IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BOBBIE DEE LENGELE,	)	
	)	Court of Appeals No. A-10679
Appellant,	)	Trial Court No. 3AN-09-1851 CR
	)	
v.	)	
	)	MEMORANDUM OPINION
STATE OF ALASKA,	)	
	)	
Appellee.	)	No. 6072 — July 16, 2014
	)	

Appeal from the Superior Court, Third Judicial District, Anchorage, Larry D. Card, Judge.

Appearances: Michael T. Schwaiger, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Charles D. Agerter, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Bolger, Supreme Court Justice,[*] and Coats, Senior Judge.[**]

PER CURIAM.

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

[**] Sitting by assignment made pursuant to article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

Bobbie Dee Lengele was convicted of criminal nonsupport.[1] In a previous decision, we concluded a jury instruction given at her trial was potentially misleading when it stated that it is not a lawful excuse for nonpayment of child support "when, though employable, the defendant voluntarily terminates his/her employment, voluntarily reduces his/her earning capacity[,] or fails to diligently seek employment."[2] Following our decision, Lengele filed a petition for hearing, and the Alaska Supreme Court remanded this case for our review of whether this erroneous jury instruction was harmless beyond a reasonable doubt.[3]

At trial, the parties introduced evidence about several employment positions that could be relevant to this analysis.

Lengele testified she was working as a technician at Alyeska Pipeline Service Company in 1999. She testified she did not get past the initial training for that job because of the turmoil of her divorce, including threats and property destruction by her husband while she was at work. When the Child Support Services Division (CSSD) sent a withholding order to Alyeska, the company confirmed Lengele had been terminated in 1999.

Lengele also testified she was hired by NANA Management for a security job and attended two training sessions (before she was fired for not having a driver's license). She also began training for a job with Nabors Drilling, but lost her position when a couple of the company's oil rigs burned down.

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[1] AS 11.51.120(d).

[2] *Lengele v. State*, 295 P.3d 931, 935-36 (Alaska App. 2013).

[3] Alaska Supreme Court Order, File No. S-15079 (July 24, 2013).

Lengele also testified she had worked for Carrs-Safeway and for Fred Meyer. The State introduced a tape-recorded interview in which Lengele apparently said she quit one of these jobs because "it really wasn't worth it" after CSSD garnished her paycheck. Testimony from a CSSD representative confirmed the agency had served a withholding order on Carrs-Safeway in February 2003, while Lengele was employed by that company.

Lengele also testified she had some experience and training in bartending, and she had applied for some jobs in that field. But she suggested she could not earn enough money at a bartending job to pay for her transportation to and from work. Lengele also testified she had applied for other jobs without success.

There were other jury instructions that emphasized the State was required to prove Lengele's failure to pay child support was unreasonable. Both parties made arguments that relied on this standard. But parts of the prosecutor's arguments suggested the State could satisfy this burden simply by showing Lengele had voluntarily terminated her employment:

> Ladies and gentlemen, we know that she had the ability to provide financial support. She worked. She quit her job voluntarily. She self-induced her poverty.

This argument may have improperly focused the jury's attention on the voluntariness rather than the reasonableness of Lengele's efforts to maintain employment.

Conclusion

We conclude there is a reasonable possibility the jurors would have reached a different verdict if they had been properly instructed. We thus conclude the error in this jury instruction was not harmless beyond a reasonable doubt.

It appears that the Alaska Supreme Court has retained jurisdiction of this case. We therefore transmit this memorandum opinion to the Alaska Supreme Court for further consideration.