

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

JEFFERY K. HOLT,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12219
Trial Court No. 3HO-11-00515 CR

MEMORANDUM OPINION

No. 6782 — April 3, 2019

Appeal from the Superior Court, Third Judicial District, Homer, Charles T. Huguelet, Judge, and the Statewide Three-Judge Sentencing Panel, Eric Smith, Trevor Stephens, and John Suddock, Judges.

Appearances: Renee McFarland, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Coats, Senior Judge.*

Judge ALLARD.

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

Jeffrey K. Holt was convicted, following a jury trial, of one count of first-degree sexual assault and four counts of second-degree sexual assault.² On appeal, Holt argues that there was insufficient evidence of coercion to support his conviction for first-degree sexual assault. He also argues that there was a fatal variance between the theory of first-degree sexual assault for which he was indicted at the grand jury and the State's theory of prosecution at trial. For the reasons explained here, we reject both claims of error.

Holt also raises claims of error with regard to his sentence. He first argues that three of his convictions for second-degree sexual assault should have merged. We reject this claim based on the Alaska Supreme Court's recent decision in *State v. Thompson*.³

Holt also argues that the three-judge sentencing panel misunderstood its statutory authority, and he argues that his sentence is excessive. For the reasons explained here, we conclude that a remand is required so that the three-judge sentencing panel can reassess Holt's case under the correct legal authority. Because this reassessment may result in a different sentence, we do not address Holt's excessive sentence claim.

Lastly, Holt argues that the trial court erred when it failed to make various corrections to his presentence report. The State concedes that these corrections should have been made. This concession is well-founded and we direct the superior court on remand to make the agreed-upon changes.⁴

² AS 11.41.410(a)(1) and AS 11.41.420(a)(3)(B), respectively.

³ *State v. Thompson*, __ P.3d __, Op. No. 7330, 2019 WL 322680 (Alaska Jan. 25, 2019).

⁴ *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess any concession of error by the State in a criminal case).

Background facts

Holt met K.J. while K.J. was living in Fairbanks. K.J. later moved to Homer, where she lived with her two-year-old son.

In August 2011, Holt contacted K.J. and asked if he and his brother-in-law could stay with her when they visited Homer later that month to go fishing. K.J. considered Holt to be a friend and felt comfortable allowing him to stay in her home when he was in Homer. In the past, Holt had expressed interest in a sexual relationship with K.J., but she felt that she had made it clear that she was not interested in a sexual relationship.

Holt arrived at K.J.'s home around 8:30 p.m. on the evening of August 31. He arrived alone, explaining that his brother-in-law was unable to make it. He brought with him a "whole bunch of groceries" and two bottles of alcohol — gin and raspberry vodka. K.J. began cooking dinner and fixed herself a drink.

After they ate and cleaned the dishes, K.J. went to her computer to check her email; Holt remained in the kitchen where he fixed a second drink for K.J. The drink Holt mixed was an odd color; it was bright red and K.J. thought it tasted like cough syrup. Although K.J. remembered drinking only about half of the drink, the drink "just floored" her.

Sometime after Holt gave K.J. this drink, he came over to the computer desk where K.J. was sitting. As K.J. turned toward him, Holt grabbed her jaw and forced his penis into her mouth. K.J. was able to pull away from him, and she went to the kitchen counter where she picked up her cell phone and tried to text her friend, Milton "Jay" Inama. She was unable to send a coherent text. K.J. tried to go to the bathroom, but she fell as she tried to walk there. Holt helped K.J. in the bathroom and she told him she was having some problems.

K.J. had only limited memories of what happened next. She recalled Holt removing her clothes and performing oral sex on her while she was lying on the couch with her feet on the floor. K.J. tried to tell him to stop, but her words did not make any sense.

Holt next took a quilt from the couch and put it over K.J.'s head and upper body. K.J. felt his fingers inside her vagina and rectum. While this was happening, K.J. passed out. When she came to, Holt had removed the quilt; he was kneeling in front of her and his penis was in K.J.'s vagina. K.J. started crying and managed to say "don't do this, don't do this." In response, Holt stopped and told K.J. "I'm sorry ... I didn't mean to hurt you."

Holt then carried her upstairs so she could check on her son. While she tried to nurse her son, Holt sucked on her other breast. Eventually, Holt carried K.J. back downstairs.

