IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RALPH LOREN BARENZ II, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12428 Trial Court No. 3PA-14-02277 CR MEMORANDUM OPINION No. 6792 — May 15, 2019

Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge.

Appearances: Ralph Loren Barenz II, *in propria persona*, Wasilla. RuthAnne B. Bergt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Coats, Senior Judge.[*]

Judge ALLARD.

Ralph Loren Barenz II was convicted, following a jury trial, of first-degree sexual assault for sexually assaulting fifteen-year-old K.E. Barenz has filed a *pro se*

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

appeal, raising five claims of error. For the reasons explained here, we find no merit to these claims of error and we therefore affirm the judgment of the superior court.

Factual background and prior proceedings

In August 2014, sixteen-year-old A.E. was involved in a sexual relationship with thirty-three-year-old Barenz. Barenz occasionally stayed in the apartment below A.E.'s family's apartment, but primarily lived at a campsite at Jim Creek, in Butte, where he kept both a camper and a tent. A.E. and her fifteen-year-old sister, K.E., frequently spent time with Barenz.

On August 4, 2014, A.E. and K.E. went to visit Barenz at his campsite. While there, the girls smoked marijuana and drank vodka provided by Barenz. A.E. became sick, and ultimately ended up lying down in the camper.

According to K.E.'s testimony at the trial, K.E. went to look for Barenz because she realized she needed help to take care of A.E. K.E. found Barenz lying down on a mattress in his tent. When K.E. went into the tent, Barenz pulled her to him and began kissing her. K.E. kissed Barenz back. Barenz began to touch K.E.'s body and tried to put her hands down his pants. K.E. pulled away.

K.E. testified that Barenz then grabbed her by the shoulders and shoved her downward towards his penis as he unbuckled his pants. K.E. told Barenz to stop, but Barenz ignored her plea and held her down, attempting to take her pants off. K.E. tried unsuccessfully to push Barenz away, pulling at his hair and scratching him in the process.

K.E. testified that she started screaming when Barenz tried to take her pants off. In response, Barenz put his hand against her throat and began to strangle her. K.E. could not breathe and she involuntarily urinated on the mattress, prompting Barenz to call her a "stupid bitch" and throw her on the tent floor. Barenz got on top of her and

strangled her with both of his hands. K.E. testified that she "saw stars" and blacked out for some period of time. According to K.E., she thought Barenz was going to kill her.

K.E. testified that she eventually stopped struggling in hopes that Barenz would stop strangling her. She told him "I'll do it and I'll be quiet." Barenz flipped K.E. over, pushed her face into the tent floor, and penetrated her vagina with his penis.

After the assault, Barenz lay down on his mattress and fell asleep. Once Barenz was asleep, K.E. put on her clothing and went outside to find her sister.

K.E. was unable to wake her sister, who was lying asleep in Barenz's camper. K.E. ran to another nearby camper and told the people inside what happened. They called 911, reporting that a highly intoxicated young girl was in their camper saying that someone "choked and raped her."

Alaska State Troopers arrived in response to the call. The troopers noticed a red mark on the left side of K.E.'s neck and petechiae on her face and neck. The troopers went to the campsite to get A.E., who was asleep and difficult to wake. When she woke up, A.E. was "totally out of it" and did not know where she was. K.E. and A.E. were transported to the Children's Place in Wasilla, where both girls were interviewed and K.E. was medically examined.

The medical examination revealed petechiae from K.E.'s jawline to the outside of her ear, on her eyelids, and on both cheeks. The nurse who conducted the medical examination testified that the appearance of K.E.'s petechiae was consistent with strangulation and occlusion of the jugular veins. K.E. had linear abrasions on the left side of her face and on her neck, clavicle, and breastbone. There were bruises on her back and right arm, and abrasions on her right elbow and left leg. K.E.'s earrings and nose ring had been ripped out. An examination of K.E.'s genitals showed vaginal abrasions. Forensic testing later revealed Barenz's DNA on K.E.'s vaginal and cervical swabs, as well as under K.E.'s fingernails.

K.E. was then sent to the emergency room. The emergency room doctor noted extensive petechiae, consistent with strangulation, on K.E.'s face and neck, as well as a subconjunctival hemorrhage in K.E.'s eye.

In the meantime, while K.E. and A.E. were being transported to the Children's Place, the troopers contacted Barenz. Barenz had four long scratches on his neck, scratches on his right arm and leg, and scratches on his back.

Barenz was arrested and transported to the Palmer trooper post. Barenz waived his *Miranda* rights and agreed to be interviewed. During the interview, Barenz initially denied knowing K.E.'s name and denied seeing either K.E. or A.E. that night.

Barenz was later charged with first-degree sexual assault, two counts of third-degree assault, and second-degree sexual abuse of a minor.[1]

A six-day trial was held, during which the State called fifteen witnesses. The defense presented no witnesses. The jury found Barenz guilty on all four counts. These counts merged into a single conviction for first-degree sexual assault at sentencing. Barenz was subsequently sentenced to 30 years with 5 years suspended (25 years to serve).

This appeal followed.

