

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

CHARLES FRANCIS NEAL,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13211  
Trial Court No. 3AN-16-08006 CR

MEMORANDUM OPINION

No. 7096 — March 20, 2024

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Erin B. Marston, Judge.

Appearances: David T. McGee, Attorney at Law, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Patricia L. Haines (initial brief) and Eric A. Ringsmuth (supplemental brief), Assistant Attorneys General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge WOLLENBERG.

Charles Francis Neal was charged with second-degree assault in connection with a physical altercation with his wife. Following a trial, a jury acquitted Neal of

second-degree assault but found him guilty of the lesser included offense of third-degree assault under the theory that he had recklessly caused physical injury by means of a dangerous instrument — namely, by using his hands to impede his wife’s normal breathing by applying pressure to her throat or neck.

Neal appeals his conviction for third-degree assault, raising two claims. First, Neal argues that the jury instruction defining the elements of third-degree assault failed to correctly specify the mental state with respect to the element, “by means of a dangerous instrument.” But Neal did not object to the jury instruction on this basis, and for the reasons explained in this opinion, we decline to find plain error. Second, Neal argues that the State presented insufficient evidence to support his conviction for third-degree assault. We also reject this claim.

We therefore affirm Neal’s conviction.

#### *Factual background*

In October 2016, Janess Neal suspected that her husband, Charles Neal, was being unfaithful to her after she discovered condoms in his pocket. She confronted Neal while he was sleeping in their bedroom, yelling at him and ripping away the blankets. Neal tried to explain and then went into the bathroom. Janess left the bedroom to get their six-year-old daughter ready for school.

Neal had the car keys and informed Janess that he would take their daughter to school. But Janess did not want Neal to have the car, and she tried to rip the keys away from him.

Their argument became increasingly physical, with Janess slapping and kicking at Neal, and Neal grabbing and restraining Janess. To avoid fighting in front of their daughter, Janess and Neal went back to the bedroom. As the two continued to struggle, they rolled off the bed. According to Janess, Neal held her down, and she felt

him use his hands to choke her around the neck, “applying a lot of pressure.” Janess had difficulty breathing, and felt “very flushed,” “very hot,” and “very faint,” to the point that she thought that she could possibly die. She testified that she “felt like [she] was gasping for air,” and that she cried out to Neal that she could not breathe.

According to Janess, the couple’s daughter came into their room and yelled at them to stop, which caused them to “snap[] out of everything that was going on.” The altercation left Janess’s throat sore, and she later told the police that she had difficulty swallowing.

Janess told Neal that she was going to call her mother. Neal asked for Janess’s phone and attempted to bend it. Although the phone bent a little, it did not break and was still functional, and Janess took it back.

The couple continued arguing, and after Neal stepped on Janess’s foot, causing her to fall to the ground, Janess decided to call the police. Neal left the home after Janess succeeded in contacting a 911 dispatcher.

Anchorage police responded to the 911 call. Janess told the responding officers that Neal had put her in a chokehold and put his knee on her throat. Both of the responding officers observed injuries around Janess’s neck, which one officer described as “fairly significant.” At trial, Janess testified that these marks — as shown in photographs — were “from the incident that had happened between us and trying to get him off of me, and him trying to restrain me and stuff.”

### *Procedural history*

A grand jury indicted Neal on one count of second-degree assault — *i.e.*, intentionally causing physical injury by means of a dangerous instrument.<sup>1</sup> The State

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<sup>1</sup> AS 11.41.210(a)(1).

also charged Neal by information with four misdemeanors — one count of fourth-degree assault,<sup>2</sup> one count of interfering with a report of a domestic violence crime to law enforcement,<sup>3</sup> and two counts of criminal mischief.<sup>4</sup>

Neal’s case proceeded to a jury trial. At trial, Janess testified that she and Neal had undergone extensive counseling since the incident sixteen months prior, and that the counseling had changed her perspective on what had happened. She wanted all the charges against Neal dropped. Janess testified that she was “definitely the aggressor in the relationship” and characterized herself as acting more violently than Neal. She acknowledged that Neal had put his hands around her neck, applying pressure and making it hard for her to breathe, but stated that Neal “was just trying to protect himself and [her] from getting hurt any further.” Neal did not testify.