K.J.'s next memory was of standing in the kitchen. As Holt approached her, she backed away in terror and fell backwards into the kitchen cabinets, sliding down to the floor. From the floor, K.J. then saw Holt sitting at the computer, illuminated by the light of the monitor. He was masturbating. While Holt masturbated, K.J. was able to grab her phone off the counter and texted "rape 911" to her friend, Jay Inama.

K.J.'s next memory was of Holt carrying her back to the couch. She woke up to find Holt again inserting his penis into her vagina. When K.J. told Holt he was hurting her, he stopped, and then masturbated next to her until he ejaculated. Holt gave K.J. something to drink and then carried her upstairs to bed.

Shortly thereafter, Inama arrived in response to the text. Inama had also contacted the state troopers. The troopers spoke with Holt outside the home. Holt claimed that he and K.J. had had a sexual relationship in the past and that they had consensual sexual contact that evening.

K.J. was examined later that day by a nurse at South Peninsula Hospital. The nurse found various bruises and abrasions on K.J.'s body, including red marks on her chin. She also found redness and abrasions on K.J.'s genitals. Blood and urine samples were collected from K.J. The results of the lab tests run on those samples showed a blood alcohol level of 0.155. The tests also showed K.J. had paracetamol (Tylenol) in her system. K.J. denied having knowingly taken any Tylenol that evening.

Prior proceedings

The State originally charged Holt with four counts of second-degree sexual assault and one count of attempted second-degree sexual assault, based on the theory that he sexually assaulted K.J. while she was incapacitated.

During the grand jury proceedings, however, the grand jury was instructed on the definition of first- and second-degree sexual assault. Specifically, the grand jury was instructed that an offender was guilty of first-degree sexual assault if the offender engaged in sexual penetration of a person “without consent.” “Without consent” in this context means “that a person with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone” or the person “is incapacitated as a result of an act of the defendant.”⁵ The grand jury ultimately returned five counts of first-degree sexual assault, without specifying whether it had indicted under the coercion or incapacitation theory of “without consent.”

Counts I through IV were based on the acts of penetration that occurred after K.J. required Holt's assistance in going to the bathroom. Count I charged penile/vaginal penetration; Count II charged digital/vaginal penetration; Count III

⁵ AS 11.41.470(8).

charged oral/vaginal penetration; and Count IV charged penile and/or digital penetration of the rectum. Count V was based on Holt's act of forcing his penis into K.J.'s mouth when she was sitting at the desk, which occurred earlier in the evening prior to K.J. becoming markedly incapacitated. Holt unsuccessfully moved to dismiss the indictment, discussing both theories of "without consent" in his second motion to dismiss.

At the conclusion of the State's case, Holt moved for a judgment of acquittal on the first-degree sexual assault counts to the extent that they were based on the theory that K.J.'s incapacitation was caused by Holt. Holt argued that there was insufficient evidence that he had caused K.J.'s incapacitation. The trial court agreed that the evidence was insufficient, noting the absence of anything other than alcohol and Tylenol in K.J.'s blood test.

The State chose to proceed with the use-of-force "without consent" theory of first-degree sexual assault with regard to Count V — the count based on Holt's act of forcing his penis into K.J.'s mouth. But the State agreed to dismiss the other first-degree sexual assault charges in exchange for the jury being instructed on the lesser included offense of second-degree sexual assault (sexual penetration of an incapacitated person) for Counts I-IV.

Holt objected to the jury being instructed on the lesser included offense of second-degree sexual assault for Counts I-IV. He argued that the grand jury had only indicted him under the use-of-force "without consent" theory.

After confirming that the grand jury had never specified the factual basis for its "without consent" finding and also confirming that this case had primarily been litigated as an incapacitation case, the trial court overruled Holt's objection.

Following deliberations, the jury convicted Holt of all five counts — one count of first-degree sexual assault for the initial forced fellatio that occurred at the

computer (Count V), and four counts of second-degree sexual assault for the later acts of sexual penetration that occurred after K.J. became incapacitated (Counts I-IV).

