IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CARL R. TAKAK, Appellant/Cross-Appellee, v. STATE OF ALASKA, Appellee/Cross-Appellant.	Court of Appeals Nos. A-13020 & A-13029 Trial Court No. 2UT-17-00005 CR MEMORANDUM OPINION No. 7007 — May 25, 2022

Appeal from the Superior Court, Second Judicial District, Nome, Romano D. DiBenedetto, Judge.

Appearances: John Cashion, Cashion Gilmore, Anchorage, for the Appellant/Cross-Appellee. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee/Cross Appellant. Sharon Barr, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Alaska Public Defender Agency, as *amicus curiae*.

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

Judge HARBISON.

Following a jury trial, Carl R. Takak was convicted of second-degree sexual assault.[1] The charge arose after forty-six-year-old Takak drove his seventeen-year-old niece, K.R., to a secluded beach three miles outside Shaktoolik, twice attempted to kiss her, and touched her breast through her clothing.

Takak raises two claims on appeal. First, Takak argues that insufficient evidence supported his conviction for second-degree sexual assault. Specifically, he argues that the evidence was insufficient to establish that the sexual contact occurred "without consent," as that term is defined in AS 11.41.470. For the reasons explained in this opinion, we disagree, and we affirm Takak's conviction.

Takak next argues that even if the evidence was sufficient to support his conviction for second-degree sexual assault, the trial court erred in rejecting his proposed mitigating factor that his conduct was among the least serious included within the definition of the offense.[2] We agree with Takak that the single act of touching K.R.'s breast through multiple layers of clothing was among the least serious forms of second-degree sexual assault, and we accordingly remand this case for resentencing.

Finally, the State has filed a cross-appeal, arguing that the trial court erred in ruling that it was necessary to redact verified assertions from the presentence report in the absence of a testimonial denial or equivalent admissible evidence. Takak concedes this point, and our case law clearly supports this concession.[3] We have previously held that a judge may consider verified factual allegations in a presentence report unless and

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[1] AS 11.41.420(a)(1).

[2] AS 12.55.155(d)(9).

[3] *See, e.g.*, *Garland v. State*, 172 P.3d 827, 829 (Alaska App. 2007); *Evans v. State*, 23 P.3d 650, 651-52 (Alaska App. 2001); *Hamilton v. State*, 771 P.2d 1358, 1361-62 (Alaska App. 1989).

until the defendant offers a testimonial denial or equivalent admissible evidence.[4] Because the information Takak sought to redact was verified, and because he did not offer a testimonial denial or equivalent evidence, we vacate the trial court's redaction of material from the presentence report.

In sum, we affirm Takak's conviction, but remand this case for resentencing. If Takak chooses to pursue his challenge to the information in the presentence report on remand, he must do so by means of a testimonial denial or equivalent admissible evidence.

Background facts and procedural history

Takak was indicted on one count of second-degree sexual assault, and the matter proceeded to a jury trial.[5] Because Takak challenges the sufficiency of the evidence to support his sexual assault conviction, we describe the evidence presented to the jury in the light most favorable to upholding the jury's verdict.[6]

At the trial, K.R. testified about an incident that occurred on a January evening in 2017, when she was seventeen. The evening was cold and dark, and a ground storm had developed. She was walking from her home in Shaktoolik to the local school gym when her uncle, forty-six-year-old Carl Takak, saw her and offered her a ride to the gym in his pickup truck. Once K.R. was in the truck, instead of going to the gym, Takak asked her if she wanted to "go riding." K.R. agreed, and Takak drove them three miles outside Shaktoolik to a beach where there were no other people or vehicles around.

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[4] *Darroux v. State*, 265 P.3d 348, 351 (Alaska App. 2011).

[5] The State originally charged Takak with a related count of fourth-degree sexual abuse of a minor under AS 11.41.440(a)(2), but dismissed this charge prior to trial.

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

According to K.R., she and Takak initially talked about school and their family. But then Takak shifted to questioning K.R. about boys: if she had any boyfriends, if she had ever "made out" with a boy, and whether boys had ever been "rough" with her. K.R. testified that she "got kind of scared" because "nobody really asks [her] about that" and she "was worried if it would go farther."[7]

Takak then asked K.R. to lie in his lap. When she responded by asking him "How come? Why?," Takak told her that she should "just try." After K.R. complied with Takak's request to lie in his lap, Takak grabbed her face and twice tried to kiss her. When Takak asked her why she was not kissing him, K.R. told Takak, "[I]t's wrong. You're my uncle. I'm your niece." Takak then abandoned his attempts to kiss K.R. and instead grabbed her breast for several seconds — according to K.R., up to ten seconds. After this occurred, K.R. sat up and moved back to the passenger seat.

