IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DANIELLE M. MONTGOMERY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11528 Trial Court No. 3KN-12-945 CR MEMORANDUM OPINION No. 6263 — December 23, 2015

Appeal from the District Court, Third Judicial District, Kenai, Jennifer K. Wells, Magistrate Judge.

Appearances: David D. Reineke, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Samuel D. Scott, Assistant District Attorney, Kenai, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Kossler, Judges.

Judge MANNHEIMER.

Following a jury trial, Danielle M. Montgomery was convicted of driving while her license was revoked and driving in circumvention of an ignition interlock

requirement.[1] In this appeal, Montgomery claims that her convictions are flawed in two different ways.

First, Montgomery argues that the district court committed error when it refused to instruct the jurors on the defense of necessity.

Second, Montgomery argues that the district court committed plain error by failing to declare a mistrial *sua sponte* after the prosecutor elicited testimony that, after a state trooper pulled Montgomery over for speeding and discovered that her license was revoked, Montgomery failed to assert that there was any necessity for her driving.

For the reasons explained in this opinion, we conclude that neither of Montgomery's claims has any merit, and we therefore affirm her convictions.

The traffic stop

Alaska State Trooper Jason Woodruff was patrolling the Sterling Highway on Memorial Day, 2012. Shortly before 10:00 p.m., he saw a white SUV headed toward Sterling from the direction of Cooper Landing. This vehicle was traveling 14 miles per hour over the speed limit, so Woodruff initiated a traffic stop. The driver was Montgomery. Montgomery's husband, Marquis Facine, was in the front passenger seat, and their infant daughter and a dog were in the back seat.

When the trooper asked Montgomery for her driver's license, she could not produce it; she admitted that her license was revoked. Montgomery also admitted that she was driving in violation of a license restriction that required her to have an ignition interlock device (*i.e.*, a device that will not allow the engine to start until the driver submits a breath sample to be tested for alcohol). Woodruff could see that there was no such device in Montgomery's vehicle.

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[1] AS 28.15.291(a)(1) and (a)(2), respectively.

When Woodruff asked Montgomery why she was driving the vehicle instead of her husband (who was validly licensed), Montgomery replied that her husband was tired. Montgomery then explained that she and her family were traveling from Anchorage to go camping in Ninilchik, and that she was driving the vehicle because her husband had put in a full day of work just before they left Anchorage. Montgomery said nothing about any other reason why she needed to be driving.

Woodruff cited Montgomery for driving with a revoked license, for driving in circumvention of the ignition interlock requirement, and for speeding (although he reduced this charge to traveling 9 miles per hour over the speed limit, rather than 14, so that Montgomery would only accrue 2 points against her license instead of 4).

Woodruff then released Montgomery, on condition that her husband drive the vehicle. From what Woodruff could observe, Montgomery's husband was not too tired to drive.

The testimony pertaining to Montgomery's claim of necessity

At Montgomery's trial, the defense did not dispute the fact that Montgomery's license was revoked, or the fact that she was driving in violation of the ignition interlock requirement (although, in front of the jury, everyone referred to this requirement as simply a "license limitation"). In fact, Montgomery stipulated to these things. Montgomery's sole defense was a claim of necessity, and she took the stand at trial to lay the groundwork for this defense.

Montgomery testified that, on the day of the traffic stop, her husband had worked a ten-hour shift at his job in Anchorage. They decided to drive to Ninilchik when her husband got off work in the late afternoon, where they planned to go camping and clamming.

Montgomery explained that they had been on the highway for about two hours, and had just gotten to the winding, narrow road to the west of Cooper Landing, when her husband started to fall asleep at the wheel. Montgomery directed her husband to pull over, and when the car came to a stop, they discussed what to do.

According to Montgomery, she and her husband thought that they had two alternatives: they could park the car off the highway and let Montgomery's husband take a short nap, or they could continue their journey with Montgomery driving while her husband slept. They ultimately decided to continue the journey with Montgomery driving.

