

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

NORIEL M. CARINO,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11868
Trial Court No. 3KO-11-193 CR

MEMORANDUM OPINION

No. 6479 — May 31, 2017

Appeal from the Superior Court, Third Judicial District, Kodiak,
Steve W. Cole, Judge.

Appearances: Dan S. Bair, (opening brief) Assistant Public Advocate, Appeals and Statewide Defense Section, Richard Allen, Public Advocate, Anchorage, and Carolyn Perkins, (reply brief), Attorney at Law, Salt Lake City, Utah, for the Appellant. Stephen B. Wallace, District Attorney, Kodiak, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge ALLARD.

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

Following an altercation over a parking space, Noriel M. Carino punched Alfredo Viray multiple times in the face with his fists, causing injuries and fractures to both sides of Viray’s face that required surgery to repair. After a jury trial, Carino was convicted of first-degree assault for recklessly causing serious physical injury by means of a dangerous instrument (his fists).¹

At sentencing, the superior court found that Carino had proved the statutory mitigator AS 12.55.155(d)(3) — that “the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but that significantly affected the defendant’s conduct.” The court ultimately sentenced Carino to 11 years with 5 ½ years suspended (5 ½ years to serve) for the first-degree assault conviction.

Carino now appeals, arguing that the evidence at his trial was insufficient to prove that he had caused “serious physical injury” or that he had used his fists as a “dangerous instrument.”

“When a defendant challenges the sufficiency of the evidence to support the verdict, the test is whether, viewing the evidence (and the inferences to be drawn from that evidence) in the light most favorable to upholding the verdict, fair-minded people could conclude that the State had proved these elements.”² To prove that Carino used his fists as a dangerous instrument, the State needed to show “particularized evidence from which reasonable jurors could conclude beyond a reasonable doubt that the manner in which the hand was used ... posed an actual and substantial risk of causing death or serious physical injury, rather than a risk that was merely hypothetical or

¹ AS 11.41.200(a)(1). Carino was also found guilty of second-degree assault and third-degree assault. *See* AS 11.41.210(a)(2); AS 11.41.220(a)(1)(B). These convictions merged with the first-degree assault conviction at sentencing.

² *Hoekzema v. State*, 193 P.3d 765, 767 (Alaska App. 2008).

abstract.”³ To prove “serious physical injury,” the State needed to show “physical injury that causes serious and protracted disfigurement, protracted impairment of health, [or] protracted loss or impairment of the function of a body member or organ.”⁴

Here, the evidence shows that what began as a minor fight escalated into a significant beating, with Carino striking Viray multiple times in the face using wild full-arm punches (commonly referred to as “haymakers”) as Viray tried to retreat. At the time of the fight, Viray was sixty-three years old and Carino was thirty years old.

The evidence also shows that Viray suffered significant facial injuries from Carino’s punches. His cheekbones were broken on both sides, he had multiple bone fragments floating around his nose and sinus, and fluid leaked into his maxillary sinus cavities. Viray also had nerve damage as a result of the bone fragments.

The evidence further shows that Viray required surgery to repair the fractures in his cheekbones. Surgeons had to screw titanium plates into both cheekbones to keep them in place after they were reset. Without this surgery, Viray would have suffered from prolonged pain and dysfunction in his lower jaw that would have affected his ability to eat and chew his food. Even with the surgery, Viray suffered four to six months of pain in his face and jaw, and he was still having trouble chewing at the time of trial, which was six months after the injuries occurred.

Viewing this evidence in the light most favorable to upholding the verdict, we conclude that a reasonable fact-finder could find that the State had proved beyond a reasonable doubt that Carino recklessly caused serious physical injury to Viray using his hands as a dangerous instrument.

³ *Konrad v. State*, 763 P.2d 1369, 1374 (Alaska App. 1988).

⁴ AS 11.81.900(b)(57)(B). “Physical injury” is defined as “physical pain or an impairment of physical condition.” *See* AS 11.81.900(b)(47).

Accordingly, we AFFIRM the judgment of the superior court.