Following the close of evidence, the State asked the court to instruct the jury on the lesser included offense of third-degree assault under AS 11.41.220(a)(1)(B) — *i.e.*, recklessly causing physical injury by means of a dangerous instrument. The only distinction between the charged second-degree assault and the requested third-degree assault charge was the applicable mental state: second-degree assault requires a person to have the “intent” to cause physical injury, and third-degree assault requires a person to “recklessly” cause physical injury.<sup>5</sup> Both charges require use of a “dangerous

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<sup>2</sup> AS 11.41.230(a)(1).

<sup>3</sup> AS 11.56.745.

<sup>4</sup> AS 11.46.484(a)(1) (fourth-degree criminal mischief) and AS 11.46.486(a)(1) (fifth-degree criminal mischief), respectively. The State later amended the fourth-degree count to fifth-degree criminal mischief under AS 11.46.486(a)(2).

<sup>5</sup> Compare AS 11.41.210(a)(1), with AS 11.41.220(a)(1)(B).

instrument.”<sup>6</sup> Under the circumstances of this case, the relevant definition of “dangerous instrument” is the second one set out in AS 11.81.900(b)(15): “hands, other body parts, or other objects when used to impede normal breathing or circulation of blood by applying pressure on the throat or neck or obstructing the nose or mouth.”<sup>7</sup>

Neal opposed the State’s request, arguing that third-degree assault was not a lesser included offense of second-degree assault when the charge is based on the use of hands to impede breathing under the definition of “dangerous instrument” set out in AS 11.81.900(b)(15)(B). Neal argued that there was an irreconcilable conflict between the mental state set out in the third-degree assault statute (“recklessly”) and the definition of a dangerous instrument under AS 11.81.900(b)(15)(B), and he claimed that there was therefore “no such creature as a strangulation C felony where [a person] recklessly cause[s] injury by strangulation.”<sup>8</sup>

The court ultimately granted the State’s request to instruct the jury on third-degree assault. The court instructed the jury that third-degree assault was a lesser

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<sup>6</sup> AS 11.41.210(a)(1); AS 11.41.220(a)(1)(B).

<sup>7</sup> AS 11.81.900(b)(15)(B).

<sup>8</sup> Neal does not renew this argument on appeal. The only distinction between the second- and third-degree assault statutes charged in this case was the mental state — intent to cause physical injury versus recklessly causing physical injury, both with a dangerous instrument. In closing argument, the State argued that Neal intended to cause physical injury to Janess by strangling her, or, in the alternative, that he recklessly caused physical injury by doing so. Under our cognate approach — and even under the elements approach — third-degree assault was a lesser included offense of second-degree assault under these circumstances. *See Moore v. State*, 740 P.2d 472, 473-74 (Alaska App. 1987) (explaining that unlike the statutory elements approach, which requires courts to look at whether the offenses share elements, the “cognate approach . . . focuses closely on the facts charged in the indictment and the evidence presented at trial to determine whether the defendant had actual notice of possible lesser-included offenses” and whether the charged and lesser included offense have an “inherent relationship”).

included offense of second-degree assault and modeled the elements instruction for third-degree assault on the corresponding pattern jury instruction.<sup>9</sup> Neal did not object to the wording of this instruction or the elements instruction for second-degree assault (which was also modeled on the pattern instruction).<sup>10</sup> The court also instructed the jury on the law of self-defense.

In closing arguments, the State argued that Neal had intended to cause physical injury by strangling his wife and should therefore be convicted of second-degree assault. In the alternative, the State urged the jury to find that, at a minimum, Neal committed third-degree assault by recklessly impeding his wife's breathing. The State also argued that Neal's conduct was not a justified use of self-defense.

By contrast, Neal argued that the evidence did not establish any strangulation at all — and certainly not that he had done so intentionally. Neal also argued that Janess was the aggressor and that, to the extent Neal held her down, he was entitled to do so in self-defense.

The jury acquitted Neal of second-degree assault, but found him guilty of third-degree assault. The jury also acquitted Neal of interfering with a report of a domestic violence crime and one count of fifth-degree criminal mischief, but found him guilty of fourth-degree assault and the other count of fifth-degree criminal mischief. (The court merged the fourth-degree assault into the third-degree assault.)