Both before and after Takak touched K.R.'s breast, K.R. told Takak that she wanted to leave. K.R. testified that she did not feel free to leave and did not think she could get back to town on her own. K.R. also testified that she was scared that Takak would do something else that was sexual, and she did not know what to do, so she stayed quiet, staring out the window and trying not to cry. After initially driving farther away from town, Takak ultimately drove K.R. back to town and dropped K.R. off at the gym.

Once back in the village, K.R. told a friend, and then her parents, what had happened, and her parents reported the incident to the troopers. When confronted by K.R.'s mother, and later a trooper, Takak largely corroborated K.R.'s account. Takak admitted to driving K.R. out of town and asking her to lie across his lap. He told the trooper that, while K.R. was lying on his lap, he asked her if she wanted a kiss, but she

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[7] The transcript in this case indicates that K.R. stated, "Because I was — I was worried if it was [unintelligible]." But we have listened to the audio recording of this portion of K.R.'s trial testimony, and K.R. said that she "was worried if it would go farther."

said "no" and tried to pull away. According to Takak, he then put his arm over her chest and touched her breast with his right hand, but "didn't squeeze or anything." Takak explained that he wanted to "see what [K.R.] would do." After K.R. told him that she "didn't want anything like that," Takak said, "okay, good" and told her not to let any "other" men "force themselves" on her. He then "let her back on the passenger seat," and drove her back to Shaktoolik.

At the close of the State's evidence, Takak moved for a judgment of acquittal. He argued that the evidence did not establish that the sexual contact had occurred "without consent" — *i.e.*, that the sexual contact was coerced by the use of force or by the express or implied threat of death, imminent physical injury, or kidnapping.[8] The trial court denied Takak's motion, reasoning that the circumstances in which the sexual contact occurred were sufficient for a reasonable juror to conclude that the sexual assault had occurred without consent.

The jury found Takak guilty of second-degree sexual assault. This appeal followed.

The evidence presented at trial was sufficient to establish that the sexual contact occurred "without consent"

On appeal, Takak claims that the evidence presented at trial was legally insufficient to support his conviction for second-degree sexual assault. To prove this charge, the State was required to establish that: (1) Takak knowingly engaged in sexual contact with K.R. (by touching K.R.'s breast directly or through clothing), (2) this sexual

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[8] Former AS 11.41.470(8)(A) (2017); *see also* AS 11.81.900(b)(28) (defining "force" as "any bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint, or confinement"). The definition of "without consent," set out in AS 11.41.470(8) at the time of Takak's offense, has now been renumbered as AS 11.41.470(10) but is otherwise substantively unchanged.

contact occurred "without consent," and (3) Takak acted at least recklessly with respect to the circumstance that the sexual contact was "without consent."[9]

Under Alaska law, sexual contact occurs "without consent" if the person 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[.]"[10] The word "force" is defined as any "bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint, or confinement[.]"[11] In the context of sexual offenses, the "bodily impact, restraint, or confinement" that the defendant uses or threatens must be more than simply the bodily impact or restraint inherent in the charged act of sexual penetration or contact.[12]

In the present case, the State's theory of prosecution was that Takak's sexual touching of K.R. was coerced by Takak's acts of confining K.R. in the truck and implicitly threatening continued confinement or bodily impact if K.R. did not submit.

As we have previously noted, "whether coercion exists in a particular case is inherently a fact-intensive inquiry that ultimately turns on the totality of the circumstances present in a given interaction."[13] In determining whether a touching was without consent, we view the circumstances from "the perspective of the victim who is subjected to the unwanted sexual activity."[14]

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[9] *See* AS 11.41.420(a)(1); *see also Inga v. State*, 440 P.3d 345, 348 (Alaska App. 2019).

[10] Former AS 11.41.470(8)(A) (2017).

[11] AS 11.81.900(b)(28).

[12] *See Inga*, 440 P.3d at 349-50.

[13] *Id.* at 349.

[14] *State v. Mayfield*, 442 P.3d 794, 799 (Alaska App. 2019).

Here, K.R. testified that, while isolated in Takak's truck miles out of town during a stormy winter night, Takak — K.R.'s uncle and nearly thirty years her senior — began asking her if boys had ever been "rough" with her. She testified that she "got kind of scared" because "nobody really asks [her] about that" and she "was worried if it would go farther." When Takak asked her to lie in his lap, K.R. initially resisted. She first reported that when Takak asked her to lay down, she said, "No, I'm not doing it." And at trial, she testified that she asked her uncle, "How come? Why?"

