IN THE COURT OF APPEALS OF THE STATE OF ALASKA

GERALD M. NAGARUK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12030 Trial Court No. 2NO-13-154 CR MEMORANDUM OPINION No. 6605 — March 14, 2018

Appeal from the Superior Court, Second Judicial District, Nome, Timothy D. Dooley, Judge.

Appearances: Callie Patton Kim, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, 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 SUDDOCK.

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

After beating and strangling his father, Gerald M. Nagaruk was convicted of one count of first-degree robbery, two counts of second-degree assault, and one count of interfering with a report of a crime of domestic violence.[1]

Nagaruk now challenges his robbery conviction, arguing that the State presented insufficient evidence to prove that his assault on his father was in furtherance of a robbery, or that his father suffered the serious physical injury necessary to establish a first-degree robbery. Upon review of the record, we conclude that the State presented sufficient evidence to support Nagaruk's first-degree robbery conviction.

Nagaruk also argues that the trial court erred in failing to grant a mistrial after the State introduced a recorded statement by an Alaska State Trooper to the effect that, according to Nagaruk's parents, Nagaruk had threatened to shoot any state troopers who attempted to arrest him. We conclude that admission of this statement was error, but that the statement's admission did not appreciably affect the jury's verdict, and so the error was harmless.[2]

For these reasons, we uphold Nagaruk's conviction.

Background facts and proceedings

Because Nagaruk challenges the sufficiency of the evidence to support his conviction, we present the evidence in the light most favorable to the jury's verdict.

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[1] AS 11.41.500(a)(3); AS 11.41.210(a)(1); AS 11.41.201(a)(2); and AS 11.56.745, respectively.

[2] *See Brandner v. Hudson*, 171 P.3d 83, 87 (Alaska 2007); *Dobos v. Ingersoll*, 9 P.3d 1020, 1024 (Alaska 2000).

Nagaruk resided in the village of Elim in the house of his parents, Sheldon and Emily Nagaruk. On March 1, 2013, Nagaruk drank with friends to a point of intoxication that he described as "seven, eight on a scale of zero to ten." Believing that Nagaruk was too intoxicated to drive, Sheldon confiscated the keys to Nagaruk's truck.

At around 1:30 a.m., Nagaruk returned to his parents' house. He confronted his father Sheldon and demanded the truck keys that his father had earlier confiscated. When Sheldon refused to hand over the keys, Nagaruk beat him, leaving bruises on his chest. A friend of Nagaruk's arrived and pulled Nagaruk from the house.

Nagaruk returned to his parents' house around 3:30 a.m., yelled at Sheldon, and then departed. Then at 8:30 a.m., as Nagaruk's parents were sleeping in their bedroom, Nagaruk returned, awakened Sheldon, and demanded that he write Nagaruk a check for $200. Sheldon refused to write the check, assuming that Nagaruk would use the money to travel to Nome to buy more alcohol. Nagaruk repeated his demand for money as he slapped Sheldon multiple times on the chest. Nagaruk then began strangling Sheldon, placing his two thumbs and two middle fingers firmly around Sheldon's neck and cutting off his breath.

Nagaruk's mother screamed for Nagaruk to stop. Nagaruk had earlier pulled the telephone wire from the wall of the house, so his mother called for help using the family's VHF radio. Gary Nakarak, a neighbor, heard her call and went to the Nagaruk house.

Just as Sheldon was about to lose consciousness, Nakarak entered the home and demanded that Nagaruk come out of the bedroom. Nagaruk let go of Sheldon's neck and walked into the hallway, where he began to fight with Nakarak. Nagaruk and Nakarak briefly wrestled inside the house and then went outside, where Nagaruk punched Nakarak several times. One of Nagaruk's friends intervened and took Nagaruk away from the house.

Based on this evidence, the jury convicted Nagaruk of one count of first-degree robbery, two counts of second-degree assault, and one count of interfering with a report of a crime of domestic violence.

Why we conclude that the evidence was sufficient to support Nagaruk's conviction for first-degree robbery

Nagaruk claims that the State failed to offer sufficient evidence to support his conviction for first-degree robbery. The crime of robbery is elevated to first-degree robbery if, in the course of the robbery, the robber causes or attempts to cause serious physical injury to the victim. The basic crime of second-degree robbery is established when a person uses or threatens to use immediate force while taking or attempting to take property from the immediate presence and control of another person. The force must be employed with the intent to overcome resistance to the taking, or to compel delivery of the property.[3]

When reviewing claims of insufficient evidence, this Court "is obliged to view the evidence, and all reasonable inferences to be drawn from that evidence, in the light most favorable to upholding the lower court's verdict."[4] Viewing the evidence in that light, this Court asks whether a reasonable fact-finder could have concluded that the State's case was proved beyond a reasonable doubt.[5]

Nagaruk concedes that he demanded $200 from Sheldon, and that Sheldon rebuffed this demand, but Nagaruk argues that he did not beat and strangle Sheldon to enforce this demand for money. Instead, he claims that he had a different motive — to

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[3] AS 11.41.500 (first-degree robbery) and AS 11.41.510 (second-degree robbery).