When the prosecutor cross-examined Montgomery about this decision — pointing out that Montgomery's license was revoked, and that she would be breaking the law if she drove the vehicle — Montgomery replied that the decision was largely a product of expediency: she and her husband wanted to be in Ninilchik so that they could get to bed and wake up early to catch the clamming tide:

> *Prosecutor*: The fact that you'd be breaking the law — did that factor into [your] decision at all?
>
> . . .
>
> *Montgomery*: Well, I did have my license before, so it wasn't really [my husband's] concern. ... We were more concerned about [his] taking a nap and getting down there [to Ninilchik] so we can wake up early the next morning to catch the clam tide.

Montgomery added, however, that there were other reasons for this decision. Montgomery testified that she and her husband wanted to get to Ninilchik as soon as possible because they and their child had not eaten for many hours, and they had no money to buy food along the way, so they would be unable to eat until they met up with Montgomery's family at the Ninilchik campground. In addition, they were carrying

a 20-gallon gas container in the back of their SUV, and Montgomery was concerned that their child might be exposed to gas fumes if they sat in the parked car while her husband napped.

When the prosecutor asked Montgomery to sum up her claim of necessity (and paraphrased the reasons for driving that Montgomery had described in her testimony), Montgomery agreed that these were the reasons behind her decision to take over the driving from her husband. After some prompting, Montgomery added two more reasons for not wanting to park the car by the side of the road for 15 to 20 minutes to let her husband nap: the potential danger of attack by wild animals, and the potential danger of strange people approaching them.

So Montgomery took over the driving, and they headed toward Sterling, with Montgomery's husband napping in the front seat. Some 30 to 45 minutes later, the trooper stopped Montgomery for speeding.

Montgomery woke her husband as she was being pulled over. And as we have explained, her husband took over the driving — with no further problems — after the trooper issued the citations to Montgomery and released her.

Anticipating Montgomery's testimony about the purported necessity for her to drive the vehicle, the prosecutor had Trooper Woodruff describe the stretch of highway along which Montgomery was driving. Aided by a series of visual displays of the highway route, Woodruff testified that Montgomery drove past many pull-outs, side streets, and driveways where she could have stopped. All of these would have been visible to Montgomery, because it was still light outside when Woodruff pulled her over.

Woodruff also explained that the temperature was warm that evening: "short-sleeve weather". And Woodruff testified that he smelled no gas fumes inside Montgomery's vehicle during the traffic stop.

(Montgomery said the same thing — that she could not smell gas fumes inside her vehicle.)

The district court's ruling that Montgomery was not entitled to a jury instruction on her proposed defense of necessity

A criminal defendant is entitled to a jury instruction on the defense of necessity if the evidence, viewed in the light most favorable to the proposed defense, is sufficient to allow a reasonable fact-finder to conclude:

(1) that the defendant committed the charged offense to prevent a significant evil;

(2) that, given the circumstances (as the defendant reasonably perceived them), the defendant had no reasonable alternative — no adequate way to avoid this significant evil except by committing the charged offense; and

(3) that the harm threatened or caused by the defendant's crime was not disproportionate to the harm that the defendant sought to avoid by breaking the law.

Scharen v. State, 249 P.3d 331, 333 (Alaska App. 2011), citing *State v. Garrison*, 171 P.3d 91, 94 (Alaska 2007).

After hearing the testimony in Montgomery's case, the trial judge concluded that Montgomery had failed to present sufficient evidence of the second element of the test — *i.e.*, evidence sufficient to warrant a conclusion by a reasonable fact-finder that Montgomery had no reasonable alternative except to drive the vehicle herself.

The judge noted that, according to the testimony, the question confronting Montgomery was whether she should take over the driving from her husband, so that they could continue traveling toward Ninilchik without interruption, or whether they

would park their vehicle off the road for a time, to let her husband take a short nap before he resumed driving.

