IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CHRISTOPHER FRANK JOHNSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11790 Trial Court No. 3AN-12-12048 CR MEMORANDUM OPINION No. 6444 — April 5, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack Smith, Judge.

Appearances: David T. McGee, under contract with the Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

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

Christopher Frank Johnson was charged with felony driving under the influence and driving while his license was suspended.[1] During Johnson's jury trial, the prosecutor asked the judge to admit into evidence a recording of a citizen's 911 call reporting Johnson as an intoxicated driver. Johnson's defense attorney objected, arguing that the admission of the evidence would violate the Confrontation Clauses of the United States and Alaska constitutions, because the State did not intend to present the 911 caller's testimony at trial. The judge overruled this objection and admitted the recording. The jury convicted Johnson.

The United States Supreme Court held in *Davis v. Washington*[2] that 911 calls made to report an ongoing emergency are non-testimonial in nature, and so the admission of recordings of such calls does not violate the federal Confrontation Clause. Johnson acknowledges the holding in *Davis* but argues that his case is distinguishable — or that, if it is not, this Court should adopt a more stringent state Confrontation Clause standard. Johnson also raises an alternative hearsay argument: that the 911 recording did not satisfy the criteria for admission under the "present sense impression" exception to the hearsay rule.

We need not reach these contentions because any error in admission of the 911 call was harmless beyond a reasonable doubt.

Background facts

At 2:27 a.m. on November 17, 2012, a bartender at the Long Branch Saloon in Anchorage called 911 to report an incident. The bartender, who identified himself only as Brian, reported that a customer who was "on something" had almost driven his

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[1] AS 28.35.030(a) & (n) and AS 28.15.291(a)(1), respectively.

[2] 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-74 (2006).

red GMC pickup truck into the side of the saloon before driving across the street to a nearby parking lot. The police were dispatched to the scene but they could not locate the truck.

Around 4:00 a.m., Glenn Kent, the saloon's owner, arrived and noticed a truck parked in the lot across the street from the saloon with its hazard lights flashing. Kent spoke with the truck's occupant (later identified as Johnson) and Johnson explained that his lights were flashing because he wished to signal to the police that he was a safe driver. Johnson added that he was waiting for the bar to reopen so that he could retrieve his cell phone, which he claimed the bar had stolen. Kent concluded that Johnson was "out of it."

Kent then spoke with Brian, the bartender who had earlier reported the matter to the police. Brian told Kent that he had ejected the man from the saloon because he was screaming and violent.

After speaking with Brian, Kent decided to call the police. Kent identified himself and told the 911 operator that he had spoken with an apparently intoxicated driver and that this driver had earlier been reported to the police by the saloon's bartender. Based on his own observations, Kent told the operator that the driver was "whacked" on methamphetamine.

Anchorage Police Officer Keo Fujimoto responded to the call. Upon his arrival, he saw Johnson move from the driver's seat to the passenger's seat of the pickup truck. Johnson then admitted that he had no driver's license. The officer testified that Johnson was extremely fidgety and made "outlandish" statements. For example, Johnson claimed to have been a Hells Angel since the age of four, and that as a gang member he had been instrumental in making peace with other gangs. Asked whether he had driven the truck, Johnson explained that he had driven in the saloon's parking lot but that he had

put the truck in neutral and then either coasted or pushed the pickup across the street to his present location.

Officer Fujimoto then decided to administer a field sobriety test. While he was instructing Johnson how to perform the walk-and-turn test, Johnson swayed to one side and almost fell. During the test itself, Johnson almost fell a second time, stopped prematurely, and returned to the starting position. The officer rated Johnson's test performance as "extremely poor."

Officer Fujimoto arrested Johnson for felony driving under the influence (because Johnson had prior convictions) and for driving with a suspended license. During transport and processing, Johnson continued to make bizarre statements. Johnson underwent a blood test in custody, which revealed the presence of benzodiazepine (Valium) and methamphetamine.

At trial, the bartender, Brian, did not testify. The superior court nevertheless admitted the bartender's 911 call into evidence over the defense attorney's objection on Confrontation Clause grounds. On the 911 recording, the bartender can be heard to say:

> I got a guy there, a customer who came in. I'm the bartender over here. And he's on something and he's trying to drive and ... [he] just started coasting out of the parking lot and almost hit this building in the back.

Kent, the saloon's owner, testified at trial. Without objection, the judge admitted Kent's 911 call, in which Kent quoted Brian's earlier report that Johnson was "messed up." Kent then added his own opinion that Johnson was "whacked" on methamphetamine.

Johnson did not testify in his own defense. The jury found him guilty on both counts.

Why any error in the admission of the 911 recording of the bartender's report was harmless beyond a reasonable doubt

On appeal, Johnson argues that he was prejudiced by the bartender's "inflammatory" assertion to the 911 operator that Johnson was "on something." Johnson argues that, because the bartender did not testify, the defense attorney was not able to assert his Confrontation Clause right to question the bartender's biases, visual acuity, ability to recognize impairment, familiarity with mental illness, or whether the bartender himself was impaired by substances.

Constitutional error requires reversal of a criminal conviction unless the error is shown to be harmless beyond a reasonable doubt.[3] In assessing whether an error is harmless beyond a reasonable doubt, "the question is whether there is a reasonable possibility that the error affected the result."[4]

In order to prove its case, the State must have demonstrated that Johnson was knowingly driving or operating a motor vehicle while under the influence of a controlled substance.[5] Under the "operating" theory for a DUI conviction, the State need only show that Johnson was in "actual physical control" of the vehicle.[6]

Officer Fujimoto testified that he saw Johnson move from the driver's seat to the passenger's seat when the officer approached. The parties do not dispute that Johnson possessed the vehicle's key. In addition, Johnson's blood tested positive for a

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[3] *Chapman v. California*, 386 U.S. 18, 24 (1967); *Raphael v. State*, 994 P.2d 1004, 1010 (Alaska 2000) (error not harmless); *Tegoseak v. State*, 221 P.3d 345, 363 (Alaska App. 2009) (harmless error).

[4] *Dailey v. State*, 65 P.3d 891, 896 (Alaska App. 2003) (citing *Smithart v. State*, 988 P.2d 583, 589 (Alaska 1999)).

[5] AS 28.35.030(a).

[6] *See State v. Conley*, 754 P.2d 232, 234-35 (Alaska 1988).

significant level of methamphetamine — a controlled substance listed under AS 11.71.150. Finally, Officer Fujimoto testified that Johnson performed "probably one of the worst walk-and-turn [tests] that [the officer had] ever seen."

In light of the overwhelming evidence that Johnson was operating a motor vehicle while under the influence of a controlled substance, any error in the admission of the bartender's 911 call was harmless beyond a reasonable doubt.

Conclusion

We AFFIRM the judgment of the superior court.