Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-214

JANUARY TERM, 2018

State of Vermont v. Alan R. Osgood, Jr.*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1108-11-15 Bncr
		Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury conviction of domestic assault, arguing that the trial court's jury instruction did not guarantee juror unanimity as to which of his acts was the basis for the guilty verdict. We reverse and remand.

Based on events occurring on November 20, 2015, defendant was charged with first-degree aggravated domestic assault, unlawful restraint, and reckless endangerment. Regarding the aggravated-domestic-assault charge, the State alleged in its information that defendant "attempted to cause or willfully or recklessly caused serious bodily injury to a family or household member, in violation of 13 V.S.A. § 1043(a)(1)." At trial, the State elected to charge defendant on attempted aggravated domestic assault.

The witnesses at the April 25, 2017 jury trial were the alleged victim,[1] her mother, her aunt—the person who called the police on the day of the incident—defendant's father, and two law enforcement officers who responded to the scene. The trial testimony revealed that defendant and girlfriend and their two children were in girlfriend's car, with girlfriend at the wheel, when they began arguing about money. Girlfriend testified that at one point while they were at a friend's house near the home of defendant's parents, defendant held her face in his hands. She further testified that she could not remember whether she felt any pain as the result of defendant placing his hands on her face, but she acknowledged that the contemporaneous written statement she gave to police indicated that she felt pain at a level of two on a scale of ten. From their friend's house, girlfriend, defendant, and their children proceeded in girlfriend's car a few houses down the road to the home of defendant's parents. As they pulled into the driveway of the home, defendant jammed the vehicle's automatic transmission into park. Girlfriend reacted by striking defendant in the face.

What happened next was the central question at trial with respect to the aggravated-domestic-assault charge. The State elicited testimony from the officers that both defendant and his father made contemporaneous statements indicating that defendant had choked girlfriend after

[1] The alleged victim and defendant were not married but had two children together. Hereinafter, we will refer to the alleged victim as "girlfriend."

she struck him in the face. One of the officers also testified that girlfriend told the officer that defendant had put his hands around her face and squeezed. The officer's testimony appears to be that girlfriend stated that this face-squeezing incident occurred during the altercation in the driveway of defendant's parents' home.

On the other hand, as noted above, at trial girlfriend stated that defendant held her face in his hands earlier in their protracted argument when they were at a friend's house. She acknowledged her prior report that she felt some pain when defendant held her face in his hands at that earlier time. However, she testified that when they got to defendant's parents' driveway, after she struck his face, defendant got out of the car. Girlfriend did not corroborate the State's claim that defendant choked her at that time.

Following the close of evidence, the prosecutor requested that the court instruct the jury that it could find defendant guilty of domestic assault, as a lesser-included offense of aggravated domestic assault. The prosecutor argued that, based on the evidence, the jury could find that defendant "reached towards [the girlfriend's] face to squeeze or he did squeeze and cause—she says he caused pain." The court initially indicated it would not charge the lesser-included offense, but ultimately determined that the charge was appropriate, given the facts of the case and the evidence presented at trial. Defense counsel objected, stating as follows:

> I would object on the lesser included to the attempted to cause bodily injury as regards the face. One, I think it's fair as a lesser. It's true that in the (indiscernible) squeezing the neck. I think as far as the face goes that just did not come out during testimony. And I think it's a different charge, frankly, not the lesser included. Those are separated in time and space. One happened earlier in the day. It's not the lesser included, it's an aggravated assault.

In response to the objection, the trial court noted that there was testimony that defendant "[s]queezed the face or something."

Before closing arguments, the court reviewed with the parties its final decisions about the jury instructions. The court stated that it would note defendant's objection on the lesser included. Neither party renewed objections at the close of the jury instructions.

The court instructed the jury that an element of the State's aggravated domestic assault charge was that the defendant attempted to cause serious bodily injury to girlfriend by strangulation. With respect to the domestic assault count, the court charged the jury as follows:

> If you find [defendant] not guilty of aggravated domestic assault, then consider whether he committed the offense of domestic assault. . . .
>
> For domestic assault, the essential elements are that on the date and the place alleged in charge one, that: one, [defendant] attempted to cause bodily injury to [the girlfriend] by putting his hands on her neck or face and squeezing. He did so with intent to cause bodily injury to [the girlfriend] and [the girlfriend] is a household member.
>
> . . . .

> The second essential element is that [defendant] attempted to cause bodily injury to [the girlfriend] by putting his hands on her neck and face and squeezing.

The jury found defendant not guilty of the three charged offenses, but guilty of the lesser-included offense of domestic assault. The court sentenced defendant to a term of three-to-six months, all suspended, and placed him on probation with standard and special conditions.