The judge observed that the Sterling Highway afforded many places to park the vehicle in safety: it is "a road designed for people to camp", with "lots of pull-outs and places to pull over".

Responding to Montgomery's expressed concern about gasoline fumes inside the vehicle, the judge noted that Trooper Woodruff testified that he smelled no gasoline fumes in the vehicle, and that Montgomery herself testified that the fuel tank was covered to prevent fumes. The judge also noted that, according to the testimony, the weather was good, the temperatures were mild, and it was still light outside. Thus, even assuming that Montgomery was validly concerned about an additional 30 minutes' exposure to gasoline fumes, she could have opened the vehicle's windows or doors, or taken their child for a short walk.

And with respect to Montgomery's expressed concerns about being attacked by wild animals or by violent motorists if she and her husband parked the car for 15 to 30 minutes, the judge concluded that these were the same kinds of speculative dangers that the supreme court rejected in *Garrison*. *See Garrison*, 171 P.3d at 97-98.

For these reasons, the trial judge concluded that Montgomery was not entitled to a jury instruction on the defense of necessity. More specifically, the judge ruled that Montgomery had failed to present sufficient evidence of the second element of the test — sufficient evidence to establish that Montgomery acted reasonably when she concluded that parking the vehicle off the road for 15 to 30 minutes was not a reasonable, adequate alternative to breaking the law.

Why we affirm the trial court's decision

A defendant is entitled to a jury instruction on the defense of necessity if there is "some evidence" to support that defense.[2] The phrase "some evidence" is a term of art: it refers to evidence which, if viewed in the light most favorable to the defendant, would allow a reasonable juror to find in the defendant's favor on each element of the proposed defense. *Garrison*, 171 P.3d at 94; *Lacey v. State*, 54 P.3d 304, 306, 308 (Alaska App. 2002).

The question of whether the evidence presented in the trial court is sufficient to constitute "some evidence" of a proposed necessity defense is an issue of law. *See Garrison*, 171 P.3d at 94. Accordingly, when an appellate court reviews a trial judge's ruling on this question, we review the judge's ruling *de novo* (*i.e.*, without deference to the judge's view of the matter). *Ibid.*

In Montgomery's case, we agree with the trial judge that, even viewing the facts of this case in the light most favorable to Montgomery, no reasonable fact-finder could have reached a verdict in Montgomery's favor on her proposed necessity defense because (1) Montgomery had an obvious, reasonable, and adequate alternative to driving in violation of the law, and (2) Montgomery acted unreasonably when she concluded otherwise.

On appeal, Montgomery argues that there was a flaw in the trial judge's reasoning: The trial judge found that Montgomery had the reasonable alternative of parking the SUV off the highway for a half-hour or less, and letting her husband take a short nap. But Montgomery now argues that she could not have known that a nap of 15 to 30 minutes would restore her husband's ability to drive safely. She asserts that she

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[2] *Garrison*, 171 P.3d at 94; *Muller v. State*, 196 P.3d 815, 816 (Alaska App. 2008).

had no way of knowing how long it might take for her husband to regain the necessary level of alertness.

But this argument is not supported by Montgomery's testimony in the trial court. In her testimony, Montgomery repeatedly characterized her decision as a choice between (1) immediately continuing their journey to Ninilchik, with Montgomery driving, or (2) parking their vehicle off the road for between 15 to 30 minutes, to allow her husband to take a "short nap". Montgomery never suggested that she thought or feared that it might take longer for her husband to be sufficiently rested to resume driving.

We therefore affirm the trial judge's decision not to instruct the jury on Montgomery's proposed necessity defense.

The underlying facts pertaining to Montgomery's claim that the trial judge should have declared a mistrial sua sponte

At Montgomery's trial, when the prosecutor examined Trooper Woodruff, the prosecutor tried to anticipate Montgomery's already-announced necessity defense by asking the trooper to describe his conversation with Montgomery during the traffic stop.

