IN THE COURT OF APPEALS OF THE STATE OF ALASKA

EDWARD V. PARKS JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11900 Trial Court No. 4FA-12-175 CR MEMORANDUM OPINION No. 6484 — June 21, 2017

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Michael P. McConahy, Judge.

Appearances: Elizabeth D. Friedman, Law Office of Elizabeth D. Friedman, Palmer, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Tamara E. de Lucia, 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, Edward V. Parks Jr. was convicted of kidnapping, first-degree assault, second-degree assault, fourth-degree assault, and first-degree witness

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

tampering based on allegations that he assaulted his long-term partner B.S. and refused to allow her to leave their home to seek medical assistance for two days.

On appeal, Parks argues that his kidnapping conviction should be reversed on three separate grounds. He argues first that the State pursued a different theory of kidnapping at trial than it did at grand jury, resulting in a fatal variance. Parks next argues that the superior court committed plain error by failing to instruct the jury on the need for unanimity with regard to the factual basis for the kidnapping charge. Lastly, Parks argues that the evidence at trial was insufficient to prove that the kidnapping was more than just "incidental" to the assault. For the reasons explained here, we find no merit to these claims.

Parks also argues that his second- and fourth-degree assault convictions should merge with his first-degree assault conviction. Because the State argued for the first-degree assault conviction based on the entire continuing incident, rather than based on a discrete or separable assault, we agree with Parks that the other assault convictions should merge into the first-degree assault conviction. Accordingly, we remand this case to the superior court and we direct the court to amend the judgment and resentence Parks accordingly.

Relevant factual background

On December 18, 2011, Parks and his long-term partner, B.S., were drinking vodka with friends in their shared Fairbanks apartment. At some point in the evening, B.S. stepped outside to smoke a cigarette. Parks came outside shortly afterward, apparently upset at B.S. He demanded that B.S. get into their car, and she complied.

As Parks drove, he began assaulting B.S. — punching her and banging her head against the dashboard. At some point, he forced her out of the vehicle and began

kicking and punching her as she lay in the snow. Parks threatened B.S.'s life and told her that, if she would not "shut up," he would "make her." Eventually, Parks forced B.S. back into the vehicle and returned to their apartment.

B.S., who was severely intoxicated, recalled little of the drive. Her next memory was of lying naked on the floor of the apartment. Parks bound her hands and feet with belts. She began crying loudly, hoping that a neighbor might hear her and contact the police. Parks removed the laces from a pair of his boots and pulled them around B.S.'s neck so tightly that she struggled to breathe. Parks then began repeatedly punching B.S. After approximately twenty to thirty minutes of continued beating, Parks removed the belts from B.S.'s hands and feet and laid her on the bed.

As a result of injuries sustained from the attacks, B.S. was unable to leave the apartment. She asked Parks to take her to the hospital, but he refused. Parks brought her food and water, and helped her to the bathroom. Two days later — and only after B.S. promised not to tell anyone the details of the assault — Parks agreed to take her to the hospital. Parks dropped her outside the emergency room entrance and then drove away.

B.S. was admitted to the hospital with numerous injuries. She had linear bruises on her neck, multiple rib fractures, and a laceration on her kidney that was bleeding into her abdominal cavity. Her eyes were "essentially swollen shut." As a result of the rib fractures, one of B.S.'s lungs was leaking air into the space between her lung and chest wall, causing the lung to collapse.

During her four-day hospitalization, B.S. initially refused to disclose the cause of her injuries. But she eventually provided a detailed account of the incident to her former parole officer, and then to the police.

The State indicted Parks on two counts of kidnapping, one count of first-degree assault, two counts of second-degree assault, one count of third-degree assault,

one count of fourth-degree assault, and one count of first-degree witness tampering for attempting to convince B.S. to change her testimony.[1] The case proceeded to trial, and a jury found Parks guilty of all counts.

At sentencing, the judge merged the two kidnapping convictions. The judge also merged one of the second-degree assault convictions into the first-degree assault conviction and merged the third-degree assault conviction into the other second-degree assault conviction. The court ultimately imposed a composite sentence of 59 years' imprisonment with no time suspended. This appeal followed.

Parks's kidnapping convictions were not the result of a fatal variance

Under Alaska Statute 11.41.300(a)(1)(C), a person commits the crime of kidnapping if "the person restrains another with intent to ... inflict physical injury upon [the person] or place the restrained person or a third person in apprehension that any person will be subjected to serious physical injury."

