IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STEVEN D. BERRY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11876 Trial Court No. 3PA-12-152 CR MEMORANDUM OPINION No. 6564 — January 10, 2018

Appeal from the Superior Court, Third Judicial District, Palmer, Kari Kristiansen, Judge.

Appearances: James Alan Wendt, Law Offices of James Alan Wendt, Anchorage, for the Appellant. Elizabeth T. Burke, 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.

A jury found Steven D. Berry guilty of first-degree theft for embezzling over $400,000 from his employer over a ten-year period. Berry managed a multi-locale

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

self-service car wash business in the Matanuska-Susitna Borough. After Berry was fired for damaging a vehicle, the owners of the business observed an immediate spike in revenue from the coin boxes at the car wash's stalls, vacuum stands, and vending machines. The owners then hired a forensic accountant to review their relevant financial records. The accountant concluded that the car wash should have earned more than $400,000 in additional revenue during the term of Berry's employment.

The owners reported the matter to the police. Berry was subsequently indicted for first-degree theft.[1] A jury found him guilty of that crime.

On appeal, Berry challenges his conviction on four grounds. First, he claims that Superior Court Judge Kari Kristiansen erred by limiting the defense attorney's cross-examination of Berry's wife, Tasha Buxton, on the issue of her alleged bias. For the reasons we discuss here, the judge did not abuse her discretion.

Second, Berry claims that the judge improperly denied his attorney's mid-trial request to require the car wash business to produce ten years' worth of daily revenue records for the jury's review. We affirm the judge's ruling.

Third, Berry appeals the judge's denial of a mistrial after a prosecution witness inadvertently violated a protective order by briefly referring to drug paraphernalia the witness had observed in Berry's home. This minor incident did not undermine the fairness of Berry's trial.

Fourth, Berry claims that, because the prosecutor did not instruct the grand jury that it could aggregate Berry's cumulative alleged thefts into a total amount satisfying the statutory minimum for first-degree theft, and because the indictment did not set forth every element of that crime, the judge should have dismissed the indictment. We uphold the judge's ruling.

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[1] AS 11.46.120.

Berry's claim that the court improperly limited his cross-examination of his wife

In his opening statement to the jury, Berry's defense attorney claimed that Buxton had falsely reported to the police that she had been kidnapped by someone hired by Berry. The defense attorney argued that this fabrication evidenced Buxton's extreme bias against Berry, and that the jury should accordingly disbelieve her upcoming testimony regarding the embezzlement.

After opening statements were complete, the prosecutor asked the judge to preclude the defense attorney from questioning Buxton about her kidnapping claim. The prosecutor informed the judge that, approximately one year after Buxton told a police investigator that she had helped Berry to hide boxes of dollar coins in the rafters of their home, Buxton reported to the police that a masked man concealed himself in her car and forced her at gunpoint to drive to a specified location. The gunman then allegedly told her that she should drop her child custody case against Berry.

The prosecutor argued that Berry should not be allowed to question Buxton about this incident unless Berry first proffered that Buxton's account of the kidnapping was false. In response, the defense attorney stated he did not intend to prove that Buxton had lodged an untruthful kidnapping allegation against Berry. Instead, the attorney argued that even a *truthful* allegation that Berry was behind the kidnapping would be admissible to show Buxton's bias against Berry.

The judge granted the prosecutor's preclusion motion, but she ruled that the defense could question Buxton about other sources of bias on Buxton's part.

During cross-examination by the defense attorney, Buxton testified that she had applied for domestic violence restraining orders against Berry because he had physically abused her multiple times. She further testified that she was litigating a divorce and child custody case against him, wherein she was contending that Berry

should have no visitation with their daughter until he completed a domestic violence batterer's intervention program. She testified that she was no longer on speaking terms with Berry, even about matters affecting their young daughter.

Notwithstanding this strong evidence of a profound estrangement existing between the two, Berry now argues that the trial court erred when it precluded him from questioning Buxton about the kidnapping incident in order to even further clarify her bias against him.

