

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MISHAEL M. ANGAIK,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11889
Trial Court No. 4BE-13-523 CR

MEMORANDUM OPINION

No. 6483 — June 21, 2017

Appeal from the Superior Court, Fourth Judicial District, Bethel,
Dwayne W. McConnell, Judge.

Appearances: Josie Garton, Assistant Public Defender, and
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
June Stein, 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 ALLARD.

Following a jury trial, Mishael M. Angaiak was convicted of one count of
third-degree assault based on evidence that he pointed a gun at a village police safety

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

officer during what appears to have been a failed suicide attempt.¹ Angaiak was sentenced to 2 years with 15 months suspended (9 months to serve).

On appeal, Angaiak argues that his conviction should be reversed because the superior court erroneously excluded various pieces of evidence that Angaiak asserts were relevant to his defense. For the reasons explained here, we conclude that the superior court did not deprive Angaiak of his ability to present his defense and that any error in excluding this evidence was harmless.

Facts and prior proceedings

On June 17, 2013, defendant Mishael Angaiak's father called the police and asked for assistance because someone was playing with a gun at his house. Village Public Safety Officer Jacob Tobeluk Jr. and Village Police Officer Jonathon Nokowallera responded to the call and found Mishael Angaiak inside the arctic entryway, leaning against the inside door to the house. Angaiak was holding a .22 caliber pump-action rifle that was pointed down.

When the officers asked Angaiak what was going on, Angaiak told them to "Go away." Angaiak also lifted the rifle, squared it against his shoulder, and pointed it at Officers Tobeluk and Nokowallera. The officers quickly moved behind the outer door, repeatedly commanding Angaiak to put the gun down. Officer Tobeluk readied his Taser but he did not deploy it because he feared that, if he did, Angaiak would reflexively pull the trigger and fire the rifle.

Officer Tobeluk could see that the rifle was in the cocked, ready-to-fire position. He could also see that Angaiak's finger was resting on the rifle's receiver and was not directly on the trigger.

¹ AS 11.41.220(a)(1)(A).

As Officer Tobeluk hid behind the wall, Angaiak continued to point the rifle at him, crying hysterically and telling the officers to leave. After Officer Tobeluk continued to yell for Angaiak to put the rifle down, Angaiak lowered the muzzle toward the ground, uncocked the rifle by depressing the trigger slightly, and then pointed the rifle up at himself. Officer Tobeluk later testified that he thought that Angaiak might shoot himself in front of them.

Officer Tobeluk directed Angaiak to put the rifle down and to talk with him. Angaiak then lifted the rifle as though he were going to throw it. Officer Tobeluk moved his head behind the wall, afraid that Angaiak was going to throw the rifle at him. Angaiak then dropped the rifle on the ground.

After securing the rifle and then handing it to the other officer, Officer Tobeluk grabbed Angaiak, and the two officers took Angaiak to the public safety building. Examination of the rifle revealed that there was a live round in the chamber and another live round in the magazine.

Angaiak was charged with two counts of third-degree assault for recklessly placing the two officers in fear of imminent serious physical injury by means of the firearm.²

At trial, Angaiak's defense attorney argued that Angaiak was suicidal and was considering killing himself when the officers arrived. The attorney argued that Angaiak had reacted reflexively to the officers' arrival by raising the rifle without realizing that he was pointing the rifle at the officers, and that Angaiak therefore had not acted "recklessly" with regard to placing the officers in fear of serious imminent physical injury. The defense attorney also argued that Officer Tobeluk was not "in fear of serious imminent physical injury" because he could see that Angaiak's finger was not on the

² AS 11.41.220(a)(1)(A).

trigger. Lastly, the attorney argued that there was no evidence that the rifle was ever pointed at the other officer, who was standing behind Officer Tobeluk, out of Angaiak's sight.

Following deliberations, the jury convicted Angaiak of third-degree assault for recklessly placing Officer Tobeluk in fear of imminent serious physical injury, but the jury acquitted Angaiak of the other third-degree assault count related to Officer Nokowallera.

This appeal followed.