This appeal followed.

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<sup>9</sup> See Alaska Criminal Pattern Jury Instruction 11.41.220(a)(1)(B) (2001). The court also instructed the jury on the applicable definition of “dangerous instrument.”

<sup>10</sup> See Alaska Criminal Pattern Jury Instruction 11.41.210(a)(1) (2001).

*Neal’s claim that the court misinstructed the jury on the elements of third-degree assault*

For the first time on appeal, Neal argues that the trial court should have construed his categorical objection to instructing the jury on third-degree assault as a request for the trial court to modify the elements instruction for third-degree assault. In particular, Neal argues that use of a dangerous instrument is conduct and therefore the court erred when it failed to assign a “knowingly” mental state to the “by means of a dangerous instrument” element.<sup>11</sup>

In support of his argument, Neal contends that the plain meaning of subsection (B) of the “dangerous instrument” definition — *i.e.*, using one’s hands to impede normal breathing by applying pressure on the throat<sup>12</sup> — is a “behavior or action,” not a circumstance. He further contends that the legislative history of this subsection — which shows that the legislature intended to ensure that the act of strangulation could be prosecuted as a felony — supports his conclusion.<sup>13</sup>

In response, the State argues that there is no mental state that accompanies the “dangerous instrument” element. At most, the State contends that “by means of a dangerous instrument” is a circumstance that requires a “recklessly” mental state (and that the jury instruction in this case sufficiently communicated this requirement).

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<sup>11</sup> See AS 11.81.610(b) (“[I]f a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to (1) conduct is ‘knowingly’; and (2) a circumstance or a result is ‘recklessly.’”).

<sup>12</sup> AS 11.81.900(b)(15)(B).

<sup>13</sup> See Sponsor Statement for House Bill 219 by Representative Mike Hawker (March 15, 2005) (contained in the House Judiciary Committee File for House Bill 219); *Foy v. State*, 513 P.3d 1085, 1090-91 (Alaska App. 2022) (discussing the legislative history and intent of AS 11.81.900(b)(15)(B)).

We believe there is a middle ground between these two positions and that, by categorically applying the mental state of “knowingly” to the entire definition of “dangerous instrument” under AS 11.81.900(b)(15)(B), Neal paints this definition with too broad a brush. Under AS 11.81.900(b)(15)(B), “dangerous instrument” is defined as “hands, other body parts, or other objects when used to impede normal breathing or circulation of blood by applying pressure on the throat or neck or obstructing the nose or mouth.” This definition can essentially be divided into two parts — (1) “imped[ing] normal breathing or circulation of blood” and (2) “applying pressure on the throat or neck or obstructing the nose or mouth” by hands, other body parts, or other objects.

Neal was convicted of third-degree assault for recklessly causing physical injury by means of a dangerous instrument — *i.e.*, by using his hands to impede his wife’s breathing or circulation of blood by applying pressure to her neck. The State was therefore required to prove that Neal actually impeded his wife’s normal breathing or circulation of blood. As the Texas Court of Criminal Appeals has noted, impeding breathing is a bodily injury,<sup>14</sup> or, in the words of the Alaska statute, a “physical injury” — *i.e.*, “a physical pain or an impairment of physical condition.”<sup>15</sup> It was therefore a necessary result of this offense. And as to this resulting physical injury, the State had to

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<sup>14</sup> *Price v. State*, 457 S.W.3d 437, 442-43 (Tex. Crim. App. 2015) (concluding that occlusion assault (*i.e.*, assault by strangulation) in Texas is a result-based offense, and the result — bodily injury — occurs when “normal breathing or circulation of the blood has been impeded”).

<sup>15</sup> AS 11.81.900(b)(48); *see also State v. Hendricks*, 359 P.3d 294, 299-301 (Or. App. 2015) (finding sufficient evidence of “physical injury” for purposes of assault conviction where, as a result of the defendant’s conduct, the victim was “completely unable to breathe for a period of time, causing her to fear for her survival”); *Ortiz v. State*, 623 S.W.3d 804, 808 (Tex. Crim. App. 2021) (“If impeding is not proven, then the evidence is legally insufficient to prove occlusion assault, and proving a different injury proves a different assault[.]”).



prove — and the State argued — that Neal acted recklessly.<sup>16</sup> That is, Neal had to be aware of and consciously disregard a substantial and unjustifiable risk that he was impeding his wife’s breathing.<sup>17</sup>

We therefore reject any suggestion by Neal that the State had to prove that he *knowingly* impeded his wife’s breathing. As to this result, or physical injury, he only had to be reckless.

