

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

LLOYD WILLIAM DAVIS JR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12048
Trial Court No. 3NA-11-00240 CR

MEMORANDUM OPINION

No. 6802 — June 26, 2019

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

Appearances: Andrew Steiner, Attorney at Law, Bend, Oregon
(opening brief), and Jane Martinez, Law Office of Jane B.
Martinez, LLC, Anchorage (reply brief), both under contract
with the Office of Public Advocacy, Anchorage, for the
Appellant. Elizabeth T. Burke, Assistant Attorney General,
Office of Criminal Appeals, Anchorage, and Jahna Lindemuth,
Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Suddock,
Senior Superior Court Judge.*

Judge SUDDOCK.

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

Lloyd William Davis appeals his conviction and sentence for kidnapping. He raises six claims on appeal.

First, Davis contends that at the outset of his trial, the prosecutor committed to pursue only one of the two theories of kidnapping for which Davis had been indicted, only to renege on this commitment late in the trial, thereby prejudicing Davis. But Davis did not argue this theory of prejudice to the trial judge, and has therefore not preserved this claim for appeal. In any event, we conclude that even if it was error for the judge to allow the prosecutor to change course in this way, any error was harmless.

Second, Davis argues that the evidence presented at his trial was not legally sufficient to support his kidnapping conviction, because the State failed to present evidence that Davis's restraint of the victim exceeded the type of restraint inherent in Davis's assault of the victim. We conclude that the evidence supports a finding that Davis subjected the victim to a restraint exceeding that inherent in the assault.

Third, Davis argues that the trial judge committed plain error by failing to require the jurors to unanimously agree on the precise act that constituted the "restraint" of the victim. We conclude that jury unanimity on a single act was not required.

Fourth, Davis argues that he should have been convicted of a lesser classification of kidnapping because he safely released his victim. But based on the evidence, the trier of fact could reasonably reject this claim.

Fifth, Davis argues that the State failed to timely disclose some of the victim's medical records. The judge found no prejudice, and the record supports the judge's finding.

Sixth, Davis argues that the sentencing judge erred by rejecting a proposed mitigating factor at sentencing. But kidnapping is an unclassified felony; the judge's sentencing authority for this crime is not affected by the existence or absence of the

aggravating and mitigating factors codified in AS 12.55.155(c) and (d). Davis's claim is therefore moot.

Underlying facts

In 2011, Brandon Reedy and his cousin were working as commercial fishers. In late August of that year, Reedy's boat was docked in Chignik Bay, and Reedy and his cousin decided to spend the evening socializing at their captain's house. Afterwards, Reedy returned by himself to his boat to sleep.

Reedy was soon awakened by Davis and two other men, all of whom worked on another fishing boat. Davis was apparently angry because Reedy's cousin had stolen an iPod from him. The men pinned Reedy to his bunk, and they punched, slapped, and kicked him for about fifteen minutes. During this time, they threatened to rape and kill Reedy.

Eventually, they took Reedy out to the dock and made him remove his shirt. One of the men tied a rope into a noose, which they tightened around Reedy's neck. The men then pulled down Reedy's pants and underwear. One man stood behind the naked Reedy, pantomiming a rape; he then burned Reedy's buttocks and penis with a cigarette. The men reiterated that they were going to rape and kill Reedy, and they repeatedly tightened the noose around his neck. Reedy, struggling to breathe, thought he was going to die.

The men ultimately removed the noose and allowed Reedy to dress himself. They then said that they intended to beat up Reedy's cousin, presumably in retaliation for stealing the iPod. When Reedy revealed that his cousin was sleeping at their captain's house, the men forced Reedy to walk the three-quarters of a mile to the house. This walk took between fifteen and twenty minutes — and, during that time, the three

men continued to hit and threaten Reedy. One of the men carried the noose, and Reedy feared serious harm if he tried to escape.

Once they arrived at the captain's house, the men ordered Reedy to go into the house to lure his cousin outside so they could "beat the crap out of him." They told Reedy that if he did not comply, they would kill him, or at least subject him to an assault "ten times worse" than that already inflicted.

But as soon as Reedy entered the house, he locked the door and awakened the captain. The two called the police, and a village public safety officer arrived a short time later. Davis and his two friends had by then departed, but only after damaging an ATV that was parked outside the house.

When a health aide examined Reedy, she observed widespread injuries, including lumps on his head, significant damage to the left side of his face and left ear, injuries on his neck consistent with strangulation, and a red mark on Reedy's penis consistent with a cigarette burn. And Reedy eventually underwent two surgeries to repair an injury to his shoulder.