Woodruff testified that, after he discovered that Montgomery's driver's license was revoked, he asked Montgomery why she was driving the vehicle instead of her husband (who was properly licensed). Montgomery replied that she was driving because her husband was tired — that her husband had completed a whole shift at his work just before they left Anchorage.

The prosecutor then asked Woodruff a series of questions about what Montgomery *failed* to say:

Prosecutor: So, besides the male passenger being tired, did the defendant give you another reason why she was driving? Any other reasons?

Woodruff: No other reasons. She — she didn't say anything else.

Prosecutor: Did she say [that] anyone [in the vehicle] had been injured?

Woodruff: No.

. . .

Prosecutor: [Was] anyone starving or extremely hungry in that car? Was that ... statement ever made?

Woodruff: No.

Prosecutor: Did the child in the back [of the vehicle] seem unhappy or in distress in any way?

Woodruff: No.

. . .

Prosecutor: Okay. Did the defendant, at any time, say that there was any emergency going on at all? [Did] she ever tell you that ...

Woodruff: No.

Montgomery's attorney did not object to any of these questions or answers. Indeed, when Montgomery's attorney cross-examined Trooper Woodruff, she asked him an additional question on this topic. After asking Woodruff to repeat his earlier testimony about Montgomery's explanation for driving — that "the reason [she had] taken the wheel [was] because ... [her husband] was tired" — the defense attorney then asked

Woodruff whether Montgomery had said anything else to him about her reasons for driving:

> *Defense Attorney*: Okay. Did she give you any detail [other] than that, that you recall?
>
> *Woodruff*: There was some [additional] discussion, but I believe the discussion was [concerning] where they had pulled over and switched [drivers] ... .

After Trooper Woodruff completed his testimony, the prosecutor rested the State's case, and Montgomery took the stand to offer her explanation for driving the vehicle. The trial day then ended.

The next morning, when the parties returned to court, the *trial judge* brought up the issue of a defendant's right to silence. The judge suggested that, in light of the prosecutor's series of questions about what Montgomery said, and failed to say, to Trooper Woodruff, it might be appropriate to instruct the jury that Montgomery had no obligation to say anything to the trooper.

After the judge explained her concern, both the defense attorney and the prosecutor agreed that a curative instruction should be given. In particular, the prosecutor asked the trial judge to instruct the jurors, "Basically, don't hold it against the defendant for not essentially sharing her defense with the officer at the time of the stop. That's really what we want to tell the jury — [the defendant] doesn't have to say anything, and you shouldn't hold it against her for not saying anything."

This issue was then put to one side while the parties argued whether Montgomery was entitled to a jury instruction on the defense of necessity. After the trial judge issued her final ruling on this subject (denying Montgomery's request for a necessity instruction), the judge reminded the parties about giving a curative instruction on Montgomery's right to silence.

But at this point, Montgomery's defense attorney changed her mind: she now told the judge that she did not think the situation could be cured with a jury instruction. The defense attorney told the judge, "I don't think there's any instruction that can un-ring the bell. ... I don't know of any instruction that can cure it."

The defense attorney's statement — that no jury instruction could cure the problem — led to the following colloquy:

> *The Court*: Well, so are you making [a] request of any sort, then, relating to that [problem]?
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> *Defense Attorney*: No.
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> *The Court*: Okay. So you don't want an instruction, then, on that [issue]?
>
> *Defense Attorney*: Well, I think the Court has pointed out that there's a problem here, and there needs to be an instruction. I'm just saying that I don't think that any instruction will be adequate.

Despite the defense attorney's assertion that no instruction could adequately cure the situation, the trial judge took a recess and drafted an instruction regarding Montgomery's right not to say anything to the trooper. When the judge presented her draft instruction to the attorneys, the prosecutor stated that he had "no objection" to the draft instruction, and Montgomery's attorney told the judge, "That's fine."