To "restrain" another person "means to restrict the person's movements unlawfully and without consent, so as to interfere substantially with the person's liberty by ... confining the person either in the place where the restriction commences or in a place to which the person has been moved."[2] Restraint is "without consent" if it is accomplished "by force, threat, or deception."[3]

The State charged Parks with two counts of kidnapping, each alleging a different theory of kidnapping. The first count alleged that Parks restrained B.S. "with

---

[1] AS 11.41.300(a)(1)(C), AS 11.41.200(a)(2), AS 11.41.210(a)(1), AS 11.41.210(a)(3), AS 11.41.220(a)(1)(B), AS 11.41.230(a)(1), and AS 11.56.540(a)(1), respectively.

[2] AS 11.41.370(3)(B).

[3] *Id.*

intent to inflict physical injury upon [B.S.]." The second count alleged that Parks restrained B.S. "with intent to place [B.S.] in apprehension that she [would] be subjected to serious physical injury."[4]

At grand jury, the prosecutor argued that both counts were supported by evidence that Parks restrained B.S. in their home for two days, binding her with belts for part of that time. With respect to the first count — intent to inflict serious physical injury — the prosecutor argued that Parks restrained B.S. with belts with the intent to beat her up. With respect to the second count — intent to place B.S. in apprehension of serious physical injury — the prosecutor stated:

> I would submit to you folks that being held in the house for two days when you need medical attention, naked and bound, that would put you in apprehension of receiving serious physical injury.

The prosecutor reiterated these two theories of kidnapping in his opening statement at trial, stating that the evidence would show that, after returning to the residence, Parks bound B.S.'s arms and legs and "continued his assaultive behavior." The prosecutor also stated that the evidence would show that "for two days, [Parks] wouldn't let [B.S.] leave that residence and wouldn't take her to the hospital."

During closing argument, however, the prosecutor narrowed his theory of restraint to focus specifically on Parks' binding B.S.'s hands and feet, rather than the whole two-day confinement. The prosecutor argued:

> [Parks] restrained her. And how did he restrain her? He restrained her with belts, a belt wrapped around her feet, and a belt wrapped around her arms.

The prosecutor then argued that Parks restrained B.S. with the intent to inflict physical injury on her (the theory supporting the first kidnapping count):

---

[4] AS 11.41.300(a)(1)(C).

> Why did he restrain her? The evidence showed after he restrained her that he began to viciously beat her again, kicking her in the ribs area, same place he was kicking her before. And it also showed he began to strangle her by putting what she believes is his boot laces around her neck up to the point where she couldn't breathe.

The prosecutor also argued that Parks' act of binding B.S.'s arms and legs was done with the intent to place B.S. in apprehension of serious physical injury (the theory supporting the second count of kidnapping):

> [H]is intent was to place her in a real fear, fear of what would happen next.
>
> She continued to cry out, because remember you heard evidence that she began to cry out to try to get the neighbor's attention. He didn't want that. He restrained her. He beat her. And he beat her to such a condition to where she was not going to be screaming out to try to get the neighbor's help then. It's not a stretch to put — or to ascertain that she was in fear of being subjected to serious physical injury.

On appeal, Parks argues that the prosecutor's shift in focus from the entire two-day ordeal to the act of binding alone resulted in a fatal variance from the theories of kidnapping argued to the grand jury.[5] According to Parks, "the factual basis for the indictment described a different event from the facts the trial jury used to convict."

We disagree. As explained above, the prosecutor asked the grand jury to indict Parks based on the theory that he held B.S. for two days, and that B.S. was "naked and bound" for part of that time. At trial, the prosecutor narrowed his focus to a subset of this factual basis, focusing solely on the evidence that B.S. was bound, to prove the

---

[5] *See Bowers v. State*, 2 P.3d 1215, 1217 (Alaska 2000) ("A conviction for an offense different from the one charged is a fatal variance and requires reversal.").

kidnapping counts.[6] Given that Parks was on notice from the grand jury presentation that the State would be relying on evidence that Parks bound B.S.'s arms and legs to support the kidnapping charges, we find no fatal variance here.[7] Accordingly, we reject this claim of error on appeal.

The superior court did not commit plain error by failing to give a factual unanimity instruction to the jury

When the State presents evidence of multiple incidents, each of which could support a separate conviction for the charged offense, due process requires that the trial court instruct the jurors that they must be factually unanimous as to the incident relied upon to reach a verdict.[8]

Parks argues that the judge should have given a unanimity instruction in this case because the jury heard evidence of three separate acts that could potentially constitute a factual basis for finding that Parks "restrained" B.S. Specifically, the jury heard about Parks' demand that B.S. get into the car with him, Parks' act of binding B.S.'s hands and feet, and Parks' refusal to allow B.S. to leave the home for two days. Because Parks did not request a unanimity instruction, he must now show plain error on appeal.[9]

The State argues that a unanimity instruction was unnecessary because kidnapping is a continuing offense, one that does not end until such time as the kidnapper

---

[6] *See United States v. Leichtnam*, 948 F.2d 370, 376-77 (7th Cir. 1991) ("An indictment may be narrowed, either constructively or in fact, without resubmitting it to the grand jury.").

