IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SHELLY R. FALL, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11985 Trial Court No. 3KN-13-1628 CR MEMORANDUM OPINION No. 6545 — November 22, 2017

Appeal from the Superior Court, Third Judicial District, Kenai, Charles T. Huguelet, Judge.

Appearances: Glenda Kerry, Law Office of Glenda J. Kerry, Girdwood, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Senior Judge COATS.

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

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

Shelly R. Fall was convicted of felony driving while under the influence, driving while license suspended or revoked, and driving in violation of a license limitation. Fall's defense at trial was that a man named Brian Barker was driving, and that she had falsely admitted she was driving to the arresting officer because she was afraid of Barker.

On appeal, Fall broadly asserts that the superior court's evidentiary rulings violated her right to present her defense. Fall challenges the superior court's rulings excluding evidence of Barker's character for violence and dishonesty. She also challenges the superior court's refusal to instruct the jury on the actual elements of Barker's prior conviction for a crime of dishonesty (which was admitted to impeach Barker's credibility). Fall requested this instruction in order to emphasize that Barker had been convicted of lying to a police officer.

For the reasons explained in this decision, we conclude that Fall was fully able to present her defense. We therefore affirm the judgment of the superior court.

Background facts

In October 2013, Alaska State Trooper Timothy Wolff was on patrol near Kenai when he noticed a pickup truck parked in a roadside pullout. As Wolff drove past the pullout, he saw a woman, later identified as Fall, leave the pickup's driver's door — which was open — walk around the pickup, violently open the truck's passenger door, and yell at the passenger. To Wolff, it appeared that Fall was going to assault the passenger, so he turned his vehicle around, returned to the pullout, and contacted Fall and the passenger, Brian Barker. Wolff did not see Fall driving the pickup, nor did he see her sitting in the driver's seat as he drove past the pullout. Wolff did, however, see Barker leave the passenger seat when Barker got out of the truck.

When contacted, Fall said she had been driving. Fall also owned the pickup. Fall gave different accounts about her relationship with Barker. When first asked what was going on, Fall initially told Wolff that it was a domestic disturbance, but she also added that she was just giving Barker a ride, and did not know him — that he was a hitchhiker. She then said she worked with him. She finally said she was in an on-and-off relationship with him. Fall said that she and Barker had been arguing because she did not know where she was going and Barker wanted to get out of the pickup.

Based on his contact with Fall and Barker, Wolff determined that no assault had occurred. But both Fall and Barker told Wolff that neither could legally drive. Fall's driver's license was either suspended or revoked, she did not know which, and Barker's license was revoked. According to Wolff, Fall admitted she had been driving, and Barker told him that he (Barker) had not been driving. So Fall was arrested for driving while license was suspended or revoked.

When Wolff checked for warrants for Fall and Barker, the dispatcher informed Wolff that at least two troopers should be present when contacting Barker. Consequently, Trooper Ethan Norwood soon arrived at the scene. Norwood took Fall into custody for driving with a revoked or suspended license. As Norwood did so, he observed that Fall was swaying and wobbling, had bloodshot and watery eyes, and smelled of alcohol. Fall admitted that she had been drinking.

According to Norwood, Fall also told him that she had been driving, and she thought that she could make it home safely. After Norwood administered field sobriety tests and determined that Fall was too impaired to drive, he arrested her for DUI. A breath test showed that Fall's blood alcohol content was .110 percent.

When Norwood and Fall were at the correctional center, Fall told Norwood that she was "taking the fall" for Barker. But because Fall made this statement so late in the DUI process, Norwood believed that Fall was being untruthful when she

insinuated that Barker had been driving. Fall did not tell either trooper that she was afraid of Barker.

Fall was charged with felony driving while under the influence, driving with a suspended license, and driving in violation of a license limitation (Fall's truck did not have a required ignition interlock device).[1]

At trial, Fall called her second cousin, Geraldine Morris, as a witness. Morris testified that Barker left Kenai some time after Fall pleaded not guilty to the charges. But Morris did not know why Barker had left Kenai. Morris also explained that Barker tried to contact Fall through Morris by making phone calls and sending text messages to Morris's phone. She said that Barker was polite at first, but he then started making threatening calls and sending threatening text messages directed towards Fall.

