

NOTICE

This is a summary disposition issued under Alaska Appellate Rule 214(a). Summary dispositions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

HAROLD CLAYTON BILLUM,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12937
Trial Court No. 3AN-14-02419 CR

SUMMARY DISPOSITION

No. 0185 — March 31, 2021

Appeal from the Superior Court, Third Judicial District,
Anchorage, Paul E. Olson and Michael L. Wolverton, Judges.

Appearances: Sharon Barr, Assistant Public Defender, and
Samantha Cherot, Public Defender, Anchorage, for the
Appellant. RuthAnne Beach, Assistant Attorney General,
Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson,
Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison,
Judges.

Harold Clayton Billum was charged with, and ultimately convicted of,
fourth-degree misconduct involving a controlled substance (for possession of heroin) and
driving under the influence after he rear-ended a vehicle at a red light in Anchorage.¹ A

¹ AS 11.71.040(a)(3)(A)(ii) and AS 28.35.030(a)(1), respectively. Billum also pleaded
no contest to driving with a suspended license, and at trial he conceded his guilt and was
found guilty of driving without insurance. He does not challenge these additional
(continued...)

search incident to arrest revealed a bindle of heroin in Billum's wallet as well as a small digital scale with brown residue on it in his jacket pocket. An officer testified at trial that the scale was of a kind commonly favored by heroin users to purchase and measure doses of heroin. Subsequent testing of Billum's blood showed the presence of alprazolam (commonly known as Xanax) and morphine (which can be a derivative of heroin).

Prior to trial, Billum moved to exclude evidence of the scale, and the residue on the scale, arguing that the evidence was not relevant to the issue of whether he possessed the heroin in his wallet or was under the influence at the time of the collision, and that the jury might misconstrue this evidence as suggestive of distribution, rather than mere possession, of controlled substances. After conducting an analysis under Alaska Evidence Rule 403, the trial court allowed the State to present evidence of the scale and the residue, but the court precluded any testimony or argument suggesting that Billum was involved in the distribution of controlled substances.

On appeal, Billum renews his argument that the residue and scale were not relevant, and that any minimal probative value was outweighed by the danger of unfair prejudice. We reject this argument. Billum's defense at trial was that he was unaware of the heroin in his wallet, and that the drugs in his blood were within the therapeutic range for legitimate medical use. Consequently, evidence of Billum's contemporaneous possession of a scale commonly used to measure doses of heroin tended to make it more likely that he was aware of the heroin in his wallet and that the morphine in his blood was the result of heroin ingestion rather than medication.²

¹ (...continued)
convictions on appeal.

² See Alaska R. Evid. 401; *McLaughlin v. State*, 818 P.2d 683, 687 (Alaska App. 1991).

We further conclude that the trial court did not abuse its discretion in finding that evidence of the scale and residue was more probative than prejudicial. While the court allowed the State to present this evidence, the court precluded any evidence or argument that Billum's possession of the scale was indicative of distribution, which was the specific form of prejudice that Billum raised. Under these circumstances, the trial court did not err in allowing the State to present the scale and residue evidence.

Billum also raises one additional argument: he contends that the jury may have found him guilty of possessing the untested brown residue on the scale, rather than the heroin in his wallet, and that such a verdict would represent a fatal variance from the offense for which the grand jury indicted him.

Billum's argument is based on the trial court's response to questions the jury asked in the middle of deliberations. On a single piece of paper, the jury asked three questions:

- (1) We would like the definition of "immediate precursor" from instruction #15?³
- (2) Is there a certain amount of residue needed to get accurate test results? Did the scale exhibit have enough to test and if so, why wasn't it tested?
- (3) We would like to hear Bushue (Officer) and Officer Gould testimony again?

The trial court responded to these questions by: (1) providing the statutory definition of "immediate precursor"; (2) telling the jury that "[a]ll the evidence has been presented"; and (3) arranging for playback of the requested testimony.

³ Jury Instruction No. 15 provided a definition of controlled substance in accordance with AS 11.71.140(d)(11) and AS 11.71.900(5): "'Controlled substance' means a drug, substance, or immediate precursor included in the schedules set out in Alaska Law. As a matter of law, heroin is a schedule IA controlled substance."

Billum’s attorney additionally requested that the trial court give a factual unanimity instruction. Reading the jury’s first and second questions in tandem, the attorney expressed concern that the jurors might have been deliberating on the residue on the scale, rather than the drugs in the wallet, as a basis of guilt. The trial court rejected Billum’s reading of the jury questions and declined to give any further instructions.

We agree with Billum that the trial court should have granted his request for a factual unanimity instruction at that point. Alaska law “requires jurors to reach unanimity regarding the act for which the defendant is found guilty.”⁴ If there is any possibility that the jury could be confused or divided over which specific act forms the basis for conviction, the trial court has a duty to instruct the jury that its verdict must reflect unanimous agreement upon “just what the defendant did.”⁵

But, under the circumstances of Billum’s case, any error was harmless beyond a reasonable doubt.⁶ Both Billum and the State agree that Billum was indicted and prosecuted for possession of the heroin in his wallet, *not* the brown residue on the scale. The parties’ closing arguments, and indeed the presentation of evidence throughout trial, established a single, unequivocal basis for conviction — *i.e.*, the heroin in Billum’s wallet.

⁴ *Taylor v. State*, 400 P.3d 130, 134 (Alaska App. 2017) (citing *Khan v. State*, 278 P.3d 893, 897 (Alaska 2012)).

⁵ *State v. James*, 698 P.2d 1161, 1167 (Alaska 1985); *see also Des Jardins v. State*, 551 P.2d 181, 190 (Alaska 1976) (explaining the trial court’s responsibility to provide guidance when a jury question suggests confusion about a legal issue).

⁶ *See, e.g., Anderson v. State*, 337 P.3d 534, 537-40 (Alaska App. 2014) (explaining the test for harmlessness as it applies to the failure to provide a unanimity instruction).

In fact, the phrasing of the jury’s question recognized this distinction. The jury noted that the State had not presented any evidence of the nature of the residue, and inquired about why testing was not performed. In other words, the jurors did not presume that the substance was heroin. Rather, they asked whether there was additional evidence that could have clarified the nature of the residue.

Furthermore, even reading the jury questions as Billum’s attorney did — *i.e.*, as the jury requesting a definition of “immediate precursor” specifically *because* it was considering convicting Billum based on the untested residue — the trial court’s accurate instruction on “immediate precursor” precluded the jury from reaching such a verdict. The trial court correctly instructed the jury that an “immediate precursor” is “a substance which is by statute or regulation designated as the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture of that controlled substance.”⁷ Since there was no evidence in the record about the nature of the substance found on the scale, the jury could not have concluded that the substance was an “immediate precursor.”

In short, there is no reasonable possibility that the jurors could have convicted Billum based on the residue on the scale. As such, Billum’s conviction does not represent a variance from the charge for which he was indicted, nor does it suggest that the jury failed to agree on “just what [Billum] did.”⁸

The judgment of the superior court is AFFIRMED.

⁷ AS 11.71.900(13).

⁸ *James*, 698 P.2d at 1167.