This curative instruction, ultimately numbered "Instruction 27", instructed the jurors:

> The defendant in this case had a right not to offer the investigating officer an explanation for her driving. To the extent that she remained silent, you cannot consider, discuss or speculate about it.

> It is up to the State to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that she is innocent.

Why we conclude that the judge did not commit plain error when she failed to declare a mistrial sua sponte

On appeal, Montgomery again takes the position that the trial judge's curative instruction was insufficient to cure the prejudice of Trooper Woodruff's testimony — that, indeed, no instruction could have cured the problem. Montgomery argues that the judge had no choice but to declare a mistrial, even though Montgomery's attorney expressly refused to ask for one.

Montgomery's argument is premised on the assertion that the prosecutor should not have been allowed to ask Trooper Woodruff about what Montgomery failed to say when she was stopped. But it is not clear whether the prosecutor's questions to Trooper Woodruff constituted error at all. One could argue that, because Montgomery chose to speak freely to Woodruff about her reasons for driving even though her license was revoked, Montgomery's later claim of necessity was validly undercut by her failure to tell Woodruff about any aspect of this alleged necessity. As our supreme court recognized in *Sidney v. State*, if a suspect voluntarily speaks to the police, "[o]missions and inconsistencies in [the suspect's] exculpatory statement [can] properly be pointed out at trial." 571 P.2d 261, 264 (Alaska 1977).

But even assuming that the prosecutor's questions to Woodruff on this topic were improper, we still conclude that the trial judge did not commit plain error when she failed to declare a mistrial *sua sponte*.

In her brief to this Court, Montgomery cursorily argues that the trial judge's instruction on this topic was incapable of curing the prejudice to Montgomery's case. But as we have explained, Montgomery *stipulated* that she drove even though her license was revoked, and that she drove in circumvention of the ignition interlock requirement. Her only potential defense was the proposed necessity defense — and we have just upheld the trial judge's decision not to instruct the jury on this defense. Given our ruling on this issue, Montgomery could not have been prejudiced by the testimony regarding her failure to explain the purported necessity to Trooper Woodruff.

There is a second reason why we find no plain error. Even assuming that Montgomery had been prejudiced, and even assuming that the trial judge's curative instruction was insufficient to cure this prejudice, Montgomery's attorney was given a clear opportunity to ask for a mistrial, and the attorney pointedly refrained from asking for one.

As we explained earlier, when the defense attorney declared that no curative instruction would be adequate, the trial judge immediately asked the defense attorney, "So are you making [a] request of any sort ... relating to [this problem]?" The defense attorney answered "No" — even though the defense attorney then repeated, "I don't think any instruction will be adequate."

If the defense attorney thought that no instruction would be adequate to cure the problem, then the defense attorney should have asked for a mistrial.

By refusing to ask for a mistrial, the defense attorney was trying to have it both ways. If the defense attorney induced the judge to declare a mistrial in the absence of a defense request, the defense attorney would theoretically have the option of either (1) acquiescing in a new trial, or (2) arguing later that the trial judge's action was not required by manifest necessity. This second argument, if successful, would result in all

the charges being dismissed with prejudice.[3] (Indeed, this is why we have repeatedly urged judges to be cautious about declaring mistrials when the defense has not requested one.[4])

Accordingly, we rule that the judge's failure to declare a mistrial *sua sponte* did not constitute plain error.

Conclusion

The judgement of the district court is AFFIRMED.

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[3] *See Douglas v. State*, 214 P.3d 312, 326 (Alaska 2009).

[4] *See*, *e.g.*, *Kailukiak v. State*, 959 P.2d 771, 777 (Alaska App. 1998); *Riney v. State*, 935 P.2d 828, 838-39 (Alaska App. 1997); *Nelson v. State*, 874 P.2d 298, 308 (Alaska App. 1994); and *March v. State*, 859 P.2d 714, 717 (Alaska App. 1993).