IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KELSEY P. GEORGE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11028
Trial Court No. 3GL-09-231 CR

MEMORANDUM OPINION

No. 6063 — June 25, 2014

Appeal from the Superior Court, Third Judicial District, Glennallen, Eric Smith, Judge.

Appearances: Dan S. Bair, Assistant Public Advocate, Appeals & Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge MANNHEIMER.

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

Kelsey P. George was convicted of eight crimes — four counts of first-degree sexual abuse of a minor (sexual penetration of a child under the age of 13), one count of attempted first-degree sexual abuse of a minor, and three counts of second-degree sexual abuse of a minor (sexual contact with a child under the age of 13). These convictions were based on evidence that George engaged in unlawful sexual activity with three young girls, and later confessed to the sexual abuse when he was interviewed by a state trooper.

George challenges two of these convictions in this appeal: the attempted first-degree sexual abuse charge, and one of the second-degree sexual abuse charges.

With respect to the challenged attempted first-degree sexual abuse conviction, George argues that this conviction is tainted because the state trooper was allowed to testify that, in his opinion, George's confession to this crime was truthful. As we explain in this opinion, we agree with George that the trooper should not have been allowed to give this testimony, but we conclude that the error is harmless.

With respect to the challenged second-degree sexual abuse conviction, George contends that the evidence presented at his trial was not legally sufficient to support the jury's verdict. For the reasons explained in this opinion, we conclude that the evidence was sufficient to support George's conviction.

George's attack on the attempted first-degree sexual abuse conviction

Among the charges for which George was indicted, one of them involved T.E., a girl under the age of 13. George was charged with attempted first-degree sexual abuse of a minor for attempting to engage in sexual penetration with T.E..

When State Trooper Phillip Duce questioned George about this allegation, George confessed that he put his hands down T.E.'s pants: he told the trooper, "I don't

know why I did it. I must've been thinking something. ... I think I might've been like half-asleep and a little drunk."

At trial, George's attorney asserted that this apparent confession was false. The defense attorney argued that the purported confession was the result of Trooper Duce's aggressive style of suggestive questioning, coupled with George's mental disability, fetal alcohol syndrome. The defense attorney contended that because George suffered from fetal alcohol syndrome, he was extremely suggestible and he tried to please other people, even when the other person was a state trooper who was investigating him as the suspect in serious crimes.

During the prosecutor's examination of the trooper, the prosecutor attempted to rebut the defense attorney's contention — but in an improper way. The prosecutor first elicited the fact that the trooper had interviewed "hundreds" of suspects during his career. Then the prosecutor asked the trooper whether, "based on [his] experience and [his] experience with [George]", the trooper believed that George was being truthful when he confessed. The trooper replied, " I do."

The defense attorney did not object to either the prosecutor's question or the trooper's answer. But even though there was no objection at trial, George argues on appeal that the trial judge committed plain error by allowing the investigating trooper to give this answer.

Under Alaska law, a witness is not allowed to play the role of a "human polygraph" and express a personal opinion about the defendant's guilt or innocence, or the credibility of an alleged victim's accusatory statements or testimony. [1] George's case involves a slightly different situation: an instance where a witness expressed a personal

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[1] *See Sakeagak v. State*, 952 P.2d 278, 282 (Alaska App. 1998); *Flynn v. State*, 847 P.2d 1073, 1075-76 (Alaska App. 1993); *Thompson v. State*, 769 P.2d 997, 1003 (Alaska App. 1989).

opinion about the credibility of an out-of-court statement made by the defendant. But the governing principle is the same.

If anything, the principle applies more forcefully in George's case, because this particular witness was a law enforcement officer, and the prosecutor asked him to evaluate the truthfulness of George's confession "based on [his] experience" of interviewing "hundreds" of suspects, as well as "[his] experience with [George]". In other words, the prosecutor was asking the trooper to offer what purported to be an *expert* assessment of the truthfulness of George's confession — an assessment based both on the trooper's personal interactions with George and his lengthy experience as a criminal investigator. As this Court noted in *Sakeagak v. State*, 952 P.2d 278, 282 (Alaska App. 1998), the problem with this kind of testimony is that "jurors may surmise that the police are privy to more facts than have been presented in court, or [jurors] may be improperly swayed by the opinion of a witness who is presented as an experienced criminal investigator."

