

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

RICHARD W. TOLOTTA,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11593
Trial Court No. 3KN-10-1951 CR

MEMORANDUM OPINION

No. 6364 — July 27, 2016

Appeal from the Superior Court, Third Judicial District, Kenai,
Anna Moran, Judge.

Appearances: Renee McFarland, Assistant Public Defender,
and Quinlan Steiner, Public Defender, Anchorage, for the
Appellant. Elizabeth T. Burke, 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.

Richard W. Tolotta was convicted of coercion after he interrupted the
public meeting of a Cohoe-Kasilof community group and threatened to kill the group's

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

members if they did not end the meeting, or if they met at a later time. His threats caused the group to end that meeting and also caused at least one member to fear for her physical safety and to quit the group.

On appeal, Tolotta argues that the evidence at trial was legally insufficient to support his conviction for coercion. Specifically, he asserts that the State failed to prove beyond a reasonable doubt that his threat was more than mere political hyperbole and bluster, or that the member's fear for her physical safety was objectively reasonable. He also argues that the State failed to prove beyond a reasonable doubt that the member ceased participating in the meeting out of fear induced by his threat. Likewise, he asserts that the State failed to prove beyond a reasonable doubt that the member's failure to attend subsequent meetings was induced by this fear.

For the reasons explained here, we reject these claims and conclude that the evidence at trial, when viewed in the light most favorable to upholding the jury's verdict, was legally sufficient to support Tolotta's conviction for coercion.

Tolotta next contends that the trial court committed plain error by failing to respond to a jury question regarding the jury unanimity requirement. But Tolotta has not provided an adequate record on appeal to allow us to meaningfully review his claim and we cannot determine whether this question was given to the judge or whether the judge ruled on it. We therefore decline to review a claim of plain error based on pure speculation.

Finally, Tolotta challenges his sentence as illegal. The State concedes error, and we find this concession to be well taken and remand for resentencing. On remand, we also direct the superior court to address contested factual allegations contained in Tolotta's presentence report.

Facts and proceedings below

On November 8, 2010, an ad hoc citizens' group held a meeting at the Kasilof fire station to discuss perceived problems with the local personal use fishery. Six Kasilof residents attended the meeting, one of whom was Carole Johns-Okamoto.

Minutes after the group convened, Tolotta entered the room and demanded that the meeting end. Tolotta told the participants that they were "not allowed to have a meeting," and that he was "not allowing" the meeting to continue. One group member suggested that future meetings could be held in a private residence. Tolotta responded that he would "find out where [this member] live[d]" and "bring more people there and ... take [them] all out." Tolotta also specifically threatened to kill them.

The members were eventually able to escort Tolotta out of the building, lock the doors, and contact the Alaska State Troopers. While they waited for the troopers to arrive, Tolotta paced in the parking lot and once attempted to open the locked door. Fearing that Tolotta might have a weapon, group members stayed away from the windows until troopers arrived. Tolotta eventually departed, but troopers stopped him nearby. Once Tolotta was arrested, the group ended the meeting.

Based on this conduct, Tolotta was indicted on six counts of coercion¹ — five counts alleging coercion of five individual group members as to the termination of the meeting, and one count for causing Carole Johns-Okamoto to abstain from attending subsequent meetings (of the group's members, only Johns-Okamoto was deterred from attending subsequent meetings). Tolotta successfully challenged the indictment as to one count, but the remaining five counts — including the two counts relating to Johns-Okamoto — went to trial.

¹ AS 11.41.530(a)(1).

The jury found Tolotta guilty of the two counts alleging coercion of Johns-Okamoto but acquitted him of the remaining charges. Superior Court Judge Anna Moran merged the two convictions and sentenced Tolotta to 25½ months' incarceration with 24 months suspended, and 5 years' probation. This appeal followed.

Why we conclude the evidence sufficed to establish that Tolotta's threat reasonably induced Johns-Okamoto to fear for her personal safety

A defendant commits the crime of coercion under AS 11.41.530(a)(1) if the defendant (1) compels another person to engage in conduct that they have the right to abstain from, or to abstain from conduct that they have the right to engage in, (2) by instilling in the other person a reasonable fear that, if they do not comply with the defendant's demand, (3) the defendant or someone else will commit a crime against that person or against anyone else, or will inflict any of the other types of harm specified in AS 11.41.530(a)(2)-(6).

Tolotta does not dispute that the statements he directed to the group assembled at the fire station caused Johns-Okamoto to fear for her physical safety. But Tolotta contends that the evidence presented at his trial was insufficient to establish that Johns-Okamoto's fear was reasonable.

More specifically, Tolotta argues that most of his statements were simply political expressions of his general dissatisfaction with government, and of his particular dissatisfaction that the group of residents had assembled to discuss forming a community council. Tolotta asserts that no reasonable person in Johns-Okamoto's position would have understood his statements to be true threats of violence.

