

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.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DONALD JOHN LUNDY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11535  
Trial Court No. 3AN-12-4668 CR

MEMORANDUM OPINION

No. 6363 — July 27, 2016

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Philip R. Volland, 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. Kenneth M. Rosenstein, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,  
Superior Court Judge.\*

Judge SUDDOCK.

---

\* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

A jury convicted Donald John Lundy of second-degree assault, driving while license revoked, and driving in violation of a restricted license. According to evidence presented at trial, Lundy was seated in his parked vehicle near an Anchorage apartment complex. A resident of the complex knocked on his window, and Lundy attacked the resident. He then moved his vehicle a short way. Superior Court Judge Philip R. Volland sentenced Lundy to a composite term of 10 years and 20 days, with 160 days suspended. This appeal followed.

*Factual background*

Late in the evening of May 14, 2012, police officers responded to a report of an assault in the parking lot of an Anchorage apartment complex. Anchorage Police Officer Christopher Nelson found David Gonyea lying in the parking lot in a pool of blood. Lundy was sitting in the driver's seat of a vehicle parked in an adjoining alley with the engine running.

Lundy was indicted on one count of second-degree assault. The State also charged him with driving while license revoked and driving in violation of a restricted license (for failing to install an ignition interlock device).<sup>1</sup>

At trial Gonyea, a resident of the apartment complex, testified that he had observed a suspicious man — later identified as Lundy — sitting in the driver's seat of a car in the adjoining alley. He decided to see if the man needed help, was waiting for someone, or was there for another purpose. He knocked on the window of the car to get Lundy's attention, but then he reconsidered and turned to walk back to his apartment.

As Gonyea was walking away, Lundy emerged from his car and struck him from behind, knocking him to the ground. Lundy continued to punch and kick Gonyea

---

<sup>1</sup> AS 11.41.210(a)(2), AS 28.15.291(a)(1), and AS 28.15.121(d), respectively.

in the head. Gonyea eventually lost consciousness. An apartment resident who saw Lundy stomp on Gonyea's head called 911. Before officers responded to the scene, that witness saw Lundy move his vehicle to a different position in the alley.

As a result of the incident, Gonyea suffered a broken rib, a deep laceration on his head, and nerve damage to his lower back causing a loss of muscle control in his calf and ankle. Additionally, his right eyelid did not heal properly.

At trial Lundy testified in his own defense. He testified that earlier in the day a friend introduced him to a woman named Sondra while at a gas station and that he accompanied her as she drove his vehicle on errands. Sondra then drove to the apartment complex and went inside. While Lundy waited for her to return, Gonyea approached the vehicle, knocked loudly on the window, and yelled obscenities at him. Gonyea then opened the car door and punched Lundy in the head. Lundy defensively struck Gonyea in the face and used an "arm bar" to push him "straight down to his face." Lundy returned to the driver's seat of the car and waited for police to arrive. He testified that he had not driven the car that day.

At Lundy's request, the trial court instructed the jury on self-defense. The jury convicted Lundy on all counts.

At sentencing, Lundy asked the court to find two statutory mitigators: that his conduct was among the least serious, and that Gonyea provoked the crime to a significant degree.<sup>2</sup> Lundy argued that the mitigators were appropriate because Gonyea's injuries were minor and Gonyea was the initial aggressor. Judge Volland rejected both mitigators and sentenced Lundy to 10 years with none suspended for the second-degree assault conviction, as well as consecutive sentences of 90 days with 80 days suspended for each of the two misdemeanor convictions.

---

<sup>2</sup> AS 12.55.155(d)(9) and AS 12.55.155(d)(7), respectively.

Lundy now appeals, challenging the sufficiency of the evidence at trial to convict him on the charges of assault, driving while license revoked, and driving in violation of a restricted license. He also appeals from his sentence.

*Why we affirm Lundy’s conviction for second-degree assault*

Lundy challenges the sufficiency of the evidence supporting his second-degree assault conviction, arguing that the evidence at trial was insufficient to prove “serious physical injury.” Lundy also argues that the State did not adequately negate self-defense.

When a defendant challenges the sufficiency of the evidence to support a criminal conviction, 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.<sup>3</sup> We then ask whether, viewing the evidence in that light, a reasonable fact-finder could conclude that the State proved its case beyond a reasonable doubt.<sup>4</sup>

Here, Lundy was charged with second-degree assault for “recklessly caus[ing] serious physical injury to another person.”<sup>5</sup> “Serious physical injury” has two meanings under AS 11.81.900(b)(57): (1) a “physical injury caused by an act performed under circumstances that create a substantial risk of death;”<sup>6</sup> and (2) a “physical injury that causes serious and protracted disfigurement, protracted impairment of health, [or]

---

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

<sup>4</sup> *Id.*

<sup>5</sup> AS 11.41.210(a)(2).

<sup>6</sup> AS 11.81.900(b)(57)(A).

protracted loss or impairment of the function of a body member or organ.”<sup>7</sup> The State presented both theories to the jury.

As for the theory that Lundy’s conduct created a substantial risk of death, the evidence presented at trial, taken in the light most favorable to the jury’s verdict, established that Lundy — a 300-pound man — punched, kicked, and stomped on Gonyea’s head. When officers arrived, Gonyea was unconscious on the ground, lying in a pool of his own blood. Based upon this evidence, a reasonable juror could have concluded that when Lundy stomped on and kicked Gonyea’s head, he subjected Gonyea to a substantial risk of death.<sup>8</sup>

The State also introduced evidence in support of its alternative theory of second-degree assault — that the victim suffered protracted impairment of health or of a body member. Gonyea testified at trial that, as a result of the assault, he suffered nerve damage and walks with a limp. His eye no longer produces adequate moisture, resulting in impaired vision and scar tissue on his eyelid that affects his ability to blink. We find this evidence was sufficient to support the jury’s verdict.