According to K.R., after she laid in Takak's lap as instructed, Takak grabbed her face and twice tried to kiss her. K.R. told Takak that his behavior was "wrong" and that she wanted to leave, but Takak "grabbed" her breast for several seconds. K.R. again told Takak that she wanted to leave.

K.R. testified that, during her interactions with Takak, she was "alone" and felt "scared" and "worried about [her] safety":

> I knew we were alone, and I got scared. I was scared at the time. I didn't try to show it, but I didn't know what to do. I was — I was asking myself questions like, "If I don't do this, will he get mad and then try," or questions like, "If I don't do this, what he's asked, will he get mad at me?" I was worried about my safety, because none of — none of my uncles out of — on both sides didn't — I mean, they didn't do that to me.

K.R. told the jury that she did not believe she could get back to town on her own, in the cold, dark night. After Takak "let her" back onto the passenger seat — as Takak later described it to a trooper — Takak drove farther away from town before driving K.R. back to the gym. Takak himself acknowledged that, after touching K.R.'s breast, he told her not to let any "other" men "force themselves" on her.

At trial, Takak conceded that K.R. did not subjectively want or invite the sexual contact.[15] But he argued — and continues to argue — that the State failed to present sufficient evidence that he coerced K.R. to acquiesce to the sexual contact by the use or threat of imminent bodily impact, restraint, or confinement beyond the force inherent in the charged act of sexual contact itself.[16] He compares his case to *State v. Townsend*, an unpublished decision in which this Court concluded that the State had failed to present sufficient evidence that the victim was coerced by the use of force.[17]

But the circumstances in *Townsend* — where the defendant briefly took hold of another man's genitals in a crowded bar — are readily distinguishable from the present case. Significantly, in *Townsend*, there was no testimony that the victim felt threatened or fearful; indeed, the victim's reaction to the touch was to lunge at Townsend, and then chase Townsend out of the bar.[18] By contrast, in the present case K.R. testified to the fear she felt during the incident. Additionally, while *Townsend* involved a brief and apparently unplanned encounter in a crowded public place, in Takak's case, the evidence showed that Takak acted deliberately to isolate K.R. in the truck, rendering her unable to protest or resist.

We conclude that the circumstances of this case are more analogous to our decision in *Ritter v. State*.[19] Ritter was a massage therapist in Barrow (now Utqiagvik) who was convicted of second-degree sexual assault for engaging in sexual contact with

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[15] Takak also conceded that he knowingly engaged in sexual contact with K.R.

[16] *See Inga*, 440 P.3d at 349.

[17] *State v. Townsend*, 2011 WL 4107008, at *4 (Alaska App. Sept. 14, 2011) (unpublished).

[18] *Id.* at *1.

[19] *Ritter v. State*, 97 P.3d 73 (Alaska App. 2004).

four female clients without their consent.[20] The women testified that Ritter engaged in acts of sexual contact — such as pressing his penis against their bodies or putting his hand on their breasts or genitals — during their massage appointments. The women did not protest or leave the room because they were in shock, they were undressed and alone, and they could not win a physical confrontation against Ritter.[21]

On appeal, we affirmed Ritter's convictions. We noted that it was reasonably foreseeable that Ritter's massage therapy clients would be surprised and frightened by his actions. Ritter's victims were "afraid to protest or resist: they were alone with him, they were undressed, and it was not feasible to run outside into the cold."[22] Indeed, all of the women testified that Ritter's conduct was unexpected, that it left them afraid and in shock, and that they endured the touching due to these circumstances.[23] We concluded that the evidence supported a finding that the women were "coerced by an implicit threat of imminent physical injury or kidnapping — which, in [that] context, mean[t] restraining another person with intent to sexually assault them," and the jury thus could have concluded that the sexual contact was "without consent."[24]

We reach the same conclusion here. In this case, the State presented evidence that Takak's actions were unwelcome and frightening to his seventeen-year-old niece, particularly given the family dynamic and age difference.[25] K.R. testified that she

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[20] *Id.* at 74.

[21] *Id.* at 75-76.

[22] *Id.* at 77-78.

[23] *Id.*

[24] *Id.* at 78 (citing AS 11.41.300(a)(1)(C)).

[25] *See State v. Marshall*, 253 P.3d 1017, 1027 (Or. 2011) (holding that, in determining (continued...)

was scared by Takak's request that she lie in his lap, his attempts to kiss her, and his questions about her sexual activity and about whether boys had ever been "rough" with her.[26] K.R. further testified that she did not know what to do in that situation — given that she was alone with him in his truck parked several miles out of town during a stormy winter night.[27] Other than her pants and a sweater, K.R. was wearing only a hoodie and a jacket she described as "[n]ot really" warm — in other words, clothing inadequate for what would have been a three-mile trek back to Shaktoolik. K.R. testified multiple times that her isolation, her inability to return to Shaktoolik on her own, and her uncle's increasingly uncomfortable advances — over her expressions of discomfort — made her fear what he would do next. Like the victims in *Ritter*, K.R. was afraid to protest or to resist any more than she did.

