IN THE COURT OF APPEALS OF THE STATE OF ALASKA

FRANK BYRON YARRA JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11875 Trial Court No. 4FA-12-2014 CR MEMORANDUM OPINION No. 6509 — August 16, 2017

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Michael A. MacDonald, Judge.

Appearances: Olena Kalytiak Davis, Attorney at Law, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and James E. Cantor, Acting 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).

Following a jury trial, Frank Byron Yarra Jr. was convicted of second-degree theft[1] for stealing a bicycle valued at $500 or more. On appeal, he argues that the evidence was insufficient to support his conviction. He also argues that the prosecutor misstated the law during his closing argument. Lastly, Yarra challenges his sentence as excessive, arguing that the judge erred in ruling that Yarra was a worst offender and in rejecting Yarra's two proposed statutory mitigators.

For the reasons explained here, we affirm Yarra's conviction and his sentence.

The evidence was sufficient to support Yarra's conviction

Yarra was charged with theft under two theories, stealing William Hulin's bicycle[2] or, in the alternative, recklessly receiving it as stolen property.[3] Yarra claims that the evidence at trial was insufficient to prove either basis for second-degree theft. We disagree.

According to the testimony at trial, Hulin and his wife visited Fairbanks so that Hulin could ride his mountain bike on biking trails. Hulin had purchased this bicycle, which originally retailed for $5,000, on Craigslist for $1,700, and he had affixed a small sticker to its frame so that he could definitively identify the bicycle as belonging to him.

While in Fairbanks, Hulin and his wife stayed at a local campground. One day, Hulin locked the bicycle to a picnic table at their campsite. He and his wife then drove to a nearby restaurant to eat lunch. When they returned, the bicycle was gone.

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1 Former AS 11.46.130(a)(1) (2012).

2 AS 11.46.100(1) (defining theft as obtaining property of another).

3 AS 11.46.100(4); AS 11.46.190(a) (defining theft by receiving).

Hulin began telephoning local pawnshops. The second shop he called, the Two Dice Pawn Shop, had just taken in a bicycle that matched the description Hulin provided. Affixed to the bicycle's frame was the small sticker that Hulin had secreted there. According to the store's records, the bicycle was pawned by Yarra, who provided a Delta Junction address. Evidence at trial indicated that Yarra had not lived in Delta Junction for many years.

Yarra testified in his own defense. He claimed that while he was staying at the same campground as Hulin, another person offered to sell the bicycle to Yarra for $50. Yarra agreed, and then immediately pawned the bicycle for $150. Yarra further testified that when he later returned to the pawn shop, he learned that the bicycle had been reported stolen.

Superior Court Judge Michael A. MacDonald instructed the jury on two legal theories of theft — taking the property of another with intent to deprive, and recklessly receiving stolen property. The jury returned a general guilty verdict.

Evidence is legally sufficient to support a criminal conviction if the evidence and the reasonable inferences to be drawn from it, when viewed in the light most favorable to upholding the jury's verdict, are sufficient to convince fair-minded jurors that the government proved its allegations beyond a reasonable doubt.[4] We have independently reviewed the record in this case, and we conclude that the evidence presented at Yarra's trial is legally sufficient to support the jury's verdict under either theory of theft presented.

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[4] *State v. McDonald*, 872 P.2d 627, 652 (Alaska App. 1994).

The prosecutor's comparison of negligence to recklessness during final argument was not plain error

Yarra's second claim on appeal is that the prosecutor committed plain error when he inaccurately characterized the relationship between the culpable mental states of recklessness and negligence during his closing argument. Yarra argues that the prosecutor inaccurately suggested that the culpable mental state of negligence necessarily includes the culpable mental state of recklessness, rather than the converse. Yarra argues that this erroneous characterization of the law manifestly confused the jury and prejudiced Yarra.

Yarra's attorney did not object to the prosecutor's remarks, so Yarra must show plain error. In order to show plain error, Yarra must establish, in part, that the prosecutor's argument was obviously incorrect, and that it affected Yarra's substantial rights.[5] That is, he must demonstrate that the prosecutor's argument, taken as a whole, was so egregious as to "undermine the fundamental fairness of the trial."[6]

During his closing argument, Yarra's defense attorney argued that Yarra had testified truthfully about how he obtained the bicycle, and that he did not behave recklessly when he purchased the bicycle. The defense attorney contrasted negligence with recklessness, and pointed out to the jury that merely negligent conduct was insufficient to convict Yarra of theft by receiving stolen property.

During his rebuttal argument, the prosecutor displayed momentary confusion about the relationship between negligence and recklessness:

> Frank Yarra was negligent, and included with that — included in negligence, he was reckless.

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[5] *See Adams v. State*, 261 P.3d 758, 764, 773 (Alaska 2011) (explaining the plain error test).