Davis was arrested and indicted on charges of first-degree burglary (for entering the boat to commit a crime), second-degree assault, kidnapping, and third-degree criminal mischief (for damaging the ATV). He was tried jointly with one of the other perpetrators. A jury found both men guilty of the first three crimes and of the lesser included offense of fourth-degree criminal mischief for damaging the ATV.

Davis now appeals his kidnapping conviction and his sentence.

Davis's contention that the prosecutor improperly amended the State's theory of kidnapping late in Davis's trial

Davis was indicted for kidnapping under AS 11.41.300(a)(1)(C). Under this provision of the kidnapping statute, a person commits the crime of kidnapping if they

restrain another person with intent to “inflict physical injury upon” or to “sexually assault” the restrained person or if they restrain another person simply with the intent to place the restrained person “in apprehension” that they or any other person “will be subjected to serious physical injury or sexual assault.”

Before jury selection began, the prosecutor told the judge that “this [was]n’t a sexual assault case,” and that therefore jury selection should not be expected to take as long as it would in a prosecution for sexual assault.

Later, the charges against Davis were read to the potential jurors — as well as the language of the kidnapping statute that we just quoted. The jurors were then asked if there was any reason why they would have trouble sitting on Davis’s jury.

When two of the prospective jurors indicated that they might have difficulty impartially evaluating a case that involved sexual assault, the trial judge, relying on the prosecutor’s earlier remark, told one prospective juror that Davis’s case would not involve sexual assault: “The State’s theory is not going to be that there was sexual assault, or anything like that. It’s going to be other theories. You won’t hear any evidence of sexual assault, and you wouldn’t need to deliberate and discuss that either.”

The trial judge’s comment prompted Davis’s co-defendant’s attorney to ask, out of the presence of the jury, whether the prosecutor was “waiving the theory [that] the kidnapping regarded [a] threat of sexual injury or sexual assault.” The judge then asked the prosecutor to clarify the State’s position. The prosecutor responded that, while she intended to introduce evidence that the assailants had threatened to rape Reedy, to prove the kidnapping charge she would rely solely on the theory that the men placed Reedy in fear of physical rather than sexual assault:

The Court: Are you going to present evidence that . . . Mr. Reedy was in fear of sexual assault? I got the impression that that wasn’t the State’s theory of how the defendants committed the crimes

....

Prosecutor: Well, Your Honor, there is behavior that the victim has alleged to have happened that I believe constitutes third-degree sexual assault. . . . I'm not waiving the State's right to elicit that testimony, but I'm not going to be arguing that the defendants restrained [Reedy] with the intent to put him or a third person in fear of sexual assault.

....

[The State's theory of kidnapping] is that . . . the defendants restrained Mr. Reedy with the intent to inflict physical injury upon him.

During the State's case the prosecutor, as promised, presented evidence that Davis and his companions threatened to rape Reedy, that they placed a burning cigarette against his penis, and that they pantomimed raping him while he was restrained with a noose. Reedy testified that he feared a sexual assault. Davis's attorney did not object to any of this evidence.

After the parties rested, the judge and the attorneys discussed jury instructions. Based on the prosecutor's statement during voir dire that she was "not going to be arguing that [Davis and his companions] restrained [Reedy] with the intent to put him . . . in fear of sexual assault," Davis's co-defendant's attorney objected to any mention of sexual assault in the jury instructions on kidnapping.

The prosecutor then told the trial judge that she *would* be arguing that Davis and his companions committed kidnapping by placing Reedy in fear of sexual assault. Ultimately, the trial judge agreed to partially redact the kidnapping instruction — by removing the reference to an intent to *commit* sexual assault, but leaving in the reference to an intent to put Reedy *in apprehension of* sexual assault. The kidnapping instruction read:

To prove that [Davis] committed [the] crime [of kidnapping], the State must prove beyond a reasonable doubt [that]

(1) the defendant restrained Brandon Reedy; and

(2) the defendant intended to inflict physical injury upon Brandon Reedy or place him or a third person in apprehension that any person will be subjected to serious physical injury or sexual assault.

During her summation to the jury, the prosecutor argued that Davis committed kidnapping because he restrained Reedy with the intent to inflict physical injury *and* with the intent to place Reedy in fear of sexual assault.

