IN THE COURT OF APPEALS OF THE STATE OF ALASKA

VIKTOR M. MALYK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11958 Trial Court No. 4DJ-12-012 CR MEMORANDUM OPINION ON REHEARING No. 6823 — September 18, 2019

Appeal from the Superior Court, Fourth Judicial District, Delta Junction, Douglas L. Blankenship, Judge.

Appearances: Renee McFarland, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Mannheimer, Senior Judge,[*] and Suddock, Senior Superior Court Judge.[*]

Judge MANNHEIMER.

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Viktor M. Malyk was convicted of two counts of second-degree sexual assault and one count of fourth-degree sexual abuse of a minor stemming from two incidents involving his 16-year-old niece. In our initial decision in this case, we affirmed Malyk's convictions. *See Malyk v. State*, unpublished, 2018 WL 6719694 (Alaska App. 2018).

One of the issues that we addressed in our decision was a flaw in the jury instruction defining the elements of second-degree sexual assault — a flaw that Malyk's attorney did not object to in the trial court. On appeal, Malyk claimed that this flaw in this jury instruction constituted plain error, and that this error required reversal of his sexual assault convictions.

We concluded that the flaw in the instruction was partially cured by other portions of the same instruction, and that any remaining lack of clarity was cured by the prosecutor's opening statement and her summation to the jury. In both of these statements to the jury, the prosecutor correctly described the elements of second-degree sexual assault (*i.e.*, the elements that the State was required to prove). *See Malyk*, 2018 WL 6719694 at *6–7.

After we issued our decision, Malyk filed a petition seeking rehearing of the jury instruction issue. In this petition, Malyk asserted that the flaw in the jury instruction was structural error — meaning that the error automatically required reversal of Malyk's sexual assault convictions, without regard to whether the error was cured by other portions of the jury instruction and by the prosecutor's statements to the jury. In support of this structural error argument, Malyk relied on the supreme court's then-recently issued opinion in *Jordan v. State*, 420 P.3d 1143, 1155–56 (Alaska 2018).

In response to Malyk's petition for rehearing, we directed the parties to file supplemental briefs on the question of whether the flaw in the jury instruction was structural error. We have now received and considered those briefs.

For the reasons explained in this opinion, we conclude that the error in the jury instruction was not structural error. We therefore again affirm Malyk's sexual assault convictions.

The flaw in the jury instruction

To establish the crime of second-degree sexual assault as defined in AS 11.41.420(a)(1), the State must prove that the defendant engaged in sexual contact with another person, and that this sexual contact occurred "without consent" — which means that the victim was not willing to engage in the sexual activity, and that the victim was coerced by force or by the threat of force. [1]

At Malyk's trial, the jury was correctly instructed on the meaning of "without consent". But the instruction on the elements of second-degree sexual assault was flawed.

This jury instruction began correctly, by telling the jurors that "a person commits the crime of sexual assault in the second degree if the person knowingly engages in sexual contact without the consent of that person."

But then, when the instruction listed each element of the offense separately, the list of elements failed to explicitly reiterate the requirement that the sexual contact occurred without Malyk's niece's consent. Instead, the instruction only referred to this requirement tangentially, by telling the jurors that the State had to prove that Malyk "recklessly disregarded [his niece's] lack of consent."

Here is how the instruction listed the elements of the crime:

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[1] *Milligan v. State*, 286 P.3d 1065, 1070–71 (Alaska App. 2012).

> First, that the event in question occurred at or near Delta Junction, in the Fourth Judicial District, ... on or between February 1, 2012 and February 11, 2012;
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> Second, that Viktor M. Malyk knowingly engaged in sexual contact with [his niece]; and
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> Third, that Viktor M. Malyk recklessly disregarded [his niece's] lack of consent.

In between the "second" and "third" elements listed here, the instruction should have explicitly listed the requirement that the sexual contact occurred without the consent of his niece.

Neither party brought this error to the judge's attention, but on appeal Malyk argued that this flaw in the jury instruction constituted plain error.

Our initial decision on this issue

In our initial opinion in this case, we rejected Malyk's claim of plain error. *See Malyk*, 2018 WL 6719694 at *7.

First, we noted that the jury instruction did not totally ignore the element of "without consent". In fact, the first sentence of the jury instruction told the jurors that a person commits the crime of second-degree sexual assault "if the person knowingly engages in sexual contact *without the consent of that person*." The problem was that the instruction then failed to explicitly reiterate this "without consent" element of the offense when the instruction listed each element separately.

The instruction *did*, however, tell the jurors that the State had to prove that Malyk "recklessly disregarded [his niece's] lack of consent" — which implied that the

jurors had to find that the sexual contact occurred without his niece's consent. And the jury was correctly instructed on the legal meaning of "without consent".

To the extent that the jury instruction lacked clarity on this point, we concluded that this flaw was rectified by the prosecutor's explanation of this charge during her statements to the jury.

Both in her opening statement and in her summation to the jury at the close of the trial, the prosecutor explicitly told the jurors that, with regard to the charge of second-degree sexual assault, the State was required to prove that the sexual activity occurred "without consent".

And in her summation, the prosecutor explained why she believed that the evidence established the coercion necessary to prove the element of "without consent":

> *Prosecutor*: The next thing you have to find with regard to Counts I and II is that he acted without consent. That this wasn't something that [Malyk's niece] said was okay, it wasn't something that — her will was overborne by his actions and his words.
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> And so what do we have [on] that? Well, we've got his written statement. He says, I did it without consent. She says she was afraid. She says that she didn't — was afraid to hit him because he was drunk and she was afraid he was going to hurt her. That's "without consent". She says that when he was licking her "pee", he was hanging on to her. That's "without consent".

