

NOTICE

This is a summary disposition issued under Alaska Appellate Rule 214(a). Summary dispositions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DATEEN DUANE ARKELL,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13836
Trial Court No. 4GA-19-00038 CR

SUMMARY DISPOSITION

No. 0344 — September 13, 2023

Appeal from the Superior Court, Fourth Judicial District,
Nenana, Thomas I. Temple, Judge.

Appearances: Michael L. Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Heather Stenson, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Dateen Duane Arkell was convicted of third-degree fear assault, third-degree weapons misconduct, fourth-degree criminal mischief, and first-degree witness tampering after he grabbed his girlfriend's gun during an argument and then threw the

gun into her rear car windshield, breaking the glass, as she tried to drive away from him.¹

On appeal, Arkell argues that the court committed plain error when it failed to *sua sponte* instruct the jury that it needed to be unanimous as to which act — grabbing the gun or throwing it into the windshield — placed the victim in fear.² We reject this contention.

At trial, the victim testified that the time between the two acts was only about ten seconds. Under these circumstances, Arkell’s conduct would likely support only a single conviction for assault, in which case there was no requirement of factual unanimity.³ But even when two acts could each individually serve as the basis for a conviction, a factual unanimity instruction is not required when the State selects the individual act upon which it will rely.⁴ Here, the prosecutor clearly explained during closing argument that Arkell’s act of grabbing the gun was the basis of the third-degree assault charge.

The judgment of the superior court is therefore **AFFIRMED**.

¹ AS 11.41.220(a)(1)(A), AS 11.61.200(a)(1), AS 11.46.484(a)(1), and AS 11.56.540(a)(1), respectively.

² See *Taylor v. State*, 400 P.3d 130, 134 (Alaska App. 2017) (“[W]hen the State presents evidence that a defendant committed different acts that could each separately support a criminal conviction, the trial judge is required to instruct the jurors that, in order to return a verdict, they must reach unanimous agreement as to which of these acts the defendant committed.”).

³ See *S.R.D. v. State*, 820 P.2d 1088, 1092 (Alaska App. 1991) (explaining that “multiple blows struck in the course of a single, continuous criminal episode” generally constitute one assault).

⁴ See *Jackson v. State*, 342 P.3d 1254, 1259 (Alaska App. 2014).