Takak argues that his case is distinguishable from *Ritter* because Takak's conduct was less threatening and aggressive, and because unlike the women in *Ritter*, K.R. acted in response to the unwanted touching by moving back to the passenger seat of the truck.

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[25] (...continued)
whether the force used was sufficient to compel the victim to submit to or engage in the sexual contact, "the trier of fact may consider circumstances known to the defendant that relate to whether the victim was in fact 'compelled,'" such as the victim's age, the differences in age between the victim and the defendant, and the relationship between the victim and the defendant).

[26] *See Nicholson v. State*, 656 P.2d 1209, 1213 (Alaska App. 1982) (holding that a reasonable juror could conclude that a teenage girl's momentary acquiescence in the defendant's touching of her breast was coerced by the implicit threat of physical injury, where the girl woke up to the man, naked and uninvited, in her bed).

[27] *Cf. Inga v. State*, 440 P.3d 345, 350 (Alaska App. 2019) (concluding that there was sufficient evidence of coercion, in part because the sexual contact occurred "in an isolated location by a man who the victim had good reason to be afraid of").

But under AS 11.41.470, conduct may occur "without consent" even if the victim resists the unwanted sexual contact.[28] Accordingly, the fact that K.R. moved away from Takak — thereby ending the contact — does not negate the other circumstances which demonstrate that the touching was coerced by the use of force. We do not look to one factor alone, but instead we assess the totality of those circumstances, considering all the facts, to determine whether there was sufficient evidence to conclude that the sexual contact was without consent.[29]

Additionally, Takak's own admissions indicate that he was aware that K.R. would perceive his actions as "forcing" himself on her, and that his actions were intended to put K.R. to some kind of test "to see what she would do." Takak acknowledged that K.R. told him that she did not want to kiss him and that K.R. tried to pull away from him when he attempted to kiss her. But rather than stopping, he continued, and even escalated, his advances by touching her breast. Takak's subsequent advice to K.R., that she should not let any "other" men "force themselves" on her, demonstrates that he was aware that K.R. would feel coerced to submit to his sexual advances.

We acknowledge that this case is a close one, particularly regarding the issue of force, and that reasonable jurors could have viewed the evidence differently. But when we assess the sufficiency of the evidence to support a criminal conviction, this

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[28] Former AS 11.41.470(8)(A) (2017) (explaining that "'without consent' 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 . . . .").

[29] *See State v. Mayfield*, 442 P.3d 794, 799 (Alaska App. 2019) ("[T]he question of coercion is evaluated under the totality of the circumstances").

Court views the evidence (and the inferences that could reasonably be drawn from that evidence) in the light most favorable to supporting the verdict.[30]

Viewing the evidence in the light most favorable to the verdict, we conclude that a reasonable juror could find that Takak's sexual touching of K.R. was "without consent" as defined by AS 11.41.470 and our cases interpreting this statute. Additionally, although Takak does not directly challenge the sufficiency of the evidence to establish that he recklessly disregarded K.R.'s lack of consent, we conclude that the evidence was sufficient to satisfy this element.

We accordingly affirm Takak's conviction for second-degree sexual assault.

The trial court erred in rejecting Takak's proposed mitigating factor that his conduct was among the least serious included in the definition of the offense

As a first felony offender, Takak faced a presumptive sentencing range of 5 to 15 years for his second-degree sexual assault conviction.[31] At sentencing, Takak proposed a mitigating factor under AS 12.55.155(d)(9) — that his conduct was "among the least serious conduct included in the definition of the offense." If the sentencing judge had found the proposed mitigating factor, Takak would have faced an adjusted sentencing range of 2.5 to 15 years.[32]

Although the judge recognized that the sexual contact was brief and occurred over multiple layers of clothing, he concluded that Takak's conduct did not qualify as "among the least serious," given what the judge characterized as the "predatory" nature of Takak's conduct, and the trauma K.R. suffered as a result. After

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

[31] AS 12.55.125(i)(3)(A).

[32] AS 12.55.155(a)(2).

rejecting Takak's proposed mitigator, the court sentenced Takak to 15 years' imprisonment with 7 years suspended (8 years to serve).

