STATE OF NEBRASKA, APPELLEE, V. JOSHUA G. ALFREDSON, APPELLANT.

804 N.W.2d 153

Filed October 7, 2011. No. S-10-295.

1. **Courts: Trial: Sentences: Juries: Appeal and Error.** Where a court errs in failing to require the jury to decide a factual question pertaining only to the enhancement of the sentence, not to the determination of guilt, the appropriate harmless error standard is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.
2. **Convicted Sex Offender: Sentences: Juries.** Because lifetime community supervision under Neb. Rev. Stat. § 83-174.03 (Reissue 2008) is an additional form of punishment, a jury, rather than a trial court, must make a specific finding concerning the facts necessary to establish an aggravated offense where such facts are not specifically included in the elements of the offense of which the defendant is convicted.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, KAREN B. FLOWERS, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Joshua G. Alfredson was convicted by a jury of first degree sexual assault and second degree false imprisonment. The trial court subsequently determined that an "aggravated offense" had been established, and it sentenced Alfredson to 15 to 20 years' imprisonment for first degree sexual assault and 1 year's imprisonment for second degree false imprisonment, to run concurrently. The Nebraska Court of Appeals affirmed his

convictions and sentences on direct appeal.[1] Alfredson filed a petition for further review, which we granted in part for the limited purpose of reviewing whether the trial court's error, as found by the Court of Appeals, was harmless error. The error as found by the Court of Appeals was that the trial court, rather than the jury, made the determination that Alfredson had committed an aggravated offense, subjecting him to lifetime community supervision. For the following reasons, we determine that the trial court's error was not harmless and reverse in part the decision of the Court of Appeals.

BACKGROUND

Alfredson was charged by information with first degree sexual assault, a Class II felony,[2] and first degree false imprisonment, a Class IIIA felony.[3] The charges arose out of an incident that took place on April 5, 2009, in which Alfredson initially contacted the victim, with whom he had had a previous sexual relationship, for a ride home. The victim drove to the establishment where Alfredson had been drinking with some friends, picked him up, and drove him to another location where his car was parked. The events which followed were disputed at trial.

The victim testified that she suggested to Alfredson that he return to her house to "sleep it off," because she thought he had had too much to drink and should not drive himself home. The victim explained that Alfredson smelled like alcohol and was stumbling, slurring his words, and talking about hurting or killing himself. The victim testified that Alfredson was angry and wanted to drive himself home. The victim followed him to his apartment and asked Alfredson if she could come up to his apartment with him because she was worried about his well-being.

The victim testified that, once inside the apartment, Alfredson continued to drink over the next few hours, while the two

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[1] *State v. Alfredson*, No. A-10-295, 2011 WL 1378603 (Neb. App. Apr. 12, 2011) (selected for posting to court Web site).

[2] See Neb. Rev. Stat. § 28-319 (Reissue 2008).

[3] See Neb. Rev. Stat. § 28-314 (Reissue 2008).

talked. Alfredson became increasingly angry. He had ingested cocaine, he needed help finding the bathroom, and he urinated on the floor and in the shower. The victim testified that she attempted to go home and to take the prescription bottle that Alfredson had told her contained powder cocaine, but that Alfredson would not let her leave until she returned the cocaine. The victim attempted to leave, but Alfredson took her car keys and blocked the front door of the apartment.

The victim testified that a struggle ensued and that Alfredson tackled her, pushed her face into the carpet, threatened to break her arm and her neck, and threatened to kill her and her family and friends. After several minutes, Alfredson got off of the victim and went into his bedroom. The victim testified that she followed Alfredson and that he told her that if she wanted her keys, she would have to get into bed with him. The victim then leaned over the bed to find the keys, and Alfredson grabbed her, pinned her down, and pushed himself on top of her. The victim testified that Alfredson said he was getting "horny" but that she told him they were not "going to have sex like this." The victim explained that she told Alfredson "no" several times but that Alfredson grabbed her breast and threatened to "rip it right off," pulled her pants and underwear down, and initiated sexual intercourse. After several minutes, Alfredson got off the victim and went into the living room.