On appeal, Davis asserts that the jury instruction on kidnapping improperly included a theory that the prosecutor explicitly disavowed during jury selection. Davis further asserts that his defense attorney formulated his trial strategy in reliance on the prosecutor's statement about the State's theory of the kidnapping charge, and that the interests of justice now require Davis to receive a new trial. But Davis did not argue this theory of prejudice to the trial judge (he instead argued that he had refrained from conducting voir dire regarding sexual assaults), and so he has not preserved it for appeal.

In any event, were we to reach this matter, we would find any error to be harmless. Even if the judge should not have allowed the prosecutor to backtrack on her early commitment to a single theory of the case, it is inconceivable that the prosecutor's change of course made any difference to the outcome of this case. That is, even if we assume that the jurors unanimously found that Davis acted with the intent to cause Reedy to fear that he would be sexually assaulted, there is no reasonable possibility that the jurors did not *also* unanimously find that Davis acted with the intent to inflict physical injury on Reedy. Accordingly, Davis was not prejudiced by any error that occurred.

Davis's claim that the evidence presented at his trial was not legally sufficient to support a finding that he and his companions "restrained" Reedy for purposes of the kidnapping statute

The evidence presented at Davis's trial clearly showed that Davis and his companions "restrained" Reedy in the everyday sense of this word. The three men pinned Reedy to his bunk and beat him for a quarter of an hour. They then took him onto the dock, where they placed a noose around his neck and continued to assault him. Then the men forced Reedy to walk almost a mile to his captain's house and tried to force him to lure his cousin out of the house so that Davis and his companions could beat up Reedy's cousin.

But under Alaska law, the "restraint" that is needed to support a conviction for kidnapping must exceed the amount of restraint that is incidental to the defendant's target crimes — in Davis's case, the target crime of assaulting Reedy. As we explained in *Alam v. State*, and again in *Hurd v. State*, in order to support a separate conviction for kidnapping, the defendant's restraint of the victim "[must] exceed, either temporally or spatially, the type or degree of restraint necessary to commit the target crime."¹

In *Hurd*, we set forth the factors that a jury must consider when it decides whether the defendant's restraint of the victim is sufficient to support a separate conviction for kidnapping:

(1) how long the victim was restrained; (2) if the victim was moved, how far the victim was moved and where the victim was taken; (3) whether, under the facts, the restraint exceeded what was necessary for commission of the defendant's target crime; (4) whether the restraint significantly increased the risk of harm to the victim beyond the risk of harm inherent in the target crime itself; and (5) whether the restraint had some

¹ *Hurd v. State*, 22 P.3d 12, 15 (Alaska App. 2001) (citing *Alam v. State*, 793 P.2d 1081, 1083-84 (Alaska App. 1990)).

independent purpose — *i.e.*, whether the restraint made it significantly easier for the defendant to commit the target crime or made it significantly easier for the defendant to escape detection.^[2]

At the same time, we rejected the suggestion that the defendant’s restraint of the victim had to be entirely separate from the defendant’s target crime. We held that “if the defendant’s restraint of a victim is significant enough, that restraint can constitute the independent crime of kidnapping even though the restraint might simply be part of the defendant’s plan for committing the target crime.”³

Davis now argues that, during the prosecutor’s final argument, she described two separate acts constituting restraint of Reedy: the events on the boat and the dock, and the forced marching of Reedy to the captain’s house. Because of the prosecutor’s argument, Davis argues, the judge was required to instruct the jury *sua sponte* that it must unanimously agree on whether at least one of these acts constituted the *actus reus* of kidnapping.

We disagree with the underlying premise of Davis’s arguments: his assumption that the jury was required to divide the episode into separate, individual acts of restraint, and then to decide whether any of these acts, considered individually, would support a kidnapping conviction.

Davis’s proposed approach is fundamentally at odds with the test that we adopted in *Hurd*. Under *Hurd*, the fact finder is directed to consider the totality of the encounter between the defendant and the victim when the fact finder evaluates whether

² *Hurd*, 22 P.3d at 19.

³ *Id.* at 18.

the defendant's restraint of the victim was legally sufficient to support a separate kidnapping conviction.⁴

As we noted in *Hurd*, the level of restraint can be sufficient to support a kidnapping conviction “even though the restraint might simply be part of the defendant’s plan for committing the target crime.”⁵ Thus, Alaska law does not require juries to individually examine each of the defendant’s acts, or every separate facet of the defendant’s restraint of the victim. Rather, as we explained in *Hurd*, the question is whether the totality of the defendant’s conduct, when analyzed under the *Hurd* factors, constituted a restraint that either temporally or spatially exceeded what was necessary to commit the defendant’s target assault.⁶

For these reasons, we reject Davis’s argument that the judge committed plain error by failing to instruct the jurors that they had to reach unanimous agreement as to the particular individual acts of restraint that Davis committed. No unanimous agreement was required on this matter.

