walked into an open liquor store and attempted to conceal a bottle of liquor or two. When confronted, Edwin pulled out a canister of bear spray from

¹² *Collins v. State*, 816 P.2d 1383, 1385 (Alaska App. 1991) (citing *Hartley v. State*, 653 P.2d 1052, 1055-56 (Alaska App. 1982)).

¹³ *Michael v. State*, 115 P.3d 517, 519 (Alaska 2005).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

his pocket and threatened to use it against the store manager. Although bear spray qualifies as a defensive weapon for purposes of the first-degree robbery statute, it is non-lethal and significantly less dangerous than the typical deadly weapon or dangerous instrument used in most first-degree robberies.¹⁷ The record also shows that, when the store manager's husband barred Edwin's exit, Edwin gave up the bottles of liquor without a struggle and without deploying the bear spray. It was only after he was placed in a defensive hold by the next-door barber, that the bear spray "went off."¹⁸

On appeal, the State argues that Edwin's prior convictions preclude a finding that Edwin's conduct was "among the least serious conduct included in the definition of the offense." We disagree. As we have previously explained, for purposes of AS 12.55.155(d)(9), the word "conduct" includes the defendant's mental state and motive, and the consequences (or potential consequences) of the defendant's actions.¹⁹ But it does not typically include consideration of prior convictions, except to the extent

¹⁷ Cf. *Parks v. State*, 731 P.2d 597, 598 (Alaska App. 1987) ("In determining whether conduct involved in a first-degree robbery is among the least serious within the definition of the offense, the sentencing court's primary focus must be on the extent of actual risk that was created by the use or threatened use of a dangerous instrument in the case before it."); see also *Whitescarver v. State*, 962 P.2d 192, 196 (Alaska App. 1998) ("The potential for physical harm is a more important factor in determining the seriousness of a robbery than is the amount of property taken.").

¹⁸ On appeal, Edwin asserts that the bear spray went off accidentally. At the time, however, Edwin told the police that he had sprayed the bear spray "in the air." The trial court did not make any factual findings resolving this discrepancy.

¹⁹ *Joseph v. State*, 315 P.3d 678, 684 (Alaska App. 2013); see also *McGee v. State*, 95 P.3d 945, 949 (Alaska App. 2004), *rev'd on other grounds*, *McGee v. State*, 162 P.3d 1251 (Alaska 2007); *Miller v. State*, 44 P.3d 157, 158 (Alaska App. 2002); *Martin v. State*, 973 P.2d 1151, 1155-56 (Alaska App. 1999); *Schuenemann v. State*, 781 P.2d 1005, 1007 (Alaska App. 1989).

that they may shed light on a defendant's mental state or motive.²⁰ Here, Edwin's prior felony convictions are primarily theft-related, which supports rather than undermines the trial court's finding that Edwin's conduct fell more on the "property end" of a robbery offense rather than the "assaultive end" typically associated with the crime of robbery.²¹

In sum, we agree with Edwin that both the record and the superior court's findings at sentencing support the legal conclusion that Edwin's conduct was "among the least serious conduct" included in the definition of first-degree robbery.²² Accordingly, it was error for the superior court to fail to recognize this statutory mitigator, notwithstanding the obvious incompetence of Edwin's defense attorney in failing to raise it. We note, however, that the weight to be given to this statutory mitigator still rests in the sound discretion of the superior court judge, who is best situated to determine the appropriate sentence under the *Chaney* criteria.²³ We therefore

²⁰ See *Dilts v. State*, 2015 WL 1393639, at *3 (Alaska App. Mar. 25, 2015) (unpublished); *Yagie v. State*, 2016 WL 1728696, at *1 (Alaska App. Apr. 27, 2016) (unpublished); cf. *Napayonak v. State*, 793 P.2d 1059, 1061 (Alaska App. 1990) (defendant's previous convictions for violent offenses did not bar application of AS 12.55.155(d)(9) to his new robbery conviction).

²¹ See *Degler v. State*, 741 P.2d 659, 662 (Alaska App. 1987) ("[R]obbery is essentially a crime against the person; it is not a property offense."); *Nell v. State*, 642 P.2d 1361, 1366 (Alaska App. 1982) ("From the face of the statute it is clear that the legislature, in passing this robbery statute, intended to emphasize the fact that robbery is a crime against the person and deemphasize the theft aspects of the offense."); see also *Lewis v. State*, 1986 WL 1165513, at *2 (Alaska App. Feb. 19, 1986) (unpublished) ("[R]obbery . . . ranks among the most serious of violent crimes . . .").

²² See AS 12.55.155(d)(9).

²³ See *Linn v. State*, 658 P.2d 150, 153 (Alaska App. 1983) (explaining that establishing the existence of aggravating or mitigating factors by clear and convincing evidence does not, standing alone, warrant adjustment of a presumptive term (quoting *Juneby v. State*, 641 P.2d (continued...))

express no opinion as to whether the finding of this statutory mitigator should affect Edwin's overall sentence.

Conclusion

For the reasons explained in this opinion, we AFFIRM Edwin's convictions but we REMAND his sentence to the superior court for application of the AS 12.55.155(d)(9) statutory mitigator and resentencing, as appropriate.

²³ (...continued)
823, 838 (Alaska App. 1982)); *see also State v. Chaney*, 477 P.2d 441, 443-44 (Alaska 1970).