The question then remains whether a particular mental state attaches to a defendant’s *use of their hands* to apply pressure to the throat or neck. We note that, in this context, “knowingly” using one’s hands to apply pressure to the throat seems to have little practical distinction from saying that the State must prove a voluntary act — *i.e.*, that the defendant acted voluntarily.<sup>18</sup> As we noted in *Nelson v. State*, “[e]very criminal offense must be premised on some voluntary act or omission by the defendant” — but not every criminal offense has an explicit “conduct” element.<sup>19</sup> And when the voluntariness of the defendant’s actions is not contested, no express instruction on the point is needed.<sup>20</sup>

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<sup>16</sup> The State also argued that Neal intended to cause physical injury, but the jury rejected that argument.

<sup>17</sup> See AS 11.81.900(a)(3).

<sup>18</sup> AS 11.81.600(a) (“The minimal requirement for criminal liability is the performance by a person of conduct that includes a voluntary act or the omission to perform an act that the person is capable of performing.”).

<sup>19</sup> *Nelson v. State*, 927 P.2d 331, 333 n.3 (Alaska App. 1996) (“[N]ot all crimes are defined in terms of a specific type of conduct.”).

<sup>20</sup> *State v. Simpson*, 53 P.3d 165, 169 (Alaska App. 2002) (“Although the voluntariness of a defendant’s conduct is rarely disputed, it remains an implicit element of all crimes. If voluntariness is actively disputed, the government must prove it.”). Neal did  
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However, we conclude that we need not resolve this question in this case because we agree with the State that Neal did not object to the language of the jury instruction and the failure to expressly include a “knowingly” *mens rea* with respect to Neal’s use of his hands (assuming one is required) was not 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.”<sup>21</sup> As the Alaska Supreme Court stated in *Adams v. State*, “A constitutional violation will always affect substantial rights and will be prejudicial unless the State proves that it was harmless beyond a reasonable doubt.”<sup>22</sup>

Having reviewed the record, we conclude that, under the facts of this case, there is no reasonable possibility that the jury found that Neal recklessly caused physical injury without also finding that Neal knowingly used his hands to cause that result. As one Texas Court of Criminal Appeals judge addressing this issue has noted, “[I]t is hard to imagine a jury that would find that [the defendant] . . . recklessly caused an impediment to the victim’s breath or blood flow but would also fail to find that he . . . knowingly *engaged in conduct* that impeded those bodily functions.”<sup>23</sup>

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<sup>20</sup> (...continued)  
not request an instruction informing the jury that every crime requires a voluntary act.

<sup>21</sup> *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011); *see also Nelson*, 927 P.2d at 333 (reviewing instructions on elements of third-degree assault for plain error because the defendant did not object to the instructions in the trial court).

<sup>22</sup> *Adams*, 261 P.3d at 773.

<sup>23</sup> *Price v. State*, 457 S.W.3d 437, 446 (Tex. Crim. App. 2015) (Yeary, J., concurring) (emphasis added); *see generally id.* at 443-46 (concluding, contrary to the majority opinion in the case, that strangulation described a type of conduct, for which a mental state was required, but finding that the absence of such a mental state instruction was  
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Moreover, in the absence of an express objection or litigation on this issue, we cannot find that the court committed obvious error in relying on the pattern jury instruction in this case, given the long-standing absence of an express mental state in our instructions with respect to the “dangerous instrument” element.<sup>24</sup>

On appeal, Neal contends that this issue is not susceptible to plain error review under the Alaska Supreme Court’s decision in *Jordan v. State*.<sup>25</sup> In *Jordan*, the supreme court held that the failure to instruct the jury on a contested element of a charged offense is structural error that requires automatic reversal without regard to prejudice.<sup>26</sup>

We have previously recognized that the supreme court’s use of the word “contested” in *Jordan* is ambiguous.<sup>27</sup> Under traditional preservation principles and Justice Scalia’s dissent in *Neder v. United States* (upon which *Jordan* is based), a defendant must object to the omission of an element from the jury instruction and obtain an adverse ruling to preserve the issue.<sup>28</sup> In *Neder*, although the defendant did not

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<sup>23</sup> (...continued)  
not “egregious harm” — *i.e.*, not plain error).