Angaiak's argument that the court impermissibly limited his cross-examination of Officer Tobeluk

To convict Angaiak of third-degree assault for pointing the rifle at Officer Tobeluk, the State needed to prove beyond a reasonable doubt that Angaiak recklessly placed Officer Tobeluk in fear of imminent serious physical injury by means of a dangerous instrument.³ As we explained in *Hughes v. State*, “placed in fear” in this context means that the person reasonably perceives or understands a threat of imminent injury.⁴ The victim's subjective reaction to this perception is irrelevant.⁵ That is, “[i]t does not matter whether the victim of the assault calmly confronts the danger or quivers in terror. The question is whether the victim perceives the threat.”⁶

At trial, Officer Tobeluk testified to feeling frightened for his safety when Angaiak pointed the rifle at him. The officer testified that he was thinking “where do I

³ AS 11.41.220(a)(1)(A).

⁴ *Hughes v. State*, 56 P.3d 1088, 1090 (Alaska App. 2002).

⁵ *Id.*

⁶ *Id.*

hide?” and that it felt like his brain was “going 300 miles an hour.” The officer further testified that he did not deploy his Taser because he thought it would cause Angaiak to reflexively pull the trigger.

Initially, Officer Tobeluk testified that he “didn’t know” whether Angaiak’s finger was on the trigger at the time the rifle was pointed at him. Later, during cross-examination, the officer clarified that he did not see Angaiak’s finger on the trigger until after Angaiak lowered the rifle. After lowering the gun, Angaiak used his finger on the trigger to un-cock the hammer, which had been cocked during the time the rifle was pointed at Officer Tobeluk.

During closing argument, Angaiak’s defense attorney argued that the State had failed to prove that Officer Tobeluk was in fear of serious imminent physical injury, asserting that the officer “knew that Mishael Angaiak could not shoot him” because the officer “saw the finger was not on the trigger.” The attorney also argued that the officer “watched Mishael Angaiak make the gun safe” by pointing the rifle at the floor and “carefully let[ting] the hammer down to make sure the gun [was] not fired.”

On appeal, Angaiak argues that this defense argument would have been strengthened if he had been permitted to cross-examine Officer Tobeluk about certain statements the officer made to Angaiak after the incident was over and Angaiak was taken into custody. The statements in question were made in response to Angaiak’s statements that he “could have killed” the officers and that he “almost killed” Officer Tobeluk. The conversation was recorded by Officer Tobeluk but was not played for the jury. The conversation occurred as follows:

Angaiak: I could have killed one of you.

Officer Tobeluk: I don’t care, I ...

Angaiak: I could have ...

Officer Tobeluk: Shut up! Listen to me.

Angaiak: I'm listening! I've heard you all these times!

Officer Tobeluk: I went over because I care.

Angaiak: You shouldn't have. I almost killed you.

Officer Tobeluk: Yeah? You didn't have your finger on the trigger. Bullshit, I watched everything you did.

Angaiak: I could have ...

Officer Tobeluk: You could have ...

Angaiak: It was cocked and ready to go ...

Officer Tobeluk: You didn't have your finger on the trigger while you had it pointed at me. You did at one point when you pointed it down.

As Angaiak partially acknowledges, there is nothing inherently inconsistent between the officer's trial testimony and these statements. At trial, the officer testified (consistent with the recorded statement) that he did not see Angaiak's finger on the trigger until after Angaiak had lowered the rifle. And at closing, the defense attorney argued that the officer was not afraid because he "knew that Mishael Angaiak could not shoot him" because Angaiak's finger was not on the trigger.

Angaiak argues that the officer's statements, taken as a whole, are nevertheless inconsistent with his trial testimony because they suggest that the officer did not actually perceive Angaiak's actions as a threat to his safety. We question whether this is a fair reading of the officer's statements, given that the officer appears to agree with the assessment that Angaiak "*could* have killed [the officers]" and the officer only appears to be challenging Angaiak's additional claim that he "*almost* killed [him]." In other words, the officer appears to be agreeing with Angaiak that Angaiak's actions created a threat of imminent serious physical injury, even though the officer did not necessarily think that Angaiak intended to shoot him.