Morris testified that she believed Barker left threatening text messages directed at Fall because Fall was now saying that Barker, not she, had been driving. But Morris's testimony showed that she had no personal knowledge as to why Barker started threatening Fall, or whether the threats were related to Fall's decision to plead not guilty and go to trial.

Morris testified that Barker was a "bully" who had been violent towards Fall — but Morris conceded she had never seen Barker use physical force against Fall. Instead, Morris testified that she had seen Barker act violently towards other people. Morris also testified that in her opinion, Barker was an untruthful person.

Fall was able to introduce a judgment showing that Barker had been convicted in Anchorage district court of a crime of dishonesty (the municipal offense of

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[1] AS 28.35.030(a)(1), (a)(2) & (n); AS 28.15.291(a)(1); and former AS 28.15.291(a)(2) (2012).

false information).[2] But the superior court did not allow Fall to introduce additional character evidence about Barker. Fall attempted to introduce (1) her allegation, recited in a charging document, that Barker had physically assaulted her in November 2012, (2) the verbatim content of two threatening text messages Barker had sent to Morris's phone, (3) Morris's opinion as to whether Barker was a violent person and whether Fall had reason to be afraid of him, and (4) evidence of Barker's two DUI convictions to show that he had a motive to deny that he was driving that day. But because Fall did not want to testify at trial — and neither Fall nor the State called Barker to testify — Fall had no witnesses with personal knowledge of specific instances of Barker's character for violence towards her.

On appeal, Fall challenges the superior court's rulings excluding the above-listed evidence. She also challenges the superior court's refusal to instruct the jury on the elements of Barker's prior conviction for a crime of dishonesty.

The allegation that Barker had previously assaulted Fall

At trial, Fall's attorney argued that Fall had falsely told the troopers she had been driving because she was afraid of Barker. To support this defense, Fall's attorney attempted to introduce evidence showing Barker's character for violence towards Fall. In November 2012, Fall alleged that Barker had assaulted her by throwing a television at her. The police arrested Barker and filed a complaint against him regarding this incident. Although Barker was arrested, the case apparently did not proceed to trial.

Fall's attorney wanted to introduce evidence of Barker's character with evidence of this specific instance of his violent conduct towards Fall. But because Fall did not want to testify, the defense attorney instead tried to offer documentary evidence

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[2] Anchorage Municipal Code 08.30.020.

of the November 2012 allegation — the certified complaint along with related APSIN information — under Alaska Evidence Rule 404(b)(1) during her cross-examination of Trooper Wolff.

The superior court ruled that Fall's attorney could not show that Fall was afraid of Barker because he was a violent character based solely on a complaint and an entry from APSIN. Nor could Wolff testify about Barker's criminal history based solely on a criminal complaint and an APSIN entry.

We have previously ruled that a complaint similar to the one Fall's attorney was trying to introduce is inadmissable hearsay.[3] Here, the record shows that neither Wolff nor Morris had any personal knowledge of the November 2012 incident. Testimony from either of these witnesses would have been based on inadmissible hearsay.

We conclude the superior court's rulings were correct.

Fall's attorney then renewed efforts to introduce evidence of Barker's character for violence, and asked for a delay in order to call as a witness the police officer who had taken Fall's report, and to obtain the audio recording of Fall's 911 phone call to show that her statement was an excited utterance. The superior court agreed that "maybe" Fall's statement was an excited utterance. And the court agreed that evidence showing Fall was afraid of Barker was relevant and would be admissible, but only if Fall's attorney "had admissible means" to introduce it. The superior court pointed out that it would allow Fall to testify about the November 2012 incident.

The superior court ultimately ruled, however, that without some evidence that Fall was actually afraid of Barker when she was contacted by the troopers in the pullout, the jury could not reasonably infer that Fall — based on an incident that

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[3] *See Jones v. State*, 215 P.3d 1091, 1093 (Alaska App. 2009).

occurred a year prior — was afraid of Barker the day she was arrested. Fall — despite opportunities to do so during her contact with the troopers — never told either trooper that she was afraid of Barker. Consequently, if Fall did not testify at trial that at the time of the traffic stop she was afraid of Barker, then there was no evidence that she was afraid of Barker. Moreover, according to Trooper Wolff, Fall appeared to be assaulting Barker, which suggested that Fall was not afraid of Barker.

We conclude that the superior court did not abuse its discretion in concluding that the offered evidence about an incident that occurred more that a year earlier was not relevant to establish that Fall was afraid of Barker on the day she was arrested.