The State argues on appeal that, even if the trooper's testimony would ordinarily be considered improper, the testimony was nevertheless permissible in George's case because the prosecutor was attempting to rebut the defense attorney's contention that George's confession was false — that George had falsely confessed because his mental disability rendered him peculiarly susceptible to the suggestions of guilt that were either explicitly or implicitly contained in the trooper's questions.

It is true, as the State argues, that the prosecutor was entitled to ask the trooper questions designed to rebut the defense attorney's contention that George confessed simply because he suffered from a mental disability, because he was overly suggestible, and because he wished to please the trooper.

For instance, the prosecutor might have asked the trooper if George seemed confused or uncertain about what the trooper was asking him. Or the prosecutor might

have asked the trooper if there were times during the interview when George became distant, angry, or confrontational. Or the prosecutor might have asked the trooper if there were instances during the interview which tended to show that George was not suggestible — for example, times when George affirmatively rejected the implication that he had done anything improper.

But the prosecutor was not entitled to ask the trooper to express his personal opinion, based on his experience as a criminal investigator, that George's confession was truthful.

The remaining issue is whether the admission of this improper testimony requires us to reverse George's conviction for sexually abusing T.E..

(Even though Trooper Duce also questioned George about his abuse of A.M. and M.G. during the same interview, and even though George confessed to abusing all three girls, George does not argue that the trooper's improper testimony affected George's convictions on the counts involving A.M. or M.G..)

In his brief, George points out that one of the major issues at trial was that T.E. did not say the same thing to her mother as she later said to Trooper Duce. T.E. told her mother only that George had come into her room at night and rubbed her leg or thigh. She did not assert that George had reached into her pants until Trooper Duce elicited this information.

(When T.E. testified at George's trial, she was confronted with this discrepancy, and she offered an explanation for it. According to both T.E.'s testimony and her mother's testimony, T.E.'s mother decided to throw George out of the house as soon as T.E. said that George had entered her room at night and touched her leg. Because of this, T.E. felt that she did not have to offer her mother any more details about what had happened.)

At the end of the trial, based on the discrepancy between T.E.'s statements to her mother and her later statements to the trooper, George's attorney argued to the jury that T.E.'s *initial* account to her mother represented the truth, and that T.E.'s later accusation to Trooper Duce was a fabrication. Based on this view of the evidence, and based on the contention that George's confession to Trooper Duce was false, the defense attorney asked the jury to reject the State's charge of attempted sexual abuse, and instead to convict George of the lesser offense of second-degree harassment (subjecting another person to offensive physical touching). [2]

All of this suggests that when the jury assessed the credibility of T.E.'s account, they might have been influenced by Trooper Duce's assertion that George's confession was truthful.

But other aspects of the trial point to a different conclusion. When the prosecutor elicited Trooper Duce's opinion about the truthfulness of George's confession, the trooper's testimony on this point was brief and unelaborated. But during the defense attorney's cross-examination of Trooper Duce (after the trooper gave the improper testimony), the defense attorney elicited extensive testimony from the trooper as to *why* he believed that George's confession was truthful.

For example, at one point during the cross-examination, in response to the defense attorney's questions, Duce explained at length (without objection from the defense attorney) how an interviewer must pay attention to a suspect's body language, and how George's body language indicated that he was being deceptive when he denied the sexual abuse.

A little later in the defense attorney's cross-examination of the trooper, the defense attorney tried to get the trooper to concede that George was only saying self-

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[2] AS 11.61.120(a)(5).

incriminating things because he wanted to please the trooper. In response, and again without objection, Trooper Duce responded that, in his opinion, George was not simply saying things that he thought the trooper wanted to hear. In essence, the trooper restated his opinion that George was telling the truth when he confessed to abusing the girls.

The test for whether an evidentiary error is harmless is whether the error had an appreciable effect on the jury's verdict. [3] Given the extensive testimony elicited by the defense attorney regarding Trooper Duce's reasons for believing that George's initial denials of wrongdoing were deceptive, and that George's later admissions of wrongdoing were truthful, we conclude that the jury's verdict was not substantially affected by the trial judge's earlier error in allowing the prosecutor to elicit Duce's unelaborated opinion that George's confession was truthful.

We therefore uphold George's conviction for the attempted first-degree sexual abuse of T.E..