[7] *See Harvey v. State*, 604 P.2d 586, 588 (Alaska 1979).

[8] *See Khan v. State*, 278 P.3d 893, 899 (Alaska 2012).

[9] *Id.* at 896; *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

releases the victim.[10] We conclude that we need not resolve the question of whether a unanimity instruction is needed for this type of continuing offense because, contrary to Parks' claim, the factual basis for the State's theory of "restraint" was clear. As just explained, the prosecutor limited his closing argument to the single act of Parks' binding B.S.'s hands and feet. The defense likewise focused on the binding in its closing argument, arguing that the State had failed to present physical evidence corroborating that this restraint occurred. Thus, even assuming that a unanimity instruction would otherwise be appropriate, we conclude that the need for such an instruction was not "so obvious that any competent judge or attorney would have recognized it," given the way this case was litigated.[11] Accordingly, we find no plain error.

There was sufficient evidence to support separate convictions for kidnapping and first-degree assault

Parks argues that the evidence was insufficient to support a kidnapping conviction separate from the assault convictions. Parks also argues in the alternative that even if the evidence technically supports a separate kidnapping conviction, the kidnapping conviction should have merged with the assault convictions.

In support of his insufficiency claim, Parks relies on our reasoning in *Hurd v. State*, in which we held that a defendant may not be convicted of kidnapping if the restraint involved is merely "incidental" to the commission of another offense.[12] In

---

[10] *See United States v. Garcia*, 854 F.2d 340, 343 (9th Cir. 1988); *see also Crump v. State*, 625 P.2d 857, 863 (Alaska 1981) ("Alaska's kidnapping statute encompasses the holding of a victim for an unlawful purpose as well as abduction.").

[11] *Simon v. State*, 121 P.3d 815, 820 (Alaska App. 2005).

[12] *Hurd v. State*, 22 P.3d 12, 18 (Alaska App. 2001).

Hurd, we articulated five factors that the jury should consider in determining whether the restraint is "incidental" to the commission of another offense.[13] These factors are:

> (1) how long the victim was restrained; (2) if the victim was moved, how far the victim was moved and where the victim was taken; (3) whether, under the facts, the restraint exceeded what was necessary for commission of the defendant's target crime; (4) whether the restraint significantly increased the risk of harm to the victim beyond the risk of harm inherent in the target crime itself; and (5) whether the restraint had some independent purpose — *i.e.*, whether the restraint made it significantly easier for the defendant to commit the target crime or made it significantly easier for the defendant to escape detection.[14]

The superior court properly instructed the jury on the *Hurd* factors in this case, and Parks does not raise any claims that the instructions were insufficient. Instead, Parks argues that the State failed to present sufficient evidence that the restraint was more than "incidental" to the accompanying assault.

When we evaluate a claim of legally insufficient evidence, we are required to view the evidence, and all reasonable inferences to be drawn therefrom, in the light most favorable to the jury's verdict.[15] Viewing the evidence in this light, we conclude that there was sufficient evidence from which a fair-minded juror could find that the State had proved beyond a reasonable doubt that the binding was more than "incidental" to the accompanying assault. The evidence showed that Parks bound B.S.'s arms and legs for between twenty and thirty minutes, which a fair-minded juror could reasonably find far exceeded what was necessary to complete the assault. A fair-minded juror could

---

[13] *Id.* at 19.

[14] *Id.* (citing *State v. Stouffer*, 721 A.2d 207, 215 (Md. App. 1998)).

[15] *See, e.g.*, *Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

likewise reasonably conclude that the restraint significantly increased the risk of harm to B.S. by precluding her from physically resisting Parks' blows and strangulation. Lastly, a fair-minded juror could also reasonably find that the restraint also served an independent purpose by preventing B.S. from resisting, escaping, or seeking assistance. We therefore conclude that a fair-minded juror could conclude under the *Hurd* factors that the State had proved beyond a reasonable doubt that the binding was more than "incidental" to the accompanying assault. Thus, the evidence supporting the kidnapping conviction was legally sufficient.