A defendant's constitutional right to confront and cross-examine witnesses is violated when a trial court's restrictions on cross-examination unduly impair the defendant's ability to establish the witness's bias.[2] Nonetheless, under Alaska Evidence Rule 403, trial judges retain wide latitude to impose reasonable limits on cross-examination and to exclude relevant evidence of a witness's bias if the danger of unfair prejudice arising from that evidence outweighs its probative force.[3] We will not reverse a trial judge's exercise of discretion in regulating cross-examination into bias unless the jury did not otherwise receive information adequate to allow it to evaluate the bias and motives of a witness.[4]

Here, the defense attorney wanted to cross-examine Buxton regarding her allegation that she had been kidnapped at gunpoint, apparently at Berry's instigation. The trial judge could reasonably conclude that, had she allowed the defense attorney to

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[2] *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974); *Johnson v. State*, 889 P.2d 1076, 1080 (Alaska App.1995); *Wood v. State*, 837 P.2d 743, 745-47 (Alaska App.1992).

[3] *Kameroff v. State*, 926 P.2d 1174, 1179 (Alaska App.1996); *Beltz v. State*, 895 P.2d 513, 518 (Alaska App.1995); *Johnson v. State*, 889 P.2d 1076, 1080-81 (Alaska App. 1995).

[4] *McIntyre v. State*, 934 P.2d 770, 773 (Alaska App. 1997) (citing *Beltz v. State*, 895 P.2d 513, 518 (Alaska App. 1995).

ask such questions, the outcome would be a trial within a trial — because the State would be entitled to rebut the defense allegation (in the defense attorney's opening statement) that Buxton's accusation was knowingly false. Thus, the judge could reasonably anticipate that the parties would devote a substantial portion of the trial to the question of whether Buxton fabricated the kidnapping claim. And, because the testimony would likely be inconclusive, the jury would be left to speculate both as to whether there had been a kidnapping and as to whether Berry had been a participant in that crime.

The judge could also reasonably conclude that it was unnecessary to devote time to this contentious dispute. Buxton unambiguously testified that she *was* in fact biased against Berry. She testified that Berry had physically assaulted her in the past multiple times. She further testified that she was litigating a divorce and child custody case against Berry, and that the two of them were no longer on speaking terms.

Accordingly, the judge could reasonably conclude under Evidence Rule 403 that the prejudicial effect of the kidnapping evidence outweighed whatever small probative force it might have, and that litigation of this matter would be time-consuming and ultimately inconclusive.

We therefore conclude that the judge's ruling was not an abuse of discretion.

Berry's claim regarding the daily business records

Each day, the car wash business recorded its revenues onto a "stat" sheet, which included a line item entry for coin box revenue. Then, at the end of each month, these daily records were compiled onto a separate document reflecting total revenues for the month, again breaking out coin box revenue as a line item.

At trial, the State called the forensic accountant who investigated the embezzlement. The accountant testified that, in addition to the business's Quickbooks

entries, she used the business's monthly compilations of its daily revenue records to determine that the business should have earned more than $400,000 in additional revenue from the coin boxes during Berry's employment. The accountant used these monthly revenue compilations to create summaries and graphs that were admitted into evidence at trial. The accountant testified that she spot-checked the accuracy of the monthly revenue compilations, but that she did not verify each monthly revenue compilation by totaling the corresponding daily revenue sheets.

Prior to trial, the State provided the defense with the accountant's summaries and graphs, as well as the monthly revenue compilations. Midway through trial, the defense attorney requested that the jury be provided with the daily revenue records as well. The judge allowed Berry's attorney to examine these daily records, so that he might identify specific ways in which the daily records would potentially call into question the accuracy of the summaries and compilations.

After reviewing the daily records, the defense attorney renewed his request that these documents should be admitted in their entirety, but only because they were the "best evidence" of the car wash business's coin revenue. Berry's attorney did not question the accuracy of the monthly compilations, nor did he object to the accountant's graphs and summaries.

The judge denied the defense attorney's request to introduce the daily business records. She reasoned that since the attorney was not challenging either the monthly compilations or the accountant's graphs and summaries, it would serve no useful purpose to introduce voluminous daily records spanning ten years.

Under Alaska Evidence Rule 1006, summaries may be admitted in place of original writings if those writings are so voluminous that they "cannot conveniently be examined in court." Under this rule, both parties must be allowed to examine the underlying original documents in order to assess the degree of accuracy with which the

summary captures the content of the originals.[5] If either party disputes the accuracy of the summaries after reviewing the original documents, the court has discretion to order the original documents be produced in court.[6]

Here, Berry's attorney was given the opportunity to review the daily revenue sheets. But he did not question the accuracy of the monthly compilations and summaries, nor did he argue that the daily revenue sheets would contradict any other evidence at trial. Under these circumstances, the judge did not abuse her discretion in denying the defense attorney's request to introduce ten years' worth of daily records.