Under Alaska law, the parties' arguments to the jury can cure defects or ambiguities in the jury instructions.[2] In Malyk's case, we concluded that the flaw in the

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[2] *See Norris v. State*, 857 P.2d 349, 355 (Alaska App. 1993); *O'Brannon v. State*, 812 P.2d 222, 229 (Alaska App. 1991).

jury instruction on the elements of second-degree sexual assault was cured by the prosecutor's repeated statements that the State was required to prove that Malyk's sexual contact with his niece was "without consent".

Malyk's current argument that the flaw in the jury instruction constituted structural error

As we have explained, Malyk now contends that the error in the jury instruction was structural error — that the error required automatic reversal of Malyk's sexual assault convictions, and that this Court was wrong to analyze the record to see whether there was any reasonable possibility that the error in the instruction affected the jury's verdicts.

In support of his structural error argument, Malyk relies primarily on the Alaska Supreme Court's decision in *Jordan v. State*, 420 P.3d 1143 (Alaska 2018).

The defendant in *Jordan* was charged with possessing four ounces or more of marijuana in his home. At trial, Jordan's defense was that he reasonably believed that his marijuana weighed less than four ounces. The trial judge erroneously concluded that this was not a valid defense to the charge. Consequently, the judge refused to instruct the jury on this defense, and the judge refused to let Jordan testify about why he believed that his marijuana weighed less than four ounces. [3]

Thus, as our supreme court put it, "the jury was not informed that [Jordan's] reasonableness was an issue", and "the jury had no opportunity to decide ... whether [Jordan's] defense was a reasonable one". [4]

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[3] *Jordan*, 420 P.3d at 1146–47.

[4] *Id.* at 1156.

In these circumstances, the supreme court held, the trial judge's refusal to instruct the jurors on this contested element of the offense was a structural error — *i.e.*, an error that automatically required reversal of Jordan's conviction. [5]

We do not read *Jordan* as requiring automatic reversal of a criminal conviction whenever there is some flaw in the jury instruction on the elements of the crime. Even though the jury instruction on second-degree sexual assault was flawed, Malyk's case does not present the kind of structural error that was found in *Jordan*.

Jordan involved a situation where the defendant was precluded from presenting his defense. The trial judge refused to instruct the jury that it was a defense if Jordan reasonably believed that his marijuana weighed less than four ounces, and the judge refused to let Jordan testify in support of that defense.

In Malyk's case, on the other hand, even though there was a flaw in the jury instruction on second-degree sexual assault, the instruction did refer to the requirement of "without consent", and the prosecutor at Malyk's trial expressly and repeatedly told the jury that this was a necessary element of the State's proof.

Moreover, the flaw in the jury instruction did not prevent Malyk from presenting his chosen defense to the sexual assault charges. As we explained in our initial decision in this case, Malyk's defense did not hinge on whether the sexual contact with his niece was "without consent" (*i.e.*, whether the sexual contact was coerced). Rather, Malyk's attorney argued that Malyk had never knowingly engaged in sexual contact with his niece at all.

Malyk's attorney conceded that Malyk had done something inappropriate with his niece, but the defense attorney argued that Malyk's inappropriate behavior did not fit the statutory definition of sexual contact — *i.e.*, a knowing touching of his niece's

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[5] *Id.* at 1155–56.

genitals, breasts, or anus.[6] In the defense attorney's words, Malyk "kissed [his niece] below the bellybutton, but ... not actually on her private parts."

The defense attorney pointed out that Malyk's niece had sometimes been vague in her description of precisely where Malyk touched or licked her. The niece used the word "pee" to describe a person's private parts — and, during cross-examination, the niece appeared to say that she used the word "pee" to describe any portion of the body that is normally covered by underwear. The defense attorney also reminded the jury that Malyk's niece herself acknowledged that Malyk's first touch (under the blanket in the living room) appeared to have been accidental rather than knowing.

The defense attorney argued that, given all the circumstances, there was reasonable doubt as to whether Malyk's inappropriate conduct ever rose to the level of a crime — that even though Malyk might have engaged in some "inappropriate" touching of his niece, the State had nevertheless failed to prove beyond a reasonable doubt that any of this touching fit the legal definition of sexual contact.

Thus, unlike the defendant in *Jordan*, Malyk was allowed to present his chosen defense — and despite the flaw in the jury instruction, Malyk's jury was allowed to fully consider that defense.

We addressed and rejected a similar claim of plain error in *Brown v. State*, 435 P.3d 989 (Alaska App. 2018). The defendant in *Brown* was charged with criminal non-support of his children. By mistake, the jury instructions on the elements of this crime failed to expressly state that the government was required to prove that the defendant did not, in fact, pay his child support.[7]

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[6] *See* AS 11.81.900(b)(60)(A).

[7] *Brown*, 435 P.3d at 991.

Nevertheless, the jury instructions did refer to this element of the State's proof: the jury was told that the State had to prove that "Brown's failure to provide support for his children was knowing" and that "Brown's failure to provide support was without lawful excuse." Furthermore, the fact that Brown failed to pay his child support was uncontested. Brown's attorney affirmatively conceded that Brown had not paid his child support. Brown's entire defense was that he lacked the money to pay the child support despite his reasonable, good-faith efforts. [8]

Thus, unlike the defendant in *Jordan*, Brown was allowed to present his chosen defense, and the jury instructions allowed the jury to fully consider that defense. For these reasons, we concluded that the flaw in the jury instructions in Brown's case did not constitute structural error. [9]

We reach the same conclusion in Malyk's case.

Conclusion

For the reasons explained here, as well as the reasons explained in our previous decision in this case, the judgement of the superior court is AFFIRMED.

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[8] *Id.* at 991–92.

[9] *Id.* at 992.