The victim testified that she dressed and walked into the living room, where Alfredson blocked the door and refused to let her leave. Alfredson then came toward her and threw her on the couch, but she rolled off onto the living room floor. He then got on top of her and again pulled her pants down and bit her on the neck, cheek, and ear before again initiating sexual intercourse. The victim testified that she continued to tell Alfredson "no." When Alfredson got up, the victim dressed and told Alfredson that she was leaving. Alfredson blocked the door, urinated on the floor, and told her that she was going to bed with him and was not going to leave. Alfredson then grabbed her arm, led her to the bedroom, and told her to go to sleep. Once Alfredson fell asleep, the victim sent a text message to a friend, but she testified that she did not call anyone else or the police because she was scared. The victim testified that she

fell asleep and awoke around 7 a.m., when she got dressed, found her keys and cellular telephone, took the prescription pill bottle she believed contained cocaine, and left the apartment. The victim then contacted her friend and the human resources facilitator with her employer, and the facilitator then drove her, accompanied by her friend, to a hospital.

At the hospital, the victim underwent a sexual assault examination. The sexual assault nurse examiner testified that the victim had contusions on her right arm, left breast, and lower left jaw, in addition to an imprint of her braces on the inside of her lower lip and an impression on the inside of her cheek. The examination also revealed a contusion and multiple tears on the external genitalia caused by acute blunt force trauma.

The victim testified that she flushed the white powder contained in the prescription pill bottle and later gave the bottle to the police. The Nebraska State Patrol tested the bottle, but could not confirm or deny a presence of cocaine.

Alfredson testified that he had engaged in sexual intercourse with the victim, but it was consensual, and that he did not prevent the victim from leaving his apartment. Alfredson explained that the two engaged in sexual intercourse in the living room of his apartment and that the victim left in the early morning. He also stated that the prescription bottle contained an antidepressant prescription and that it did not contain cocaine.

After hearing the evidence presented, the jury convicted Alfredson of first degree sexual assault and second degree false imprisonment. At sentencing, the trial court determined that Alfredson was subject to the lifetime registration requirements of Nebraska's Sex Offender Registration Act.[4] The trial court also determined that Alfredson had committed an "aggravated offense" which further subjected him to lifetime community supervision pursuant to Neb. Rev. Stat. § 83-174.03 (Reissue 2008).

Alfredson directly appealed his convictions and sentences to the Court of Appeals. On appeal, Alfredson assigned that

[4] Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2008).

(1) the trial court erred in denying his *Batson*[5] challenge made during jury selection; (2) the Sex Offender Registration Act is unconstitutional in that the lifetime community supervision requirements constitute cruel and unusual punishment; (3) the trial court erred by failing to submit to the jury the "aggravated offense" determination, pursuant to § 83-174.03; (4) the sentences imposed were excessive; and (5) he received ineffective assistance of counsel.

The Court of Appeals found merit in Alfredson's third assignment of error and determined that Alfredson was entitled to a jury determination regarding whether the offense included the use of force or the threat of serious violence pursuant to § 83-174.03. However, the Court of Appeals determined that the trial court's error was harmless. The Court of Appeals noted that the State presented evidence that the victim was threatened and physically and sexually assaulted. Based upon its review of the record, the Court of Appeals concluded that any rational jury which convicted Alfredson of first degree sexual assault would have also concluded that it was committed through the use of force or the threat of serious violence. The Court of Appeals found Alfredson's remaining assignments of error to be without merit and affirmed Alfredson's convictions and sentences.

Alfredson filed a petition for further review, which we granted in part for the limited purpose of reviewing whether the trial court's error in failing to require the jury to decide a factual question pertaining to the enhancement of the sentence was harmless error.

ASSIGNMENT OF ERROR

Alfredson assigns that the Court of Appeals erred in failing to find that the trial court erroneously and unconstitutionally denied Alfredson a jury determination of the elements necessary to make an aggravated offense finding, subjecting Alfredson to lifetime community supervision pursuant to § 83-174.03.