Berry's request for a mistrial

Berry next claims that the court improperly denied his request for a mistrial after a witness testified that he saw drug paraphernalia at Berry's house.

The witness's comment violated a protective order that the court had granted before trial barring any mention of Berry's use of marijuana or the presence of marijuana and related paraphernalia in Berry's residence. The State did not instruct this particular witness about the protective order, and during the witness's testimony, the witness mentioned seeing drug paraphernalia in a workshop Berry used for storage.

The defense attorney immediately objected, and the court instructed the jury to disregard the comment. Berry moved for a mistrial later that day, arguing that the witness's reference to drug paraphernalia was "very prejudicial." The court found that the prosecutor was negligent for failing to warn the witness about the protective order, but that the prosecutor did not act in bad faith. The court denied Berry's request for a

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[5] Alaska Evid. R. 1006 cmt.

[6] *Id.*

mistrial, and instead offered Berry the opportunity to submit jury instructions to further cure the prejudice. Berry did not do so.

On appeal, Berry renews his argument that the reference to drug paraphernalia was prejudicial to his case. But the State never argued or implied that Berry used drugs or that he was using embezzled money to buy drugs. Under these circumstances, the judge did not abuse her discretion by concluding that a jury instruction was sufficient to cure the prejudice and by denying the motion for a mistrial.

Berry's motion to dismiss the indictment

Berry's final claim is that the court should have granted his motion to dismiss the indictment, because the indictment did not include all of the essential elements of the offense and so left him exposed to double jeopardy. Berry also argues that the indictment was flawed because the prosecutor did not instruct the grand jurors that they could aggregate Berry's daily embezzlements over the ten-year period to arrive at a total sum of $25,000 or more, the statutory minimum for first-degree theft.[7]

The judge denied Berry's motion to dismiss the indictment, finding that the indictment provided sufficient notice to Berry of the charges against him, and that the State's failure to instruct the grand jury on aggregation was harmless.

Alaska Criminal Rule 7(c) requires an indictment to be a "plain, concise and definite written statement of the essential facts constituting the offense charged" in order to sufficiently apprise the defendant of what he must be prepared to defend against and to ensure against double jeopardy should the defendant be charged again in the future.[8]

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[7] *See* AS 11.46.980(c) (stating that, when thefts are committed pursuant to one course of conduct, the values of the stolen goods must be aggregated).

[8] *State v. Semancik*, 99 P.3d 538, 540-41 (Alaska 2004) (citing *Christie v. State*, 580 (continued...)

However, "the indictment need not state every element of the charge necessary to be proved at trial,"[9] so long as "the indictment read together with the grand jury transcript gives specific notice of every element of the crime charged," and the defendant is on adequate notice of the charges against him or her.[10]

The judge applied this standard to the grand jury proceedings and the ensuing indictment in Berry's case. She did not abuse her discretion in refusing to dismiss the indictment.

Although the indictment did not specify the intent element or identify the victims, both of these details were made clear by the prosecutor when she presented the case to the grand jury. The prosecutor read the definition of AS 11.46.120 (first-degree theft) and the definition of "intentionally" to the grand jury. The prosecutor also presented testimony that made clear the fact that the basis for the charged thefts was that Berry had been embezzling from the car washes for several years. These circumstances precluded any risk of double jeopardy.

The State concedes that the prosecutor should have instructed the grand jury on aggregation, but argues that this error was harmless. We agree. The prosecutor presented evidence to the grand jury that Berry stole coins from the car washes over the course of many years. In response to a jury question, the prosecutor clarified that the amount charged was an aggregate one. Accordingly, there was no reasonable possibility

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[8] (...continued)
P.2d 310, 321 (Alaska 1978)).

[9] *Lupro v. State*, 603 P.2d 468, 473 (Alaska 1979).

[10] *Azzarella v. State*, 703 P.2d 1182, 1185-86 (Alaska App. 1985).

that Berry's grand jury would have reached a different result had it been given an aggregation instruction.[11]

Conclusion

The judgment of the superior court is AFFIRMED.

[11] *See Buckwalter v. State*, 23 P.3d 81, 86 (Alaska App. 2001) (no reasonable possibility that grand jury would have reached a different result if it had received an aggregation instruction where defendant was charged with stealing over $25,000 in goods from various businesses over a ten-month period and the State never presented evidence that any of the stolen items was worth at least $25,000).