[4] *Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

[5] *Id.*

punish Sheldon for beatings that Sheldon had inflicted upon him as a child. Secondly, Nagaruk argues that the State failed to provide sufficient evidence that he caused or attempted to cause serious physical injury when he strangled Sheldon.

But we must view the evidence in the light most favorable to upholding the jury's verdict. Viewing the evidence in that light, reasonable jurors could find that Nagaruk strangled Sheldon to compel him to write Nagaruk a check for $200.

Nagaruk also challenges the sufficiency of the evidence to prove that he inflicted or attempted to inflict serious physical injury on Sheldon, the element required to establish first-degree robbery. Alaska Statute 11.81.900(b)(57) defines "serious physical injury" as either 1) physical injury caused by an act performed under circumstances that create a substantial risk of death; or 2) physical injury that causes serious and protracted disfigurement or impairment of health.

The State's theory of the case was that Nagaruk's strangulation of Sheldon posed a risk of death. We therefore must determine whether a reasonable juror could conclude that the circumstances of the strangling gave rise to a substantial risk of death.[6]

Nagaruk argues that the evidence did not prove that he created a substantial risk of death to Sheldon. Nagaruk contrasts his case to other cases decided by this Court where strangulation victims suffered more serious harm, such as loss of consciousness, petechiae, or disrupted vision.[7] In addition, Nagaruk argues that the prosecutor failed to elicit testimony from the village health aide who testified about Sheldon's injuries as to the likelihood of death as a result of brief manual strangulation.

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[6] *See Konrad v. State*, 763 P.2d 1369, 1376 (Alaska App. 1988); *James v. State*, 671 P.2d 885, 889 (Alaska App. 1983), *rev'd on other grounds*, 698 P.2d 1161 (Alaska 1985).

[7] *See, e.g.*, *Torrence v. State*, 2014 WL 3805766, at *2 (Alaska App. July 30, 2014) (unpublished); *Kammeyer v. State*, 2005 WL 1971239, at *4 (Alaska App. Aug. 17, 2005) (unpublished).

But viewing the evidence at trial in the light most favorable to the verdict, Sheldon testified that the strangulation left him unable to breathe, and he thought he was going to die. This strangulation was interrupted only by the intervention of a neighbor.

We conclude that a reasonable juror could find that Nagaruk was intoxicated, that he was consumed by rage, and that he would not have voluntarily desisted but for the intervention of the neighbor — in other words, that Sheldon was at substantial risk of death. We accordingly uphold the jury's determination that Nagaruk was guilty of first-degree robbery.

Why we conclude that evidence of Nagaruk's threat to shoot the troopers should not have been admitted, but was harmless

After the robbery, Sheldon spoke by telephone to Alaska State Trooper Jonnathon Stroebele, who was stationed in Nome. Trooper Stroebele then spoke with Nagaruk by phone. The trooper mentioned that Nagaruk's parents had referred to a threat by Nagaruk to shoot the troopers if they attempted to arrest him.

Prior to trial, Nagaruk filed a motion for a protective order to prohibit the State from introducing Nagaruk's threat to shoot the troopers. Superior Court Judge Timothy D. Dooley denied the motion on the basis that the evidence was relevant to show Nagaruk's violent state of mind and consciousness of guilt at the time.

The prosecutor subsequently learned from Sheldon that Nagaruk did not make his threatening statement until four or five hours after the strangulation had occurred. The prosecutor concluded that, because of the passage of time, the threat was not relevant to Nagaruk's state of mind during the assaults or the robbery. The prosecutor informed the court that he had decided not to offer evidence of the threat, because it was too remote in time.

But when Trooper Stroebele testified at trial, the prosecutor played the trooper's recorded conversation with Nagaruk, including the portion when the trooper mentioned Nagaruk's threat to shoot the troopers. Nagaruk moved for a mistrial, arguing that the threat was inadmissible and unfairly prejudicial to Nagaruk. The prosecutor then abandoned his earlier-stated position that the statement was too remote in time to be probative of Nagaruk's state of mind at the time of the assaults, and argued that it was admissible for that purpose.

The judge denied the motion for a mistrial, finding that the statement was admissible because it was relevant to Nagaruk's state of mind and to his intent. We disagree.

With respect to Nagaruk's intent, the disputed issue in the case was whether, when Nagaruk assaulted Sheldon around 8:30 a.m., Nagaruk did so because he intended to intimidate Sheldon into giving him $200. The fact that Nagaruk some four to five hours later threatened to kill any police officers who came to arrest him was not relevant to the jury's determination of that disputed issue. Accordingly, admission of this threat was error, as the prosecutor originally conceded before he reversed course.

But this improperly admitted evidence had no apparent tendency to favor one party over the other. We conclude that the trooper's brief taped reference to the threat was so unlikely to affect the jury's decision that admission of this evidence did not appreciably affect the jury's verdict, and so was harmless.[8]

Conclusion

We AFFIRM the judgment of the superior court.

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[8] *Love v. State*, 457 P.2d 622, 633 (Alaska 1969).