And for these same reasons, we also reject Davis’s contention that he was entitled to a judgment of acquittal on the kidnapping charge. Viewing the evidence presented at Davis’s trial in the light most favorable to the jury’s verdict, that evidence was clearly sufficient to convince fair-minded jurors that the State had proved a degree of restraint that supported a separate kidnapping conviction.⁷

⁴ *See id.* at 19.

⁵ *Id.* at 18.

⁶ *Id.*

⁷ *See Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).

Davis's claim that he was entitled to a judgment of acquittal on the affirmative defense of "safe release of the victim"

Under Alaska law, the crime of kidnapping is normally an unclassified felony, but the crime is reduced to a class A felony if the defendant proves, by a preponderance of the evidence, the following affirmative defense codified in AS 11.41.300(d):

- that the defendant "voluntarily caused the release of the victim alive [and] in a safe place";
- that the release of the victim took place either before the defendant was arrested or within 24 hours thereafter; and
- that the defendant released the victim "without having caused serious physical injury to the victim" and "without having engaged in conduct described in AS 11.41.410(a), 11.41.420, 11.41.434, or 11.41.436" — in other words, without having committed first- or second-degree sexual assault or first- or second-degree sexual abuse of a minor.

Davis's jury was instructed on the affirmative defense of safe release. However, this defense played essentially no role at Davis's trial. Neither the prosecutor, nor Davis's attorney, nor Davis's co-defendant's attorney, made any mention of this defense when they delivered their closing arguments to the jury. At the end of their deliberations, the jury found Davis guilty of kidnapping, and rejected the affirmative defense of safe release.

The present issue on appeal arises because, in addition to asking to have the jury instructed on the affirmative defense of "safe release," Davis's co-defendant's attorney also asked the trial judge to grant a judgment of acquittal (essentially, a directed verdict) on this affirmative defense, a motion that Davis joined. In her motion, Davis's co-defendant's attorney contended that the defendants had proved this defense, given the lack of evidence presented as to any serious physical injury suffered by Reedy.

The judge denied the defense motion. On appeal Davis renews his argument that he was entitled to a judgment of acquittal of kidnapping as an unclassified felony based on this affirmative defense.

The question of the sufficiency of the evidence to support a particular verdict is a question of law.⁸ For this reason, regardless of the trial judge’s ruling or reasoning, we decide this issue de novo.

Here, viewing the evidence in the light most favorable to the jury’s verdict, there was ample reason to reject Davis’s proposed “safe release” defense. The jury could reasonably have found that Reedy’s assailants did not voluntarily release him in a safe place. According to the evidence, once Reedy and his captors arrived at the captain’s house, they ordered Reedy to go into the house and lure his cousin outside, so they could “beat the crap out of him.” The men told Reedy that if he did not obey, they would kill him, or at least assault him “ten times worse” than they already had.

Reasonable jurors could conclude that these circumstances did not constitute a “voluntary release” of Reedy — that instead, the men coerced him to enter the house under threat of injury. They departed, not because they had released Reedy, but because he defied their orders once he attained the relative safety of the house.

Moreover, the evidence (again, viewed in the light most favorable to the jury’s verdict) reasonably supported a finding that Reedy suffered serious physical injury to his shoulder while he was being assaulted by the three men.

For these reasons, reasonable jurors could conclude that Davis had failed to prove the affirmative defense of safe release by a preponderance of the evidence. Accordingly, Davis was not entitled to a judgment of acquittal based on this defense.

⁸ *Marshall v. Peter*, 377 P.3d 952, 956 (Alaska 2016).

Davis's claim that the State violated its pretrial discovery obligations by failing to disclose information about the treatment of Reedy's shoulder injury

One of the issues at Davis's trial was the extent of Reedy's injuries. Testimony revealed that, after the beatings, Reedy underwent two surgeries to repair an injury to his left shoulder.

During Reedy's trial testimony, he mentioned that his shoulder had been examined at the Alaska Native Medical Center (ANMC), a fact unknown to both the State and the defense. The prosecutor was able to quickly obtain the ANMC medical records, and the defense attorneys were able to review them before their cross-examination of Reedy. The defense attorneys subsequently obtained testimony from the doctor who examined Reedy at ANMC.