George's attack on the first-degree sexual abuse conviction involving A.M.

In Count X of the indictment, George was charged with first-degree sexual abuse for engaging in digital penetration of A.M., a girl under the age of 13. The jury found George guilty of this charge, but on appeal George argues that the evidence presented at his trial was legally insufficient to support the jury's verdict.

The State's theory of Count X was that George digitally penetrated A.M. sometime during her third-grade school year, between September 2004 and May 2005. But when A.M. was on the stand, the prosecutor failed to ask her if George digitally penetrated her during her third-grade year. Instead, the prosecutor asked about A.M.'s

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[3] *See Love v. State*, 457 P.2d 622, 631-32 (Alaska 1969); *David v. State*, 123 P.3d 1099, 1102 (Alaska App. 2005).

fourth-grade year. (The prosecutor's introductory question was, "Do you remember [George] touching you when you were in the fourth grade?")

Based on this discrepancy, George argues that the State failed to present sufficient evidence to support its allegation that George sexually penetrated A.M. during her third-grade year. But when we evaluate the legal sufficiency of the evidence, we are obliged to view the record in the light most favorable to upholding the jury's verdict. [4] And viewing the record in that light, it appears (1) that the prosecutor was under a misimpression about the timing of the offense, and (2) that A.M.'s ensuing testimony was actually about events that occurred during her *third-grade* year.

The events in this case took place in Copper Center. George was living with A.M.'s aunt. A.M. testified that her aunt used to babysit her, sometimes overnight, from the time she was quite young until her fourth-grade year, when she and her family moved to Anchorage.

A.M. further testified that, on the nights when she would stay at her aunt's house, George would come into her bedroom and touch her. According to A.M., this touching started when she was four years old and continued until she reached the fourth grade and moved to Anchorage. A.M. testified that, when George touched her, he would sometimes reach inside her vagina.

The prosecutor's mistake about the time frame of this sexual activity was clarified later in A.M.'s testimony, when she described how George would make her engage in fellatio. The prosecutor asked A.M. if this had happened when she was in the fourth grade, but A.M. repeatedly told the prosecutor that it happened when she was in the third grade:

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[4] *See*, *e.g.*, *Moore v. State*, 298 P.3d 209, 217 (Alaska App. 2013).

Prosecutor: Okay. And was [this sexual activity] in the third grade?

A.M.: (Pause; indiscernible answer)

Prosecutor: Or was that the fourth grade?

A.M.: Third grade, I think.

Prosecutor: Third grade. Did that also — did that happen in the fourth grade as well?

A.M.: (Pause) Hmmm.

Prosecutor: Yeah? ... Was that a "yes"?

A.M.: No.

Prosecutor: No. Okay. Just the third grade? ... Do you remember when you testi[fied] — well, you already said you remember when you testified in front of the other group of people [*i.e.*, the grand jury]. Do you remember telling them it also happened in the fourth grade?

A.M.: (Pause)

Prosecutor: No. Okay. ... [But] did that happen in the fourth grade as well?

A.M.: (Pause) It was the fourth grade, but like — it wasn't quite. The year didn't quite start yet.

Prosecutor: Okay. So it was the fourth grade, just you hadn't really started. Okay, thanks so much, [A.M.].

As shown by this exchange, A.M. declared that the sexual abuse occurred when she was in the third grade. The prosecutor eventually succeeded in getting A.M. to say that the abuse happened "as well" during the time between the end of third grade and the beginning of fourth grade. But A.M. never altered her statement that all of the abuse occurred before she moved to Anchorage.

Thus, viewing A.M.'s testimony as a whole, and in the light most favorable to the verdict, the jurors could reasonably conclude that George engaged in digital penetration of A.M. during the time frame specified in Count X of the indictment (September 2004 to May 2005), and shortly thereafter as well.

(See *Larkin v. State*, 88 P.3d 153, 156-57 (Alaska App. 2004), where this Court held that the precise date of the offense is normally not an element of the government's case, so long as the offense occurred within the pertinent statute of limitations and the defendant was not affirmatively prejudiced by the discrepancy between the date specified in the indictment and the date revealed by the trial testimony.)

We therefore conclude that the evidence presented at George's trial was legally sufficient to support the jury's verdict on this count.

Conclusion

The judgement of the superior court is AFFIRMED.