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[5] See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

STANDARD OF REVIEW

[1] Where a court errs in failing to require the jury to decide a factual question pertaining only to the enhancement of the sentence, not the determination of guilt, the appropriate harmless error standard is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.[6]

ANALYSIS

At the sentencing hearing, the trial court found that Alfredson's sexual assault conviction constituted an aggravated offense and that Alfredson is therefore subject to lifetime community supervision pursuant to § 83-174.03. Alfredson contends that the trial court erred in making this determination. He asserts that the factual finding of an aggravated offense must be made by a jury, rather than by the court. The Court of Appeals determined that the trial court erred in failing to require the jury to decide the issue, and we agree.

Section 83-174.03 details which sex offenders are subject to lifetime community supervision. This section was revised by the Legislature, operative January 1, 2010. However, at the time of Alfredson's offense, § 83-174.03(1) read:

> Any individual who, on or after July 14, 2006, . . . is convicted of or completes a term of incarceration for an aggravated offense as defined in section 29-4005, shall, upon completion of his or her term of incarceration or release from civil commitment, be supervised in the community by the Office of Parole Administration for the remainder of his or her life.

At the time of Alfredson's offense, § 29-4005(4)(a) defined aggravated offense, in relevant part, as "any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence."[7]

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[6] *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009), *cert. denied* 559 U.S. 981, 130 S. Ct. 1708, 176 L. Ed. 2d 195 (2010).

[7] See, currently, § 29-4001.01(1) (Cum. Supp. 2010).

[2] In *State v. Payan*,[8] we determined that the imposition of lifetime community supervision pursuant to § 83-174.03 is akin to parole and is, as a result, an additional form of punishment for certain sex offenders. Because lifetime community supervision is an additional form of punishment, a jury, rather than a trial court, must make a specific finding concerning the facts necessary to establish an "aggravated offense" where such facts are not specifically included in the elements of the offense of which the defendant is convicted.[9]

Here, Alfredson was convicted of first degree sexual assault pursuant to § 28-319. Section 28-319 provides in relevant part: "Any person who subjects another person to sexual penetration . . . without the consent of the victim . . . is guilty of sexual assault in the first degree." While penetration is a fact specifically included as an element of first degree sexual assault, "the use of force or the threat of serious violence" is not a fact specifically included as an element of the offense. Pursuant to *Payan*, Alfredson was entitled to a jury determination regarding whether the offense included the use of force or the threat of serious violence. Because the jury did not make such a determination, the Court of Appeals correctly determined that the trial court erred in finding that Alfredson committed an aggravated offense.

On further review, Alfredson asserts the Court of Appeals erred in determining that the trial court's error was harmless. The Court of Appeals correctly noted that although the trial court erred in finding that Alfredson committed an aggravated offense, such error may be harmless.[10] The appropriate harmless error standard in this circumstance is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.[11]

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[8] See *State v. Payan, supra* note 6.

[9] See *id.*

[10] See *id.*

[11] *Id.*

In determining the trial court's error was harmless, the Court of Appeals stated:

> At trial, the jury heard two very different material versions of what transpired in those early morning hours of April 5, 2009. The State presented evidence that the victim was threatened and physically and sexually assaulted by Alfredson. In Alfredson's defense, he claimed that he and the victim had consensual sexual intercourse. Based upon our review of this record, we find that any rational jury which convicted Alfredson of first degree sexual assault would have also concluded that it was committed through the use of force or the threat of serious violence. Therefore, we find that the district court's error of making the aggravated offense finding instead of submitting it to the jury was harmless.[12]

In *Payan*, we concluded that the trial court committed harmless error in finding that the defendant committed an aggravated offense. There, the jury heard two different material versions of the events. In the State's evidence, the victim and a witness testified that the victim was sexually assaulted with a knife. In his defense, the defendant and his supporting witness claimed that no assault took place whatsoever. We found there was no evidence that if the assault occurred, it was done without violence or the threat thereof. Accordingly, we held:

> On this record, any rational jury which convicted [the defendant] of the sexual assault would have also concluded that it was committed through the use of force or the threat of serious violence. Accordingly, we conclude that the making of this finding by the trial judge instead of the jury was harmless error.[13]

In this case, the record reflects two versions of the events which were presented to the jury. The State argues that the jury's finding of guilt establishes that the jury rejected Alfredson's version of the events and accepted the victim's version of the events. However, the jury convicted Alfredson of first degree

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[12] *State v. Alfredson, supra* note 1, 2011 WL 1378603 at *7.