Whether conduct qualifies as "among the least serious" is a mixed question of law and fact.[33] We review a sentencing court's factual findings for clear error, but we review *de novo* the legal determination of whether those facts establish that the conduct is among the least serious.[34] Application of the (d)(9) mitigator to a particular sexual offense "does not mean that the [offense] is somehow 'not serious' or that the victim has not been harmed."[35] "Rather, the determination of the 'seriousness' of the defendant's conduct is a relative one — the defendant's conduct is considered 'among the least serious' only in contrast to the range of conduct included within the definition of the offense."[36]

Second-degree sexual assault covers a range of conduct that includes the touching of a victim's breast or genitals directly or through clothing. The level of coercion that is required to establish the victim's lack of consent can range from direct violence resulting in serious physical harm to the victim to indirect and nonverbal threats such as those involved in this case.

Takak engaged in and was convicted of a single act of sexual contact. The sexual contact occurred through clothing and was very brief — lasting no more than several seconds. When K.R. ended the contact, Takak did not engage in any additional sexual touching of her and, after a brief drive farther away from town, he returned her

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[33] *See Michael v. State*, 115 P.3d 517, 519 (Alaska 2005).

[34] *Id.*

[35] *Simants v. State*, 329 P.3d 1033, 1036 (Alaska App. 2014).

[36] *Id.*

to Shaktoolik. Additionally, as we just explained, the coercion used by Takak did not include physical violence or direct threats.

For these reasons, we conclude that Takak's conduct was "among the least serious" conduct included within the definition of the offense and that the trial court erred by rejecting this proposed mitigating factor.[37] We accordingly remand this case for resentencing.

The trial court erred in removing verified factual assertions from the presentence report in the absence of a testimonial denial or equivalent admissible evidence

The sole issue raised in the State's cross-appeal concerns the contents of Takak's presentence report.

Prior to sentencing, the Department of Corrections prepared a presentence report, including information about Takak's criminal history. Takak acknowledged that he had been convicted of the offenses reflected in the presentence report, but he filed an affidavit disputing the factual assertions made by the victim of his 1990 conviction for fourth-degree assault. In response, the State provided a copy of the police report associated with that offense to Takak, which included the victim's statements.

The trial court recognized that Takak's affidavit was not the equivalent of a testimonial denial, which our case law has traditionally required to challenge verified information contained in a presentence report.[38] Nonetheless, the court decided to strike all assertions related to the 1990 offense that did not appear in the original 1990 charging

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[37] *See id.*

[38] *See Davison v. State*, 307 P.3d 1, 4 (Alaska App. 2013) (noting that a defendant can raise a genuine factual dispute with the presentence report through a testimonial denial or equivalent admissible evidence, including, for example, testimony presented at trial).

document, even though the assertions in the presence report were verified by the police report.[39]

On appeal, the State argues that Takak's affidavit was insufficient to raise a "disputed assertion" under Alaska Criminal Rule 32.1(f)(5), and therefore the court erred in amending the presentence report based solely on the affidavit. Takak concedes error.

We have independently reviewed the record,[40] and we agree with the parties that a defendant must offer a testimonial denial, or equivalent admissible evidence, in order to challenge verified information under Criminal Rule 32.1(f)(5).[41] An affidavit alone is not sufficient — especially an affidavit such as the one Takak filed in this case, in which he made a blanket denial of the factual allegations underlying his offense, while nonetheless acknowledging that he "engaged in conduct supporting [the] conviction."

We accordingly reverse the trial court's redaction of verified information from the presentence report. However, as explained above, we are remanding this case for resentencing in light of mitigator (d)(9). If Takak chooses to pursue his challenge to the information in the presentence report on remand, he must do so by means of a testimonial denial or equivalent admissible evidence.[42]

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[39] *See Nukapigak v. State*, 562 P.2d 697, 701 n.2 (Alaska 1977) (defining "verified" as "corroborated or substantiated by supporting data or information"). The police report is not part of the appellate record, but Takak does not claim that the information in the presentence report differed in any way from the information in the police report.

[40] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (holding that an appellate court must independently assess whether a concession of error "is supported by the record on appeal and has legal foundation").

[41] *See Davison*, 307 P.3d at 3-4.

[42] *See Smith v. State*, 369 P.3d 555, 559-60 (Alaska App. 2016) (Suddock, J., (continued...)

Conclusion

We REVERSE the superior court's rejection of mitigator (d)(9), and we REMAND this case to the superior court for resentencing in light of this mitigator. We also VACATE the superior court's deletion of verified information from the presentence report.

In all other respects, the judgment of the superior court is AFFIRMED.

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[42] (...continued)
concurring) (discussing the proper procedure for resolving challenges to allegations in a presentence report).