<sup>24</sup> See Alaska Criminal Pattern Jury Instruction 11.41.220(a)(1)(B) (2001); *see also Nelson*, 927 P.2d at 333 n.3 (noting, in 1996, that “[i]t is unclear whether the legislature intended for the phrase ‘by means of a dangerous instrument’ to refer to a ‘circumstance’ or to a particular type of ‘conduct’” and declining to decide the question).

<sup>25</sup> *Jordan v. State*, 420 P.3d 1143 (Alaska 2018).

<sup>26</sup> *Id.* at 1148.

<sup>27</sup> *Alvarado v. State*, 440 P.3d 329, 333 n.14 (Alaska App. 2019).

<sup>28</sup> *Neder v. United States*, 527 U.S. 1, 34-35 (1999) (Scalia, J., concurring in part and dissenting in part) (noting that even when jury instructions omit an essential element of the offense, the failure to make a timely objection “will preclude automatic reversal”); *Lengele*  
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*factually* contest the omitted element, he did request that the jury be instructed on it.<sup>29</sup> Given that the jury was deprived of the opportunity to determine an element of the charged offense, and given the defendant’s objection, Justice Scalia concluded that the error in removing an essential element from the jury’s consideration was structural error.<sup>30</sup>

In contrast, in *Jordan*, the opposite was true — the defendant sought to factually dispute the omitted element (*i.e.*, his *mens rea* with respect to the amount of marijuana in his home), but did not request a jury instruction on it because the trial court precluded any evidence regarding that omitted element.<sup>31</sup> That is, the defendant sought to actively contest the element as part of his defense at trial, but was not permitted to do so.<sup>32</sup> As we have recognized in previous cases, it was this failure to allow the defendant to present his defense that animated the supreme court’s decision finding structural error, notwithstanding the fact that the defendant did not specifically request that the omitted element be included in the jury instructions.<sup>33</sup>

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<sup>28</sup> (...continued)  
*v. State*, 295 P.3d 931, 935 (Alaska App. 2013) (“[A] party who objects to a jury instruction must make an objection that is sufficient to put the court and opposing counsel on notice of the defect in the instruction given; a general objection is insufficient.”).

<sup>29</sup> *Neder*, 527 U.S. at 6, 16; *id.* at 34 (Scalia, J., concurring in part and dissenting in part).

<sup>30</sup> *Id.* at 30-32, 34 (Scalia, J., concurring in part and dissenting in part).

<sup>31</sup> *Jordan v. State*, 420 P.3d 1143, 1146, 1151-52 (Alaska 2018).

<sup>32</sup> *Id.*

<sup>33</sup> *See, e.g., Geisinger v. State*, 498 P.3d 92, 110-11 (Alaska App. 2021); *Brown v. State*, 435 P.3d 989, 992 (Alaska App. 2018); *Malyk v. State*, 2019 WL 4464682, at \*3 (Alaska App. Sept. 18, 2019) (unpublished).

Here, Neal did not preserve the error under either definition of “contested.” He did not object to the elements instruction for third-degree assault. Nor did he clearly argue as a factual matter that he did not “knowingly” use his hands. Rather, he argued that he had no intent to impede his wife’s breathing in this manner, and that if he did impede her breathing, he did so in self-defense.

Accordingly, applying plain error review, we conclude that any defect in the third-degree assault instruction does not require reversal of Neal’s conviction on that count.