[13] *State v. Payan, supra* note 6, 277 Neb. at 677, 765 N.W.2d at 204-05.

sexual assault, but acquitted Alfredson on the first degree false imprisonment charge and convicted him of second degree false imprisonment.

Section 28-314(1) states:

> A person commits false imprisonment in the first degree if he or she knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury; or (b) with intent to hold him or her in a condition of involuntary servitude.

Neb. Rev. Stat. § 28-315(1) (Reissue 2008) provides: "A person commits false imprisonment in the second degree if he knowingly restrains another person without legal authority."

Alfredson argues that because the jury acquitted on the first degree false imprisonment charge, the record does not demonstrate that a rational jury would have found the use of force or the threat of serious violence required to establish an aggravated offense. Rather, it was possible that the jury could have convicted on first degree sexual assault based on a lack of consent without force or threat of serious violence. Alfredson contends that the jury's acquittal on this charge establishes a reasonable doubt to this fact.

The record reflects the victim's testimony that penetration occurred, although she verbally expressed a lack of consent, and that it occurred through the use of force and the threat of serious violence. Alfredson testified that the intercourse was consensual. The victim also testified that she was restrained physically and through verbal threats. The record indicates that the jury rejected the assertion that the victim was restrained under terrorizing circumstances or under circumstances which exposed the victim to the risk of serious bodily injury. But the jury's conviction on first degree sexual assault did not require a determination of whether the offense was committed with force or the threat of violence. Accordingly, the jury's findings do not support a conclusion that the testimony of the victim was wholly accepted while Alfredson's testimony was rejected.

Based on the evidence contained in the record and the jury's findings, we cannot say beyond a reasonable doubt that the

jury would have found that Alfredson used force or the threat of serious violence in compelling the victim to engage in sexual intercourse with him. First degree sexual assault involves sexual penetration without the consent of the victim. The jury was instructed that

> "[w]ithout consent" means (a) the victim was compelled to submit due to the use of force or the threat of force or coercion, or (b) the victim expressed a lack of consent through words, or (c) the victim expressed a lack of consent through conduct, or (d) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor.

It is not clear whether the jury found that Alfredson committed first degree sexual assault because he compelled the victim to submit through force or the threat of force or whether the jury found that Alfredson committed first degree sexual assault because the victim expressed a lack of consent through her words or actions. Further, the jury's acquittal of the first degree false imprisonment charge does not support the State's assertion that the jury accepted a version of the facts necessary to establish the aggravated offense finding.

Because we cannot say beyond a reasonable doubt that the jury would have found that Alfredson used force or the threat of serious violence in compelling the victim to engage in sexual intercourse with him, we cannot say that the trial court's error in making the determination that Alfredson committed an aggravated offense was harmless. Accordingly, we reverse, and remand to the Court of Appeals with directions to remand the cause for an evidentiary hearing for a jury to determine whether Alfredson used force or the threat of serious violence in sexually assaulting the victim and, thus, whether Alfredson committed an aggravated offense and is subject to lifetime community supervision.

CONCLUSION

We find the trial court erred in determining that Alfredson committed an aggravated offense and is, as a result, subject to lifetime community supervision. We affirm the convictions and

the sentences. We reverse, and remand to the Court of Appeals with directions to reverse and remand the cause to the trial court with directions to conduct an evidentiary hearing so that the jury may make a finding regarding whether Alfredson's sexual assault conviction was an aggravated offense and, thus, whether he is subject to lifetime community supervision. In all other respects, the decision of the Court of Appeals is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

LAVERN LOUIS GOLDEN, APPELLANT AND CROSS-APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEE AND CROSS-APPELLANT.

804 N.W.2d 31

Filed October 7, 2011. No. S-10-596.

1. **Summary Judgment.** A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Federal Acts: Railroads: Evidence.** A Federal Employers' Liability Act plaintiff bears the burden of presenting evidence from which a jury could conclude the existence of a probable or likely causal relationship, as opposed to a merely possible one.
4. **Courts: Expert Witnesses.** When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must assess whether the scientific evidence presented provides a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Richard J. Dinsmore and Jayson D. Nelson, of Law Offices of Richard J. Dinsmore, P.C., for appellant.