Lundy further argues that the evidence was insufficient to negate self-defense. He relies on his own testimony about the incident, and he argues that, because Gonyea could only recall parts of the incident, Gonyea’s testimony lacked credibility. But Lundy’s argument is based on an interpretation of the evidence in the light most favorable to himself. Viewing the evidence in the light most favorable to the jury’s verdict we find that the evidence was sufficient for a reasonable juror to conclude that Lundy did not act in self-defense.<sup>9</sup>

---

<sup>7</sup> AS 11.81.900(b)(57)(B).

<sup>8</sup> *See Davidson v. State*, 975 P.2d 67, 69 (Alaska App. 1999).

<sup>9</sup> *See Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

*Why we affirm Lundy's driving convictions*

Lundy also challenges the sufficiency of the evidence supporting his conviction for driving while license revoked and driving in violation of a restricted license. To convict Lundy of those crimes, the State had to prove that he drove his vehicle on a “highway or vehicular way or area” rather than on the private property of the apartment complex.<sup>10</sup> Since the jury could theoretically have credited Lundy’s testimony that Sondra drove the car to the apartment complex but still have convicted him based on witness testimony that he drove the car in the alley, Lundy is correct that affirmance of his driving convictions hinges upon adequate proof that the alley was a “vehicular way” as opposed to the private property of the apartment complex.<sup>11</sup>

But at trial Lundy did not challenge the character of the alley; rather he testified that he had not driven at all on the day in question. Nor did Lundy request the judge to instruct the jury on the statutory definition of the term “vehicular way or area.”<sup>12</sup> And he did not question the nature of the alley in his final argument to the jury; indeed he scarcely mentioned the driving issue at all, focusing his entire argument on the second-degree assault charge. The nature of the alley as a vehicular way was simply not at issue in the case.

On these facts the State was entitled to rely on the common meaning of the term “alley” as connoting a publicly available route and so satisfying the statutory element that the driving occur on a vehicular way. But in any event, Anchorage Police Detective James Anderson testified at trial that he had gone to the scene and determined that the alley was in fact open to the public. The alley ran between two streets and was

---

<sup>10</sup> AS 28.15.291(a)(1).

<sup>11</sup> See *Conner v. State*, 696 P.2d 680, 682-83 (Alaska App. 1985).

<sup>12</sup> AS 28.90.900(a)(31).

typical of other alleys in the neighborhood serving as access lanes to adjoining apartment parking lots. Based on this evidence, the jury could reasonably conclude that the alley was a “vehicular way.” We thus reject this aspect of Lundy’s challenge to the sufficiency of the evidence to support his convictions for driving while license revoked and driving in violation of a restricted license.

*Why we conclude that the trial court did not err in rejecting the least-serious conduct mitigator*

Lundy also challenges his sentence of 10 years’ imprisonment for his second-degree assault conviction, arguing that the judge erred in rejecting his proposed mitigator — that his conduct was among the least serious included in the definition of the offense.<sup>13</sup> The superior court concluded that the mitigator did not apply to Lundy’s case:

I have definitely seen assaults in the second degree with ... less serious injury. I have seen ... assaults in the second degree with more serious injury. But definitely breaking someone’s rib, causing a fracture of the facial bones, permanent scarring above the eye, significant enough injuries that cause at least limping. ... [W]hat occurred in this case is that Mr. Lundy stomped a defenseless man of significantly less weight and size while he lay defenseless on the ground.

The judge also noted that the victim’s injuries had persisted until the time of trial, mistakenly reciting a seven-month duration.

Lundy argues that the judge’s findings were not supported by the record because the trial occurred only four months — rather than seven months — after the assault. Though we agree that the judge misstated the elapsed time between the assault

---

<sup>13</sup> AS 12.55.155(d)(9).

and trial, we do not find that to be dispositive. The judge’s sentencing remarks explicitly focused on Lundy’s aggravated conduct, and not the nature of Gonyea’s injuries, when he rejected the least-serious conduct mitigator.

We find no error in the superior court’s conclusion that Lundy’s conduct — a 300-pound man stomping on the head of an unconscious victim — did not constitute “among the least-serious conduct” within the definition of second-degree assault.

*Why we conclude that the trial court did not err in rejecting the significant provocation mitigator*

Lundy also argues that the court erred in failing to mitigate his sentence for second-degree assault based on the (d)(7) mitigator — that “the victim provoked the crime to a significant degree.”<sup>14</sup> We first note that this mitigator does not apply to assault convictions.<sup>15</sup> Rather, a defendant convicted of assault must rely on the more stringent (d)(6) mitigator — that “the defendant acted with *serious* provocation from the victim.”<sup>16</sup>

A defendant bears the burden of proving a proposed mitigator by clear and convincing evidence.<sup>17</sup> The superior court found that Lundy had not met this burden, concluding that Gonyea’s act of rapping on Lundy’s window did not constitute a sufficient provocation to justify Lundy’s response. We have repeatedly upheld the rejection of the provocation mitigator in cases where the defendant responds with force

---

<sup>14</sup> AS 12.55.155(d)(7).

<sup>15</sup> *Smith v. State*, 229 P.3d 221, 226 (Alaska App. 2010).

<sup>16</sup> AS 12.55.155(d)(6) (emphasis added).

<sup>17</sup> AS 12.55.155(f)(1).

that is disproportionate to the perceived provocation.<sup>18</sup> We thus find no error in the superior court's rejection of the proposed mitigator.

*Conclusion*

We AFFIRM the judgment and sentence of the superior court.

---

<sup>18</sup> See, e.g., *Santoyo v. State*, 2013 WL 3963430, at \*1-2 (Alaska App. July 31, 2013) (unpublished).