But in making this claim, Tolotta views the evidence in the light most favorable to himself. This Court, on the other hand, is obliged to view the evidence in

the light most favorable to the jury’s verdict.² Viewed in that light, the evidence was sufficient to convince fair-minded jurors that reasonable people would take Tolotta’s threats of violence as true threats, and not merely as forceful expressions of anti-government sentiment or political hyperbole.

Why we reject Tolotta’s other challenges to the sufficiency of the evidence

Tolotta challenges his conviction for coercing Johns-Okamoto into ending her participation in the meeting at the fire station. According to Tolotta, the State presented insufficient evidence that Johns-Okamoto actually ceased participation as a result of his demands — because the meeting did not adjourn until after Tolotta was arrested, when the group no longer had reason to fear personal injury.

At trial, Johns-Okamoto testified that Tolotta threatened to harm or kill the group members if they did not immediately end the meeting. As a result of these threats, Johns-Okamoto attempted to leave. But she ultimately remained out of fear that Tolotta would follow her home and harm her. After Johns-Okamoto learned that Tolotta was in police custody, she immediately departed. This evidence, viewed in the light most favorable to the verdict, was sufficient for a reasonable juror to conclude that Johns-Okamoto ended her participation in the meeting as a result of Tolotta’s demands.

Tolotta also challenges the sufficiency of the evidence of his conviction for coercing Johns-Okamoto into abstaining from attending subsequent meetings. Tolotta argues that the State presented insufficient evidence that Johns-Okamoto abstained from attending subsequent meetings because of Tolotta’s threats.

But witnesses to the incident testified that Tolotta demanded that no future meetings should occur — a demand that “was directed at everybody in the room.”

² E.g., *Adams v. State*, 359 P.3d 990, 996 (Alaska App. 2015).

Tolotta made it clear that future meetings could not occur at any location and threatened to find out where the members lived and “take [them] all out” if they convened a meeting elsewhere. As a result of these threats, Johns-Okamoto testified that she abstained from attending subsequent meetings because she knew Tolotta was “out,” and she had “better things to do than to have that happen to [her].”

This evidence was sufficient to support Tolotta’s conviction for coercing Johns-Okamoto to avoid subsequent meetings. And we note that in any event, the superior court merged the two convictions, such that Tolotta was only sentenced for a single instance of coercion.

Why we reject Tolotta’s plain error claim regarding a jury question

Tolotta also argues that the trial court committed plain error by failing to respond to a jury question that inquired, “If one ... jury member says not guilty is it true that [the] defend[a]nt is not guilty[?]” The question was hand-written on a standardized jury question form and signed by the jury foreperson, but the rest of the form — including the case caption — was left blank. Tolotta argues that the court’s failure to respond to this question, and thus to instruct the jury on jury unanimity, deprived him of a fair trial.

But Tolotta points to no evidence in the record that this jury question was actually submitted to the judge, or if it was, how the judge addressed it. Based on the record currently before us, this matter was never raised in the superior court. As the State points out, it is the appellant’s burden to present a record on appeal that establishes

that an error occurred.³ Tolotta has failed to meet this burden, and we decline his invitation to notice a purported error based on pure speculation.⁴

Why we remand for resentencing and adjudication of the presentence report

Tolotta challenges his sentence of 25½ months' incarceration with 24 months suspended. At sentencing, the prosecutor asserted that, under AS 12.55.125(o), the court was obligated to impose a minimum of 2 years' suspended time in addition to any appropriate active time, and the judge agreed. But as Tolotta points out on appeal — and as the State concedes — AS 12.55.125(o) applies only to sexual assault convictions. We accordingly vacate Tolotta's sentence and remand for resentencing.

Tolotta also notes that the trial court failed to address several of his objections to factual assertions in his presentence report. Because Alaska Criminal Rule 32.1(f)(5) requires a court to redact factual assertions that a judge finds to be unproven or irrelevant, the court's failure to address Tolotta's objections was error.⁵ On remand, we direct the superior court to revisit the matter.

Conclusion

We AFFIRM Tolotta's convictions, but we VACATE Tolotta's sentence and REMAND to the superior court for resentencing. In addition, we direct the superior

³ See *Jackson v. State*, 31 P.3d 105, 110 (Alaska App. 2001) (citing *Ketchikan Retail Liquor Dealers Ass'n v. State, Alcoholic Beverage Control Bd.*, 602 P.2d 434, 438-39 (Alaska 1979), *modified on reh'g*, 615 P.2d 1391 (Alaska 1980)).

⁴ See *Sam v. State*, 842 P.2d 596, 599 (Alaska App. 1992).

⁵ See *Smith v. State*, 369 P.3d 555, 558 (Alaska App. 2016).

court to adjudicate the contested allegations in Tolotta's presentence report. We do not retain jurisdiction.