On appeal, defendant argues that the court's instruction on the lesser-included offense of domestic assault did not guarantee juror unanimity as to which of his acts supported the guilty verdict. Defendant asserts that the alleged acts of grabbing the girlfriend's face and squeezing her throat were distinctly different acts separated by time and place. According to defendant, the court's instruction gave the jury multiple ways to convict him but did not require the jury to identify which act or acts were the basis for all twelve jurors to conclude that he committed domestic assault by attempting to cause the girlfriend bodily injury.

We need not determine whether defendant adequately preserved this objection because we conclude that the court's instruction was error even under plain-error review. Plain-error review of jury instructions requires us to "examine the instructions in light of the record evidence as a whole" and decide whether the error defendant raises "would result in a miscarriage of justice." State v. Herrick, 2011 VT 94, ¶ 18, 190 Vt. 292. To find plain error, "there must be a reasonable probability that the error affected the outcome of the trial." United States v. Marcus, 560 U.S. 258, 262 (2010). An error is reasonably likely to have affected the outcome of a trial when it is reasonably likely that some jurors could have found that some of the alleged acts occurred while other jurors could have found that other of the alleged acts occurred. See, e.g., In re Carter, 2004 VT 21, ¶ 24, 176 Vt. 322 ("To demonstrate prejudice, petitioner would need to show that it was likely that some jurors found that there were threats to the victim but not to her family while other jurors found the opposite."). Defendant bears the burden of demonstrating that there was more than just a "logical possibility" that the jury differed on the factual basis underlying defendant's domestic assault conviction—the likelihood must be "reasonable." State v. Nicholas, 2016 VT 92, ¶ 26, __ Vt. __. (quotation omitted).

Applying this standard, we conclude that defendant's conviction must be reversed. A jury could infer on the basis of one law enforcement officer's testimony about girlfriend's post-incident statement that the face-cradling incident and the choking incident were one and the same. The trial court may well have believed this to be the case when it gave the lesser-included instruction. But based on girlfriend's trial testimony, the jury could also readily find that the face-cradling and choking incidents were entirely distinct, separated by time and space. The jury could conclude that the face-cradling occurred at the friend's house earlier in the parties' argument and the choking occurred a short time later at the home of defendant's parents.[2] Given this possibility, the trial court's instruction not only failed to expressly require the jury to reach unanimous consensus on which of these two potential incidents underlay its verdict, but by its own terms it allowed the jury to convict based on either the face-cradling incident or the choking incident—even if they were,

[2] We do not address defendant's contention before the trial court, not expressly renewed on appeal, that the State was not entitled to a lesser-included-offense charge based on a distinct incident from that underlying the aggravated domestic assault charge that was never charged in its own right.

as girlfriend testified, entirely distinct incidents.[3] If any jurors credited girlfriend's testimony, these two incidents were distinct in character, separated in time, supported by testimony from entirely different witnesses, and subject to different defenses.[4] For these reasons, the suggestion that some jurors may have convicted on the basis of one alleged incident while others convicted on the basis of a different one is more than a theoretical possibility; it is entirely reasonable. See Nicholas, 2016 VT 92, ¶¶ 22-33 (identifying material distinction among multiple incidents, whether proof for each incident arises from same source, and whether each is subject to same defense as factors in determining whether specific unanimity instruction is required).

Moreover, the fact that the jury acquitted defendant of the aggravated domestic assault charge, which was expressly based on the attempted choking incident, does not provide significant reassurance that its verdict was unanimous. It could have acquitted on that charge because it did not believe defendant attempted to choke girlfriend, or because it did not believe that he did so with an intent to cause serious bodily injury. For that reason, the jury's acquittal of the aggravated domestic assault charge does not significantly undermine the reasonable likelihood that one or more jurors voted to convict on the domestic assault charge on the basis of the face-cradling incident at the friends' home that girlfriend testified to, while one or more jurors voted to convict on the basis of the choking incident in defendant's parents' driveway.

Reversed and remanded.

BY THE COURT:

_____
Marilyn S. Skoglund, Associate Justice

_____
Beth Robinson, Associate Justice

_____
Karen R. Carroll, Associate Justice

[3] The trial court's oral instructions to the jury provided inconsistent guidance as to whether the jury could convict on the lesser-included solely on the basis of the face-squeezing incident. When it introduced the lesser-included instruction, the court identified one of the elements as defendant's putting his "hands on her neck or face and squeezing," but when it elaborated on the elements of the lesser-included offense, the court explained that the jury must find that defendant placed his hands "on her neck and face and squeeze[ed]." The court's written instructions to the jury consistently refer to the neck and face in the disjunctive. That is, the court instructs the jury that in order to convict of domestic assault it must conclude, among other things, that defendant attempted to cause bodily injury by putting his hands "on her neck or face and squeezing."

[4] Defendant argued self-defense with respect to the incident in his parents' driveway, but made no such claim with respect to the incident at the friends' house.