While the parties were discussing Reedy's visit to ANMC, the prosecutor mentioned that, despite several efforts, she had been unable to obtain a copy of additional medical records prepared by the surgeon who performed Reedy's second shoulder surgery. After Davis's trial was concluded, the prosecutor succeeded in obtaining those records and disclosed them to the defense.

Davis's co-defendant's attorney filed a motion, joined by Davis's attorney, seeking a new trial because of the late receipt of both sets of medical records. The defense attorneys argued that these medical records were essential to evaluating Reedy's claim that he had suffered significant injury to his shoulder — and that, because they had not received these records in time, they were unable to adequately investigate the matter, or to impeach Reedy's testimony regarding the timing and severity of that injury.

The trial judge denied the new-trial motion, primarily because the prosecutor could not have disclosed records that she did not know existed (*i.e.*, the ANMC records), nor could she disclose records that she was unable to obtain despite repeated efforts (*i.e.*, the records of Reedy's second shoulder surgery).

The judge also found that the defendants had failed to show that their defense was materially prejudiced by the late disclosure of these materials. The judge acknowledged that the medical materials were relevant to Reedy's trial testimony, but he concluded that these materials "had minimal exculpatory value," and that "similar evidence was already available [to the defense] during trial."

In sum, the judge found that the defense attorneys' lack of these materials did not materially limit the defense attorneys' cross-examination of Reedy, and that these materials "were unlikely to have led the jury to entertain a reasonable doubt about the defendants' guilt."

On appeal, Davis alleges that, prior to trial, either Reedy or his parents complained to the prosecutor that Reedy had sought treatment at ANMC, and that they were unsatisfied with this treatment. Davis argues that the prosecutor was required to inform the defense attorney of this oral statement. But Davis did not establish the truth of his assertion regarding any such conversation in the trial court; when the judge asked the prosecutor whether she had known of the ANMC visit, she replied that she was unaware of any such visit. The defense attorneys never argued to the judge that the prosecutor had withheld information, and the judge issued no ruling on this matter. For this reason, the argument is not preserved for appeal. We also note that Davis offers no rebuttal to the trial judge's conclusion that Davis's defense was not prejudiced by the late disclosure of the ANMC records.

With regard to the records of the second surgery, Davis claims that the prosecutor was required to timely alert the defense to the existence of medical records that the State was unable to obtain. Again, this specific argument was not made to the trial judge, and the judge issued no ruling on the matter.

Davis now argues for the first time that, had he known about the records before trial, he could have sought them himself and used them to impeach Reedy

regarding the date that the shoulder injury occurred. Because Davis's attorney did not raise this issue in the motion for a new trial, there is no factual record beyond brief discussions at trial from which this Court can evaluate the plausibility of Davis's assertion that his attorney might have succeeded in obtaining these records even though the prosecutor's efforts had failed. We also note that, even though the defense attorney was apprised of the existence of additional records related to the second surgery during the trial, nothing in the record indicates that Davis's attorney made any effort to obtain the records at that time.

For these reasons, we uphold the trial judge's denial of Davis's motion for a new trial.

Davis's argument that the sentencing judge should have found that Davis's conduct was among the least serious within the definition of kidnapping

Under AS 12.55.155(d)(9), when a defendant's felony offense is governed by presumptive sentencing, proof that the defendant's conduct was among the least serious within the definition of the offense constitutes a mitigating factor that authorizes the sentencing judge to impose a sentence below the normal applicable presumptive sentencing range.⁹

At sentencing, Davis's attorney argued that Davis's conduct was among the least serious within the definition of kidnapping, and that the sentencing judge should therefore find mitigator (d)(9). The judge rejected this proposed mitigating factor, and Davis argues on appeal that the judge's decision was error.

⁹ See AS 12.55.155(a).

But Davis was convicted of kidnapping, an unclassified felony, which is not governed by presumptive sentencing.¹⁰ This means that, in Davis’s case, the judge’s sentencing authority was exactly the same, regardless of whether Davis proved or failed to prove mitigating factor (d)(9) — or, indeed, any of the mitigating factors codified in AS 12.55.155(d). Davis’s claim is therefore moot.¹¹

Conclusion

The judgment of the superior court is AFFIRMED.

¹⁰ See AS 11.41.300(c); AS 12.55.125(b); see also *Allen v. State*, 56 P.3d 683, 684 (Alaska App. 2002) (discussing the use of aggravating and mitigating factors only by analogy for crimes not governed by presumptive sentencing).

¹¹ See *Hinson v. State*, 199 P.3d 1166, 1172 (Alaska App. 2008).