At sentencing, Holt requested and received a referral to the three-judge sentencing panel based on his “extraordinary potential for rehabilitation.” The three-judge panel sentenced Holt under AS 12.55.175(c) to 21 years with 5 years suspended (16 years to serve) on the first-degree sexual assault conviction, and 4 years with 3 years suspended (1 year to serve) for each of the second-degree sexual assault convictions, with the active time to be served consecutively and the suspended time to be served concurrently. Holt’s composite sentence is therefore 28 years with 8 years suspended (20 years to serve).

Holt now appeals.

Holt’s challenge to his first-degree sexual assault conviction

Alaska Statute 11.41.410(a)(1) provides that “An offender commits the crime of sexual assault in the first degree if ... the offender engages in sexual penetration with another person without consent of that person.” Sexual penetration is defined statutorily to include fellatio.⁶ “Without consent” in this context means “that a person with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone.”⁷ “Force” is defined as “[A]ny bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint, or confinement.”⁸

⁶ AS 11.81.900(b)(61)(A).

⁷ AS 11.41.470(8)(A).

⁸ AS 11.81.900(28).

The jury convicted Holt of first-degree sexual assault for the act of fellatio that occurred while K.J. was sitting at the computer desk. Holt asserts that there was insufficient evidence that the fellatio was “without consent” — *i.e.*, that it was coerced — and the conviction should be reversed on this ground. In support of this claim, Holt points to K.J.’s testimony that she was “startled” by Holt’s act of grabbing her chin and putting his penis in her mouth, and that it did not cause her pain. Holt argues that his act of grabbing K.J.’s jaw does not satisfy the statutory definition of “without consent” because “that bodily impact was necessary to commit the sexual penetration and, therefore, did not constitute forcible coercion[.]”

We find no merit to this claim. When we review a claim of insufficiency on appeal, we are required to view the evidence — and all reasonable inferences to be drawn from it — in the light most favorable to upholding the verdict.⁹ Here, K.J. testified that Holt “grabbed” her jaw and “forced” oral sex. Holt’s act of grabbing her jaw was force beyond the bodily impact required for the act of penetration itself. K.J. also specifically testified that Holt’s actions “caught [her] off guard” and made her feel “fearful and intimidated.” In addition, the nurse who examined K.J. after the incident testified that K.J. had bruises on her face, including redness on her jaw.

Viewing this evidence in the light most favorable to upholding the jury’s verdict, we conclude that a fair-minded juror could find that the fellatio was coerced by the use of force and the evidence was therefore sufficient to uphold Holt’s conviction for first-degree sexual assault. Accordingly, we reject this claim of error on appeal.

⁹ See *Bergman v. State*, 366 P.3d 542, 542-43 (Alaska App. 2016).

Holt's fatal variance claim

Holt claims that there was a fatal variance between the first-degree sexual assault counts for which he was indicted and the second-degree sexual assault counts for which he was convicted. We also find no merit to this claim.

There is no variance when a defendant is convicted of a lesser included offense for which he is on notice.¹⁰ As this Court explained in *Rogers v. State*, “a criminal defendant is on notice, as a matter of law, that the State is entitled to ask the trier of fact to find the defendant guilty of a lesser offense necessarily included within the charged offense.”¹¹

Here, the record shows that the State originally sought an indictment on charges of second-degree sexual assault (sexual penetration of an incapacitated person). But the grand jury elevated these charges to first-degree sexual assault after hearing the evidence in the case and being instructed on both theories of “without consent.” The grand jury did not specify which legal theory it relied on for the five different counts, and Holt never requested clarification on that question.

At trial, Holt argued that the grand jury *must* have indicted him only under a use of force “without consent” theory and therefore second-degree sexual assault was not a proper lesser included offense. But the trial court properly rejected this claim as inconsistent with the grand jury proceedings and with the parties’ overall litigation of the case. As the trial court noted, the grand jury heard evidence that could potentially have supported an incapacitation “without consent” theory, and Holt’s preparations for trial indicated that he expected to be tried under an incapacitation “without consent” theory

¹⁰ See *Blackhurst v. State*, 721 P.2d 645, 649 n.6 (Alaska App. 1986) (finding no variance where the defendant was indicted for second-degree murder but was convicted of the lesser offense of manslaughter); see also Alaska R. Crim P. 31(c).

¹¹ *Rogers v. State*, 232 P.3d 1226, 1236 (Alaska App. 2010).

for at least some of the counts. For example, Holt obtained the victim’s medical records and also secured an expert who testified to the forensic toxicology reports and to the absence of any rape drug in K.J.’s system. Given these circumstances, we find no merit to Holt’s fatal variance claim.