To prove third-degree assault, the State was not required to prove that the officer believed that Angaiak intended to shoot him. Instead the State was required to prove that the officer perceived a threat of imminent serious physical injury and that this perception was reasonable under the circumstances.⁷

Here, the undisputed evidence was that Angaiak pointed a .22 caliber pump-action rifle at the officer with the hammer cocked and ready to fire. At trial, the officer testified to his fear for his safety, notwithstanding the fact that Angaiak's finger was not on the trigger. The officer also testified to his fear that his actions might cause Angaiak to reflexively discharge the rifle. We also note that, other than seeking admission of the officer's purportedly prior inconsistent statements about this alleged fear, Angaiak's attorney did not question the officer about his fear or his perception of the threat that Angaiak's conduct created. Given these circumstances, and given the fact that the officer freely admitted to not seeing Angaiak's finger on the trigger, we conclude that any error in excluding these prior statements was harmless and did not affect Angaiak's ability to present his defense or to effectively cross-examine the officer.⁸

Angaiak's argument that the court erred in excluding testimony about Angaiak's suicidal behavior the day before the incident

At trial, Angaiak initially indicated that he intended to testify. As part of this testimony, Angaiak intended to explain that he had become suicidal the night before the incident because his girlfriend broke up with him. Angaiak also intended to testify that his parents took the rifle away from him the night before, and called the police.

⁷ *Hughes*, 56 P.3d at 1090.

⁸ *See Love v. State*, 457 P.2d 622, 632 (Alaska 1969).

The superior court ruled that Angaiak was free to testify about the events on the day of the incident and his state of mind at the time of the incident, but the court ruled that the proposed testimony concerning the events of the night before was not sufficiently relevant and would not be permitted. After receiving this ruling, Angaiak made the decision not to testify at all.

On appeal, Angaiak argues that the trial court abused its discretion by not allowing Angaiak to testify about the events of the night before. Angaiak contends that this testimony would have shown that Angaiak was suicidal and distraught “for a significant period of time,” and he claims that the jury should have been aware of this fact so that they could properly assess his mental state when he pointed the rifle at the officers. But Angaiak did not offer any evidentiary or expert support for his claim that the length of time he had been suicidal was relevant to the jury’s determination of his mental state on the day of the incident. Nor did Angaiak offer any evidentiary support for his claim that the reason *why* he was suicidal was relevant to such a determination. Moreover, Angaiak was given full license to testify about his suicidal state of mind on the day of the incident, but he chose not to testify. Given these circumstances, and given that Angaiak’s suicidal state of mind was uncontested at trial, we conclude that the trial court did not abuse its discretion when it limited Angaiak’s proposed testimony to the day of the incident. Accordingly, we reject this claim on appeal.

Angaiak’s argument that the court erred in excluding the recording of Angaiak’s post-arrest interactions with the officers

As already noted, Officer Tobeluk wore an audio recording device that recorded all of the officers’ interactions with Angaiak. At trial, the jury heard the audio from the officers’ initial approach to the residence, Angaiak’s pointing of the rifle, and

Angaiak's arrest. The jury did not hear the remainder of the audio, which covered the walk back to the public safety building and Officer Tobeluk's conversation with Angaiak at the building. A significant portion of this part of the audio involves Angaiak sobbing and apologizing to the officers, and the officers' attempts to quiet him down.

Angaiak's defense attorney argued that the jury should be allowed to hear this part of the audio so that they could hear Angaiak's tone of voice and verbal demeanor. The superior court rejected this argument and excluded this evidence from the jury, primarily on hearsay grounds.

On appeal, Angaiak argues that he should have been permitted to introduce this audio because, aside from what he and the officers said on the recording, his tone of voice and verbal demeanor was relevant to his claim that he was "suicidal and mentally deteriorated" at the time of the incident. Angaiak also takes issue with the superior court's conclusion that this evidence was hearsay.

We agree with Angaiak that he was seeking to use the later recordings for non-hearsay purposes. But we also conclude that exclusion of this evidence was not an abuse of discretion, given its limited probative value and its potential for unfair prejudice. We note that the jury was able to hear similar demeanor evidence in the portion of the recording that was played for them, in which Angaiak can also be heard sobbing and in clear mental distress. Moreover, the judge was reasonably concerned about all the otherwise inadmissible hearsay statements contained in the recordings. We therefore conclude that the judge did not abuse his discretion when he excluded this evidence.

Conclusion

The superior court's judgment is **AFFIRMED**.