*Neal’s claim that there was insufficient evidence to support his third-degree assault conviction*

Neal also argues that, assuming a “knowingly” mental state applies to the entire “dangerous instrument” element, there was insufficient evidence to support his conviction for third-degree assault. In particular, Neal argues that the State presented insufficient evidence to prove that he “knowingly” used his hands to impede breathing because, at best, the evidence showed that he placed his hands on her neck in an attempt to defend himself while they were “wrestling around.” But we have already rejected the argument that Neal had to “knowingly” impede breathing; rather, he only had to act “recklessly.” And even accepting that Neal had to act “knowingly” with respect to the use of hands to apply pressure to his wife’s throat, we reject Neal’s challenge to the sufficiency of the evidence.<sup>34</sup>

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<sup>34</sup> We note that, even if we agreed with Neal that the State was required, and failed, to prove that he “knowingly” used his hands, he would not be entitled to an outright acquittal. The fourth-degree assault count that merged with the third-degree assault would remain as a separate conviction, as the fourth-degree assault with which Neal was charged, AS 11.41.230(a)(1), does not contain the “dangerous instrument” element that Neal is  
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When we review the sufficiency of the evidence to support a criminal conviction, we view the evidence, and all reasonable inferences arising from that evidence, in the light most favorable to the verdict.<sup>35</sup> We then ask whether a reasonable juror could find that the defendant was guilty beyond a reasonable doubt.<sup>36</sup>

Here, Neal’s argument rests on viewing the evidence in the light most favorable to himself. But when viewed in the light most favorable to the jury’s verdict, the evidence was sufficient to show that Neal knowingly used his hands to apply pressure to Janess Neal’s neck.

Janess Neal testified that Neal put his hands on her neck and “appl[ie]d a lot of pressure,” causing her to have difficulty breathing. Janess testified at trial that she felt “very flushed,” “very hot,” and “very faint,” to the point that she thought that she might lose consciousness. She testified that she “felt like [she] was gasping for air,” and

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<sup>34</sup> (...continued)  
contesting.

Moreover, it is an open question under Alaska law whether an appellant who argues that the evidence was insufficient to establish an offense *as correctly defined* would be entitled to an acquittal (or simply a reversal and retrial), where the elements of the charge were mistakenly defined for the jury. *See Kuku v. State*, 2013 WL 5532714, at \*6 (Alaska App. Oct. 2, 2013) (unpublished) (collecting case law stating that “when the jury instructions contain a mistaken definition of the offense, the defendant is entitled to a reversal of the conviction and a retrial, but the defendant is not allowed to seek a dismissal of the charges with prejudice by arguing that the evidence at trial was insufficient to establish the offense as correctly defined” — but not resolving the issue); *see also Collins v. State*, 977 P.2d 741, 751-52 (Alaska App. 1999) (Mannheimer, J., concurring) (discussing the difference between a motion for judgment of acquittal, which requests dismissal and acquittal based on the State’s failure to factually prove one or more elements of the offense, and other motions alleging a legal error, like the failure to properly instruct the jury as to an element of the offense, which would entitle the defendant to a new trial).

<sup>35</sup> *Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

<sup>36</sup> *Id.*

that she cried out to Neal that she could not breathe. Despite this warning, Neal did not release his grip on Janess until his six-year-old daughter entered the room and yelled for him to stop. The assault left Janess's throat sore, and a responding officer observed "fairly significant" marks on her neck. Photographs admitted at trial showed injuries to Janess's neck, and Janess acknowledged that the injuries in the photos were from the incident in which Neal had tried to restrain her.

Under these circumstances, there was sufficient evidence that Neal knowingly used his hands to recklessly impede his wife's breathing (again, assuming "knowingly" applies to any portion of the "dangerous instrument" definition).<sup>37</sup> We therefore reject Neal's challenge to the sufficiency of the evidence.

### *Conclusion*

The judgment of the superior court is AFFIRMED.

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<sup>37</sup> Neal also notes that the jury acquitted him of intentionally causing physical injury (for purposes of the second-degree assault charge), and he argues that, because the "statutory language requiring an 'intentional' mental state as to results must be construed to require 'knowing' conduct," the jury necessarily concluded that "the State did not prove 'knowing' conduct." But this argument conflates the mental state applicable to the result of the offense (*i.e.*, physical injury) with the mental state applicable to conduct. *See Schlosser v. State*, 372 P.3d 272, 276-77 (Alaska App. 2016) (cautioning attorneys and trial judges not to transpose the mental states applicable to different material elements of an offense). Moreover, while proof of a higher mental state is sufficient to establish a lower mental state *as to that same element*, the failure to establish a higher mental state does not preclude the jury from finding a lower mental state as to that same element. *See AS 11.81.610(c)*.