IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ADRIAN C. HOTCHKISS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11973 Trial Court No. 3PA-14-535 CR MEMORANDUM OPINION No. 6528 — October 19, 2017

Appeal from the District Court, Third Judicial District, Palmer, David L. Zwink, Judge.

Appearances: Michael L. Barber, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Raymond E. Beard, Assistant District Attorney, Palmer, and James E. Cantor, Acting 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).

Adrian C. Hotchkiss was convicted, following a jury trial, of disorderly conduct under AS 11.61.110(a)(1). Hotchkiss appeals his conviction, arguing that the trial judge erred in failing to give a factual unanimity instruction. Because we agree that there is a reasonable possibility that the failure to give a factual unanimity instruction prejudiced Hotchkiss, we reverse his conviction for disorderly conduct.

Background facts and prior proceedings

On February 22, 2014, at approximately 10:35 p.m., James Harvey called the Wasilla Police Department to report loud music coming from his neighbor's residence. Harvey also reported that there had been a firework explosion.

Wasilla Police Officers Andrew Kappler and Thomas Smylie responded to the call and contacted Harvey's neighbor, Hotchkiss, who was having a small party with friends. The officers could hear loud music coming from the garage as they approached Hotchkiss's residence. Hotchkiss was polite and apologetic, and he agreed to turn the music down. Hotchkiss also admitted that he had lit a single firework earlier, without realizing how loud it would be.

Officer Smylie gave Hotchkiss a formal "disorderly conduct" warning, and the officers left the premises. As the officers were walking to their patrol vehicles, they observed Hotchkiss standing on his front porch and heard him yell something resembling, "Fuck the Wasilla noise ordinance." The officers then returned to the residence and arrested Hotchkiss for disorderly conduct under AS 11.61.110(a)(1). This subsection provides that:

> A person commits the crime of disorderly conduct if, with intent to disturb the peace and privacy of another not physically on the same premises or with reckless disregard that the conduct is having that effect after being informed that

> it is having that effect, the person makes unreasonably loud noise.[1]

Hotchkiss pleaded not guilty to the charge, and the case went to trial.

At trial, there was significant confusion about the factual basis for the State's theory of prosecution. On the first day of trial, prior to jury voir dire, the trial judge questioned the prosecutor as to whether the unreasonably loud noise alleged in the complaint was the music that had prompted the original call to the police or the yell that made the police turn back and arrest Hotchkiss. The prosecutor refused to commit to a factual basis for the prosecution.

During his case-in-chief, the prosecutor elicited testimony from Harvey and Officer Smylie about three potential factual bases for the prosecution: the loud music, the firecracker, and the yell. The prosecutor also elicited testimony suggesting that each one of these acts could constitute the basis for the disorderly conduct charge. For example, the prosecutor asked Officer Smylie if the music was loud enough to disturb others not on the premises. Officer Smylie answered "Absolutely. The bass would have been the — the noise that I would have defined as ... disturbing the peace." Officer Smylie also testified that the police could have arrested Hotchkiss for the firecracker.

During cross-examination, Officer Smylie explained that the police did not arrest Hotchkiss for the loud music because Hotchkiss was cooperative and turned the music down. The officer also clarified that the decision to arrest Hotchkiss was made only after the officers heard Hotchkiss yell, "Fuck the Wasilla noise ordinance," and that this decision was made based on the volume of the yell and the fact that it occurred so soon after the prior warning (rather than on the content of the speech or the profanity). However, on re-direct, at the prosecutor's urging, Officer Smylie agreed that the fact that

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[1] AS 11.61.110(a)(1).

the police walk away from an individual without arresting him does not mean that the individual did not commit a crime — testimony which again suggested that it could be the music, rather than the yell, that was the disorderly conduct actually at issue.

Near the end of trial, the parties discussed jury instructions. During this discussion, Hotchkiss's attorney argued that because the prosecutor had never clarified the factual basis for the charge, a factual unanimity instruction was needed to ensure that the jurors understood that they had to be unanimous as to the act (or acts) that constituted the offense. The defense attorney pointed out that, without a factual unanimity instruction, some members of the jury might convict Hotchkiss based on the yell, while others might convict him based on the music. The defense attorney also complained that the prosecutor's failure to commit to a factual theory made it "impossible for the defense to present a solid defense because [the State's case is] a moving target."