[6] *Rogers v. State*, 280 P.3d 582, 589 (Alaska App. 2012) (internal citations omitted).

But the prosecutor then correctly explained to the jury:

> There are different levels of culpability. The top level is intentionally. Below intentionally is recklessly, and the civil level is negligently. The civil level is not applicable, it is included in reckless[ness] ... .

The prosecutor later stated properly that Yarra was guilty if he intentionally took Hulin's bicycle, or if he purchased it while recklessly disregarding that it was stolen.

We acknowledge that the prosecutor's initial rebuttal argument suggested that negligence encompassed the culpable mental state of recklessness. But the prosecutor accurately elaborated on the hierarchy of the different culpable mental states and told the jury that the negligence standard did not apply to Yarra's case. Furthermore, the jury was instructed on the definition of both negligence and recklessness, and was told that the applicable mental state to convict Yarra was recklessness.

We conclude that there was no reasonable probability that the prosecutor's brief, inaccurate characterization of these culpable mental states affected the jury's verdict.[7] We accordingly find no plain error.

Yarra's sentence is not clearly mistaken

Because Yarra had more than two prior felony convictions, he was subject to a presumptive sentencing range of 3 to 5 years.[8] The judge sentenced him to the maximum sentence of 5 years to serve, a sentence that required the judge to find that

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[7] *See Adams*, 261 P.3d at 773 ("a [plain] error that is not constitutional in nature will be prejudicial if the defendant proves that there is a reasonable probability that it affected the outcome of the proceeding").

[8] Former AS 12.55.125(e)(3) (2014).

Yarra was a worst offender.[9] Yarra now argues that the judge erred, both in finding Yarra to be a worst offender and in rejecting Yarra's two proposed statutory mitigators. Yarra also challenges his sentence as excessive and asserts that he should only be sentenced to a maximum of 3 years.

"A worst offender finding may be based on the facts and circumstances surrounding the offense, the defendant's criminal history, or both."[10] Here, the judge based his worst-offender finding on Yarra's criminal record. Yarra, who was thirty-nine years old at the time of sentencing, had acquired twenty-four convictions in the preceding twenty-one years, nine of them felonies. His record included convictions for residential burglaries, thefts, and forgeries, as well as probation violations. Yarra was on misdemeanor probation when he committed the instant offense. The presentence report characterized his prospects for rehabilitation as "dismal, at best."

Moreover, prior to calendar call for the present case, Yarra absconded from custody, stole a vehicle, and engaged the police in a high-speed chase. The judge found that this recent conduct, viewed together with Yarra's two-decades-long criminal history, suggested that the "day Mr. Yarra is out of custody is the likely day of his next offense."

Based on Yarra's extensive record of criminality and his commission of new crimes prior to trial, the judge's finding that Yarra was a worst offender was not clearly erroneous.[11] Because the judge did not err in finding that Yarra was a worst offender, he was within his discretion to sentence Yarra to the maximum sentence of 5 years.

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[9] *See State v. Wortham*, 537 P.2d 1117, 1120 (Alaska 1975).

[10] *Howell v. State*, 115 P.3d 587, 593 (Alaska App. 2005).

[11] *See Foley v. State*, 9 P.3d 1038, 1041-42 (Alaska App. 2000) (upholding worst-offender finding based on defendant's criminal history).

Yarra also argues that the judge erred in rejecting two proposed mitigators: that Yarra's crime was among the least serious of second-degree thefts, and that the harm Yarra caused was consistently minor, and therefore inconsistent with a substantial period of incarceration.[12]

Our review of a judge's ruling on the applicability of a statutory mitigator or aggravator involves a two-step process. We review the judge's factual findings for clear error.[13] But whether those facts justify acceptance or rejection of a mitigator or an aggravator is a legal conclusion that we review de novo.[14]

Yarra argued that the least-serious mitigator applied to his crime because his theft was opportunistic rather than premeditated. The judge rejected this mitigator, noting that the bicycle's fair market value exceeded $3,000. The judge adopted the prosecutor's argument that the brevity of the period between Hulin's discovery of the theft and the bicycle's recovery did not render the theft less serious, because Hulin's recovery of his property was fortuitous and due solely to his own quick action.

As to the consistently-minor-harm mitigator, the judge found that the harm in this case was not minor, and that Yarra's prior offenses did not cause minor harm either.

We have independently reviewed the record, and we conclude that the judge's factual findings were not clearly erroneous. Based on those facts, the judge did not err in rejecting Yarra's proposed least-serious and consistently-minor-harm mitigators.

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[12] AS 12.55.155(d)(9) and AS 12.55.155(d)(12), respectively.

[13] *Michael v. State*, 115 P.3d 517, 519-20 (Alaska 2005).

[14] *Id.*

Conclusion

The judgment of the superior court is AFFIRMED.