Holt’s merger claims

At his initial sentencing, Holt argued that Counts I-IV should merge because all four convictions were based on conduct that occurred on the couch in close temporal proximity to one another. The trial court did not address these merger arguments and Holt failed to renew them when his case was transferred to the three-judge sentencing panel.

On appeal, Holt concedes that Count IV requires a separate conviction of record because it involves penetration of K.J.’s anus. However, he argues that the three different forms of vaginal penetration should merge.

Given the Alaska Supreme Court’s recent decision in *State v. Thompson*, we find no merit to this claim.¹² *Thompson* held that “separate convictions and sentences may be imposed for each distinct act of penetration when either the penetrating object or body part or the penetrated orifice has changed.”¹³ Here, Holt was convicted in Count I for penile/vaginal penetration. He was convicted in Count II for digital/vaginal penetration. And he was convicted in Count III for oral/vaginal penetration. All three counts involved different penetrating objects, thus separate convictions and sentences are appropriate under *Thompson*.

¹² *State v. Thompson*, __ P.3d __, Op. No. 7330, 2019 WL 322680 (Alaska Jan. 25, 2019).

¹³ *Id.* at *2.

Why we conclude that a remand is required for resentencing

As a first felony offender, Holt faced a 20 to 30 year presumptive range for the first-degree sexual assault conviction.¹⁴ Holt also faced a presumptive sentence of 5 to 15 years for each second-degree sexual assault.¹⁵ Under then-applicable AS 12.55.-125(o), the sentence had to include a minimum term of suspended imprisonment of 5 years and a minimum period of 15 years' probation.¹⁶ Additionally, under AS 12.55.-127(c)(2)(F), some of the sentenced time for the second-degree sexual assault convictions had to run consecutively to the sentence for the first-degree sexual assault conviction. Holt thus faced a minimum composite sentence of 20 years and 4 days to serve, with 5 years suspended and 15 years' probation.

At Holt's first sentencing hearing, he argued that his case should be referred to the three-judge panel due to his extraordinary potential for rehabilitation.¹⁷ The trial judge took the matter under advisement, and then issued a written order granting Holt's request. The trial court stated, in its written order, that if given the discretion it "would impose a sentence of less than 20 years in this case."

The case then moved to the three-judge sentencing panel. The panel heard testimony from witnesses in support of Holt. The panel also heard from K.J., who urged the panel to sentence Holt for a "very, very long time." Finally, the panel heard a short statement from Holt. The panel then retired to evaluate the evidence.

The panel returned to announce its decision. The panel first found that "by clear and convincing evidence . . . Mr. Holt has an extraordinary potential for

¹⁴ See AS 12.55.125(i)(1)(A)(ii).

¹⁵ See AS 12.55.125(i)(3)(A).

¹⁶ See former AS 12.55.125(o) (2011).

¹⁷ See *Smith v. State*, 711 P.2d 561, 571-72 (Alaska App. 1985).

rehabilitation.” Because the three-judge panel agreed that Holt had extraordinary potential for rehabilitation, the three-judge panel first looked to AS 12.55.175(e) to govern their sentencing decision. Alaska Statute 12.55.175(e) provides that:

If the three-judge panel determines under (b) of this section that manifest injustice would result from imposition of a sentence within the presumptive range and the panel also finds that the defendant has an exceptional potential for rehabilitation and that a sentence of less than the presumptive range should be imposed because of the defendant's exceptional potential for rehabilitation, the panel

- (1) shall sentence the defendant within the presumptive range required under AS 12.55.-125 or as permitted under AS 12.55.155;
- (2) shall order the defendant under AS 12.55.-015 to engage in appropriate programs of rehabilitation; and
- (3) may provide that the defendant is eligible for discretionary parole under AS 33.16.090 during the second half of the sentence imposed under this subsection if the defendant successfully completes all rehabilitation programs ordered under (2) of this subsection.

However, the panel ultimately declared that they could not understand the meaning of subsection (e). The panel therefore sentenced Holt under the general provisions of the statute — subsections (b) and (c).

Holt argues that this was error and that a remand for resentencing is required on this basis. We agree that this was error.