For similar reasons, we reject Parks' contention that the kidnapping conviction should have merged with the first-degree assault conviction. According to Parks, the kidnapping and assault were part of an ongoing course of conduct and any restraint involved in the kidnapping was incidental to the conduct involved in the assault. But this argument is merely a reformulation of Parks' challenge to the sufficiency of the evidence supporting his kidnapping conviction. Moreover, as the Alaska Supreme Court has explained, the crimes of kidnapping and assault implicate distinct societal interests:

> Clearly the statutes proscribing kidnapping and assault with a dangerous weapon were both designed to protect society from such physical and psychological dangers. However, the offense of kidnapping violates not only the victim's safety but also her personal liberty, and in this case it removed her from the hope of rescue from her previous situation.[16]

Accordingly, we find no error in the superior court's failure to merge Parks' kidnapping and assault convictions.

---

[16] *State v. Occhipinti*, 562 P.2d 348, 351 (Alaska 1977).

The superior court erred in failing to merge the second-degree assault and fourth-degree assault convictions with the first-degree assault conviction

The jury found Parks guilty of five separate assault charges. The jury convicted Parks of first-degree assault for intentionally causing serious physical injury to B.S.[17] The jury also convicted Parks of two counts of second-degree assault: one count for recklessly causing serious physical injury to B.S. through "repeated assaults," and a second count for intentionally causing physical injury to B.S. with a dangerous weapon (*i.e.*, strangling B.S. with a shoelace).[18] The jury also convicted Parks of third-degree assault for recklessly causing physical injury to B.S. with a dangerous weapon (again, by strangling B.S. with a shoelace).[19] Lastly, the jury convicted Parks of fourth-degree assault for recklessly causing physical injury to B.S. during the assault outside Parks' vehicle.[20]

At sentencing, the trial judge denied Parks' request to merge all of the assault convictions into one first-degree assault conviction. However, the judge did merge the second-degree assault conviction for causing serious physical injury by repeated assaults with the first-degree assault conviction. The judge also merged the second- and third-degree assaults for injuring B.S. with a shoelace into a single conviction.

On appeal, Parks argues that the other assault convictions should have merged with the first-degree assault conviction because the jury was not required to

---

[17] AS 11.41.200(a)(2).

[18] AS 11.41.210(a)(1), (3).

[19] AS 11.41.220(a)(1)(B).

[20] AS 11.41.230(a)(1).

distinguish between the various acts of assault for purposes of the first-degree assault conviction.

In *S.R.D. v. State*, we explained that "multiple blows struck in the course of a single, continuous criminal episode" should be charged as a single assault unless the "blows are struck at clearly separate times and in clearly separate incidents, [as] when one blow is separated from another by a change in purpose, a 'fresh impulse,' or a different provocation."[21] In determining whether separate assault counts should merge, we analyze the "gravamen of the offense — *i.e.*, the essential conduct that the statute criminalizes" — as well as whether the jury was asked to evaluate the defendant's conduct as a single criminal episode or as separate, discrete acts.[22]

This case involved multiple acts separated both in terms of time and location, and the State accordingly charged multiple counts of assault. But Parks is also correct that, at his trial, the first-degree assault charge was not differentiated from the other assaults. In his closing argument, the prosecutor argued that the jury could convict Parks of the first-degree assault based on his conduct over the course of the whole incident:

> The State's got to show that the defendant intended to cause serious physical injury to another person and that he did so. Again you heard that [B.S.] was taken by car into a location near South Cushman and beat senselessly. They got back to the residence, but he wasn't done. Next thing she knows, her clothes are off and he's forcefully putting the belts around her.
>
> And then he continues his assault when he's already beaten her senselessly before. Beaten her senselessly before, and he

---

[21] *S.R.D. v. State*, 820 P.2d 1088, 1092-93 (Alaska App. 1991).

[22] *Young v. State*, 331 P.3d 1276, 1284-85 (Alaska App. 2014).

> continues to kick at her. And he takes something around her neck and strangles her to the point she can't breathe. That is intent to cause serious physical injury. I think the evidence has shown he could[n't] care less what happened to [B.S.] at that point.

In other words, the jury was not asked to determine whether the second- and fourth-degree assaults arose from acts that were distinct from the conduct encompassed by the first-degree assault charge. Rather, the State asked the jury to convict Parks of first-degree assault based on evidence that he committed the conduct charged in the second-, third-, and fourth-degree assault counts.

Thus, given that the State presented its case for first-degree assault as an ongoing assault encompassing multiple acts that resulted in "serious physical injury," we conclude that the trial judge erred in failing to merge the assault convictions into a single conviction for first-degree assault.[23]

Conclusion

We AFFIRM the judgment of the superior court with the exception of the failure to merge the assault convictions at sentencing. On remand, we direct the superior court to merge Parks' convictions for first-, second-, and fourth-degree assault into a single first-degree assault conviction and to resentence him accordingly.

---

[23] *See Soundara v. State*, 107 P.3d 290, 299 (Alaska App. 2005).