IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ROOSEVELT HEAROD JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12670 Trial Court No. 3KN-16-00158 CR MEMORANDUM OPINION No. 6794 — June 5, 2019

Appeal from the District Court, Third Judicial District, Kenai, Jennifer K. Wells, Magistrate Judge.

Appearances: Jane B. Martinez, Law Office of Jane B. Martinez, LLC, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Paul S. Morin, Assistant District Attorney, Kenai, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and E. Smith, Senior Superior Court Judge.[*]

Judge HARBISON.

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

A jury convicted Roosevelt Hearod Jr. of one count of assault in the fourth degree for recklessly placing nine-year-old A.K. in fear of imminent physical injury. Hearod defended against this charge by advancing the justification defense of parental discipline under AS 11.81.430(a)(1) and by challenging the sufficiency of the State's evidence.

The charge against Hearod arose when his girlfriend's nine-year-old son, A.K., asked if he could use Hearod's PlayStation. Although Hearod's girlfriend replied in the affirmative, Hearod took the gaming console from A.K. and began using it. While Hearod was playing a video game, A.K. stood in front of the television, holding out his arms to block the view. Then, at his mother's urging, A.K. unplugged the gaming console. In response, Hearod got up, put his hand on A.K.'s neck, and shoved him to the ground. Hearod's girlfriend filmed this moment on her phone. A.K. then left the room, returned, and threw a stereo at Hearod.

Hearod was arrested and charged with one count of fourth-degree assault for recklessly causing physical injury to A.K. (physical assault) and one count of fourth-degree assault for, by words or other conduct, recklessly placing A.K. in fear of imminent physical injury (fear assault).[1] Hearod ultimately was convicted of the fear assault charge but was acquitted of the physical assault charge.

Hearod now appeals his fear assault conviction. His first contention is that the district court erred in instructing the jury, and his second contention is that the district court erred by not granting his motion for judgment of acquittal. For the reasons explained in this decision, we affirm the judgment of the district court.

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[1] AS 11.41.230(a)(1) and AS 11.41.230(a)(3), respectively.

Jury instructions

At trial, Hearod asserted that his use of force against A.K. was justified parental discipline under AS 11.81.430(a)(1). This statute provides, in pertinent part:

> The use of force on another person that would otherwise constitute an offense is justified under any of the following circumstances: When and to the extent reasonably necessary and appropriate to promote the welfare of the child . . . a parent, guardian, or other person entrusted with the care and supervision of a child under 18 years of age . . . may use reasonable and appropriate nondeadly force on that child[.][2]

Hearod's argument on appeal is that the trial court's instructions did not make it clear to the jury that the parental discipline justification defense applied to the fear assault charge as well as the physical assault charge. He faults the court for failing to adopt his proposed jury instruction, and he contends that the final version of instructions given to the jury did not adequately inform the jury that the justification defense applied to both assault charges. Because Hearod did not object to the final version of the instructions given to the jury, we review his claim for plain error.

Plain error is an error that "(1) was not the result of intelligent waiver or a tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial."[3]

In this case, Hearod initially proposed a justification instruction that the trial court did not give. But during the discussion on the instructions, he proposed an alternative way to address his concerns. Hearod's alternative proposal was to modify some language in the court's draft instructions and to adjust the order of the instructions

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[2] AS 11.81.430(a)(1).

[3] *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

to clarify matters for the jury. This proposal was adopted by the court and incorporated into the final jury instructions.

Because Hearod requested the very instructions that the court ultimately gave, the record is clear that the attorney did not perceive any problem with the instructions as given.

We likewise see no obvious problem with the instructions as given. The justification instruction provided to the jury was a near match to the justification statute itself. In addition, the court placed the justification instruction immediately after the elements instructions, making it clear to the jury that the justification defense applied to both charges. Finally, the parties' closing arguments reflected the parties' understanding that the justification defense applied to both charges.[4]

Given the circumstances, we conclude that the court's instructions were sufficient to make the jury aware that the justification defense applied to Hearod's use of force in both the fear assault context and the physical assault context.

Based on our review, we find no plain error in the court's instructions.

Motion for judgment of acquittal

After the jury returned its verdicts, Hearod filed a motion for a judgment of acquittal on the fear assault conviction, arguing that the State had presented insufficient evidence to support the jury's verdict on that count. The trial court denied Hearod's motion because it found enough evidence existed to support the jury's verdict.

On appeal, Hearod claims that the only evidence that could support the fear assault conviction was A.K.'s testimony, which Hearod contends focused on how he

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[4] *See Braun v. State*, 911 P.2d 1075, 1081 (Alaska App. 1996) (recognizing that arguments of the parties can cure flaws or omissions in the jury instructions).

physically harmed A.K. during the incident, not on how A.K. felt. According to Hearod, the jury rejected that testimony when it found Hearod not guilty on the physical assault charge. Hearod further argues that no reasonable jury could conclude that A.K. was in fear because A.K. did not cry or demonstrate other signs of being afraid, and also because A.K. reacted by throwing a stereo at Hearod.

Here, to convict Hearod of the fear assault charge, the State was required to prove that Hearod "by words or other conduct . . . recklessly place[d] [A.K.] in fear of imminent physical injury."[5] The State's theory of fear assault was that A.K. reasonably perceived the threat of imminent injury during Hearod's exertion of force.

Much of Hearod's argument rests on the idea that there was no evidence that A.K. was subjectively afraid of Hearod. But to prove a fear assault, the State is not required to prove that the victim was subjectively afraid.[6] Rather, the question is whether the State presented evidence from which the jury could reasonably determine that, "because of [the defendant's] conduct, [the victim] reasonably perceived a danger that he would suffer imminent . . . physical injury."[7]

In this case, A.K. testified that he felt like he was being choked when Hearod grabbed his neck. This was evidence that A.K. experienced apprehension of harm the moment Hearod grabbed him. Additionally, A.K. testified that Hearod grabbed his neck and then threw him to the floor. And because the incident was video recorded, the jurors were able to observe A.K.'s facial expression during the incident. A.K.'s contorted expression could allow a jury to conclude that A.K. reasonably perceived a danger that he would suffer imminent physical injury when Hearod grabbed him.

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[5] *See* AS 11.41.230(a)(3).

[6] *Hughes v. State*, 56 P.3d 1088, 1093 (Alaska App. 2002).

[7] *Id.*

When assessing a claim of insufficient evidence, we view the evidence, and all reasonable inferences to be drawn from that evidence, in the light most favorable to upholding the jury's verdict.[8] We then ask whether a reasonable and fair-minded juror could have concluded that the State's case was proved beyond a reasonable doubt.[9]

We conclude that there is sufficient evidence in the record, as discussed above, from which a jury could reasonably conclude that Hearod's conduct caused A.K. to perceive imminent physical injury.

Conclusion

We AFFIRM the judgment of the district court.

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[8] *Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

[9] *Id.*