As this Court has previously explained, subsection (e) of AS 12.55.175 was intended to achieve one limited purpose: to restrict the three-judge panel’s sentencing authority when a case is referred to the panel on the basis of the defendant’s

extraordinary potential for rehabilitation.¹⁸ We have held that when an individual sentencing judge refers a case to the three-judge panel on the basis of the defendant's extraordinary potential for rehabilitation, and when the three-judge panel agrees that the defendant does indeed have an extraordinary potential for rehabilitation and that, because of this potential for rehabilitation, it would be manifestly unjust to sentence the defendant within the range of sentences that would be available to an individual sentencing judge, the three-judge panel is authorized to impose a lesser sentence.¹⁹ However, under AS 12.55.175(e), the panel may not impose an active term of imprisonment that is less than what would otherwise be permitted under AS 12.55.155(a)(2) for statutory mitigating factors. In other words, under subsection (e), the panel is prohibited from imposing a sentence less than fifty percent of the low end of the applicable presumptive sentencing range when the minimum presumptive range is more than 4 years.

As the State points out on appeal, this distinction between subsection (c) and subsection (e) does not make any difference with regard to the sentence imposed on Holt's first-degree sexual assault conviction (Count V). The applicable presumptive range for Count V was 20 to 30 years, and the panel gave him 16 years to serve — which is more than the 10 years they would have been permitted to impose under (e).

However, the panel's error does make a difference with respect to Holt's sentences for his second-degree sexual assault convictions. The applicable presumptive range for these four counts was 5 to 15 years. Thus, under subsection (e), Holt's minimum active term of imprisonment for each count was 2.5 years. However, the panel

¹⁸ See *Luckart v. State*, 270 P.3d 816, 819-20 (Alaska App. 2012); *Garner v. State*, 266 P.3d 1045, 1048-49 (Alaska App. 2011).

¹⁹ See *Luckart*, 270 P.3d at 819-20; *Garner*, 266 P.3d at 1048-49; see also AS 12.55.175(e).

only gave Holt 1 year to serve on each of these four convictions, which is error under subsection (e).

As the State notes, this error could potentially be cured without increasing Holt's composite sentence by adjusting which portions of the sentence are consecutive and which portions are concurrent. But we are also concerned with the three-judge panel's sentencing analysis. Holt's individual sentencing judge referred Holt's case to the panel because the judge concluded that, based on Holt's extraordinary potential for rehabilitation, it would be manifestly unjust to sentence Holt to 20 years and 4 days — *i.e.*, the minimum composite sentence available to an individual judge under AS 12.55.125(i) and AS 12.55.127(c)(2)(F). The judge also indicated that he would personally sentence Holt to less than 20 years. The three-judge panel agreed with the individual judge that Holt had an extraordinary potential for rehabilitation, and that it would be manifestly unjust to sentence him to 20 years and 4 days. Yet the panel imposed a composite sentence of 20 years — only four days less than the applicable presumptive range. Moreover, the panel's sentencing remarks give no indication of why they did not further reduce Holt's composite time to serve based on their other findings.

The three-judge sentencing panel's confusion regarding the applicability of AS 12.55.175(e) also affected their decision with regard to Holt's eligibility for discretionary parole. The three-judge panel had the authority under subsection (e) to remove statutory restrictions on Holt's eligibility for discretionary parole for the second half of his sentence, contingent on the completion of any rehabilitation programs ordered by the court.²⁰ This is perhaps what the three-judge panel intended to do when it declared that Holt would be "eligible for discretionary parole," but this aspect of Holt's sentence should be addressed and clarified as part of the proceedings on remand.

²⁰ See AS 12.55.175(e)(2)-(3).

Conclusion

We AFFIRM Holt's convictions, but we REMAND this case to the superior court for correction of the presentence report and to the three-judge sentencing panel for resentencing under the correct legal authority.

Because we are remanding Holt's case for resentencing, we do not address Holt's excessive sentence claim at this time. Instead we direct the three-judge panel to resentence Holt within 90 days of the effective date of our decision. This deadline may be extended for good cause. Within 30 days of the time Holt is resentedenced, Holt shall notify this Court whether he wishes to renew his excessive sentence claim. If Holt wishes to renew his sentence appeal, a schedule for supplemental briefing, if appropriate, will be set. If Holt does not wish to renew his excessive sentence claim after his resentencing, this appeal will be closed.