The prosecutor opposed the court's giving the jury a factual unanimity instruction. In his argument against the instruction, the prosecutor essentially ignored the factual unanimity problem that existed in the case, and instead argued that no instruction was needed because the jury did not need to be unanimous as to whether Hotchkiss acted intentionally or recklessly under the statute.[2] The district court ruled in favor of the State and did not give the jury a factual unanimity instruction.

Following deliberations, the jury returned a general verdict convicting Hotchkiss of disorderly conduct. At sentencing, the court imposed a $250 fine with no jail time and no probation.

This appeal followed.

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[2] The prosecutor was correct that a factual unanimity instruction was not required with regard to the alternative theories under the statute. *See State v. James*, 698 P.2d 1161, 1167 (Alaska 1985).

The district court erred in failing to instruct on factual unanimity

Alaska law requires jurors to reach unanimity regarding the act for which the defendant is found guilty.[3] Thus, when the State presents evidence that a defendant committed multiple discrete acts, each of which could potentially support a criminal conviction for the charged count, and the State does not elect which act forms the basis for the charged count, the trial judge is required to instruct the jurors on factual unanimity. That is, the judge must instruct the jurors that, in order to return a verdict on that count, they must reach unanimous agreement as to which act(s) the defendant committed.[4] A trial judge's failure to give a factual unanimity instruction is constitutional error that requires reversal of the defendant's conviction unless the State can prove that the absence of the factual unanimity instruction was harmless beyond a reasonable doubt.[5]

In the current case, the prosecutor declined to identify the precise factual basis for the charge, and Hotchkiss's attorney specifically drew the court's attention to the factual unanimity problem and requested a factual unanimity instruction. The court nevertheless refused to give the requested instruction. This was error.

On appeal, the State argues that no unanimity instruction was needed because, according to the State, the prosecutor never relied on the music or the firecracker as the factual basis for the disorderly conduct charge. Instead, the State claims, the prosecutor only relied on the yell from the porch. The State asserts, in

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[3] *Khan v. State*, 278 P.3d 893, 899 (Alaska 2012); *Ramsey v. State*, 355 P.3d 601, 602 (Alaska App. 2015); *Jackson v. State*, 342 P.3d 1254, 1257 (Alaska App. 2014).

[4] *Jackson*, 342 P.3d at 1257.

[5] *Id.*

particular, that "[a] careful reading of the transcript shows that the prosecutor only argued separate legal theories of guilt, not separate factual theories of guilt."

This is untrue. The evidence adduced at trial identified three discrete instances of potentially unreasonable noise — the firecracker, the loud music, and the yell from the porch. The prosecutor's questioning of the witnesses focused on all three acts without distinguishing the yell as the factual basis for the charge. The prosecutor's opening statement similarly did not identify the yell as the factual basis for the disorderly conduct charge. Nor was the jury ever instructed that the yell was the conduct at issue.

On appeal, the State points to a few statements in the prosecutor's closing argument where the prosecutor argued to the jurors that they should convict Hotchkiss based on the yell from the porch. We agree that these statements suggest that the prosecutor may have finally settled on the yell as the factual basis for the disorderly conduct charge. But we doubt that this would have been obvious to anyone but the prosecutor. We note that the prosecutor never informed either Hotchkiss's attorney or the trial judge that he was proceeding only on the yell, even though Hotchkiss's attorney complained regularly about the factual basis of the charge being a "moving target."

Moreover, the defense closing argument makes clear that Hotchkiss's attorney (and likely the jury) did not understand that the prosecutor was now narrowing the factual basis to the yell only. Instead, during closing argument, Hotchkiss's attorney told the jury that "[y]ou've got two separate acts here. You've got the music and then you've got the yelling from the porch." The defense attorney then presented separate and distinct arguments as to why neither of these acts constituted disorderly conduct.[6]

The prosecutor did nothing in his rebuttal to correct the defense attorney's mistaken impression that the State was asking the jury to convict based on either the

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[6] *See Jackson*, 342 P.3d at 1257.

music or the yell. Nor was the jury ever instructed that the unreasonable noise directly at issue was the yell.

Given this record, we conclude that the error in failing to instruct the jury on factual unanimity was not harmless beyond a reasonable doubt. We therefore reverse Hotchkiss's conviction for disorderly conduct on this basis. We do not reach Hotchkiss's other arguments on appeal.

Conclusion

The judgment of the district court is REVERSED.