Morris's opinion that Barker was a violent person

In addition to Morris's testimony mentioned previously, Fall's attorney also wanted to introduce Morris's opinion that Barker was a violent person and that Fall had "reason to be afraid of Barker." The superior court excluded Morris's opinions. Fall argues this was error.

Morris was allowed to testify extensively about Barker's violent behavior. Normally, under the evidence rules, Morris would be limited to giving her opinion that Barker was a violent person. But Morris was permitted to testify much more broadly. Morris was allowed to testify that Barker was a bully and that she had seen Barker being physically violent toward other people. Morris was also allowed to testify that Barker had been physically violent toward Fall. Morris conceded that she had never seen Barker be physically violent toward Fall, and that her testimony was based on Fall's statement

to her. (This testimony came in over the prosecutor's hearsay objection, but the judge did not sustain the objection, so the statement was before the jury for its consideration.[4])

In addition, during the trial the troopers testified that their agency advised them that at least two troopers should be present during a contact with Barker. The troopers did not explain why this advisement was in place; it was reasonable to infer that the advisement was for safety purposes because Barker was considered violent. And Fall could argue this inference to the jury.

We conclude there is no merit to Fall's contention that the superior court restricted her ability to establish Barker's character for violence.

The threatening text messages

Fall's attorney tried to introduce the verbatim content of two text messages that Barker sent, some four months following Fall's arrest, to Morris's phone. Fall's attorney asserted that these texts were meant for Fall, and that Barker was threatening Fall so that she would not tell the police that he was driving.

But even though the superior court excluded the verbatim content of the text messages, the court allowed Morris to testify that she had read the messages, that she found them threatening, and that she believed the messages were intended for Fall. This testimony, along with Morris's other testimony about Barker's violence, supported Fall's defense that she was afraid of Barker. Even if the verbatim content of the excluded messages was admissible, their exclusion did not affect Fall's defense.

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[4] *See Christian v. State*, 276 P.3d 479, 489 (Alaska App. 2012).

Barker's DUI convictions

Fall's attorney attempted to introduce evidence of Barker's two prior DUI convictions. The defense attorney asserted that the convictions were admissible to show that Barker had a motive to deny that he was driving when contacted by the troopers. In the defense attorney's view, if Barker admitted to driving, he would face a felony DUI charge because he had two prior qualifying DUI convictions. Fall's attorney asserted that the threat of being charged with a felony DUI explained why Barker denied driving when he spoke to Wolff. Fall repeats those arguments on appeal.

But the superior court ruled that Barker's prior DUI convictions were not relevant because there was no evidence that Barker had been drinking, or was otherwise impaired, when Wolff contacted Barker and Fall. Without any evidence that Barker was impaired that day, his prior DUI convictions could not have motivated him to falsely claim he was not the driver. Stated another way, without any evidence that Barker risked a felony DUI charge, the evidence of his prior DUI convictions did not have any tendency to make his motivation to lie more or less probable.[5]

We also note that the superior court allowed Fall's attorney to introduce evidence that Barker's license was revoked. This evidence allowed the defense attorney to argue to the jury that Barker had a motivation to falsely claim that he was not driving because, if he had been driving, he faced another criminal charge because his license was revoked.

We conclude there was no error.

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[5] *See* Alaska Evidence Rule 401.

The request to instruct the jury that Barker had lied to law enforcement

Trooper Wolff testified that he contacted both Fall and Barker, and during that contact, Barker claimed that he had not been driving. The superior court allowed Fall's attorney, under Alaska Evidence Rules 806 and 609, to introduce evidence that Barker had been convicted of a crime of dishonesty to impeach his credibility — that is, to impeach Barker's out-of-court statement to Wolff. Barker had been convicted in Anchorage district court of the municipal offense of false information.

Fall's attorney, however, wanted the superior court to instruct the jury on the elements of the municipal offense. The defense attorney wanted to show that Barker's conviction involved lying "to a cop." The superior court denied the defense attorney's request. The court pointed out that there was nothing in the record to show the underlying facts of Barker's conviction. And the court also pointed out that it was instructing the jury that it was not to consider any of Barker's statements for their truth, and Barker's conviction for a crime of dishonesty was only relevant to impeach Barker's statements.

We conclude that the superior court did not err in denying the defense attorney's request for a more explicit instruction.

Conclusion

The judgment of the superior court is AFFIRMED.