Barenz's claims on appeal

Barenz raises five claims on appeal. First, Barenz argues that the superior court erred when it failed to grant a mistrial after the State violated a protective order precluding any use of the word "homeless." Second, Barenz argues that the trial court erred in allowing what Barenz characterizes as K.E.'s "false/tainted testimony." Third,

[1] AS 11.41.410(a)(1), AS 11.41.220(a)(1)(A), AS 11.41.220(a)(1)(B), and AS 11.41.-436(a)(1), respectively.

Barenz argues that it was error to allow the State to introduce a redacted version of Barenz's interview with the trooper. Fourth, Barenz argues that his *Miranda* rights were violated and his statements to the trooper should have been suppressed. Lastly, Barenz argues that the prosecutor committed prosecutorial misconduct and that cumulative error requires reversal of his conviction.

We now address each of these claims.

Barenz's claim regarding the violation of the protective order

Prior to trial, Barenz's attorney moved for a protective order prohibiting any testimony or evidence of (1) accusations of drug possession or distribution related to pending drug charges against Barenz, and (2) use of the word "homeless" to describe Barenz. The trial court granted the protective order, although it allowed the State to introduce evidence that Barenz gave K.E. and A.E. marijuana. The trial court instructed the parties to tell witnesses not to use the word "homeless," although the court acknowledged that the jury would hear testimony that Barenz was living in a tent and the jury would "conclude what they do from [that] fact."

At trial, the prosecutor played a video-recording of K.E.'s interview with a trooper. In the interview, K.E. mentions that Barenz is "homeless" and that "he kind of has an apartment but he stays out at the campsite." Although the prosecutor agreed to mute that portion of the recording, she failed to do so when the recording was played to the jury because of her unfamiliarity with the playback software.

Barenz's attorney argued that the violation of the protective order required a mistrial. The trial court found that the violation was "at most" negligent. The trial court also found that the violation was not prejudicial and that any prejudice could be cured by an appropriate jury instruction (which Barenz's attorney declined, asserting that it would only draw more attention to the matter).

We review a trial court's decision on a motion for a mistrial for abuse of discretion.[2] This is a deferential level of review because we recognize that the trial court is in the best position to observe the impact of the complained-of statements or evidence on the jury.[3] We will reverse the trial court only when, after reviewing the whole record, we are left with "a definite and firm conviction that the trial court erred in its ruling."[4]

Here, the violation of the protective order was not intentional and the prohibited reference to Barenz's homelessness was brief and in passing. Given the circumstances, we find no abuse of discretion in the trial court's denial of the motion for mistrial. Accordingly, we reject this claim of error on appeal.

Barenz's claim that the trial court allowed the State to use false/tainted testimony

Barenz argues that "the trial court abused its discretion by allowing the State to use false/tainted testimony to obtain a tainted conviction." The State interprets this argument as a challenge to the sufficiency of the evidence. However, Barenz argues in his reply brief that he is not raising a sufficiency claim. Instead, his claim appears to be that K.E.'s testimony is false and that the trial court erred in allowing the State to introduce false testimony.

In support of this claim, Barenz cites to *Napue v. Illinois*.[5] *Napue* stands for the proposition that when the State knowingly uses perjured testimony to obtain a

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[2] *Roussel v. State*, 115 P.3d 581, 585 (Alaska App. 2005).

[3] *Id.*

[4] *Id.* (citing *Hamilton v. State*, 59 P.3d 760, 769 (Alaska App. 2002).

[5] *Napue v. Illinois*, 360 U.S. 264 (1959).

tainted conviction, a defendant's due process rights are violated and reversal must occur.[6] But *Napue* is inapposite to this case. Although Barenz has identified inconsistencies in K.E.'s testimony, he has not established that her testimony was false. Because Barenz has not shown that K.E. perjured herself, let alone that she did so with the State's knowledge or the knowledge of the trial court, we find no merit to this claim of error on appeal.

We also find no merit to any claim of legal insufficiency (to the extent that Barenz is bringing such a claim). When we review the sufficiency of the evidence to support a conviction, we do not reweigh the evidence or judge the credibility of witnesses.[7] Those are matters for the jury to decide.[8] Instead, we view the evidence, and any reasonable inferences from the evidence, in the light most favorable to upholding the jury's verdict.[9] We then determine whether, viewed in that light, the evidence was sufficient for a reasonable juror to find each element proved beyond a reasonable doubt.[10] Viewing K.E.'s testimony, the medical evidence, and the forensic evidence in that light, we conclude that the evidence was sufficient to establish the crime of first-degree sexual assault beyond a reasonable doubt.

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[6] *Id.* at 270, 272.

[7] *Morrell v. State*, 216 P.3d 574, 576-78 (Alaska App. 2009).

[8] *Id.*; *see also Anthony v. State*, 521 P.2d 486, 492 (Alaska 1974) ("The assessment of witness credibility is exclusively within the province of the jury."); *Daniels v. State*, 767 P.2d 1163, 1167 (Alaska App. 1989) (rejecting defendant's request that the court review the credibility of a witness as it is a question exclusively for the jury).

[9] *See Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012) (citing *Morrell v. State*, 216 P.3d 574, 576 (Alaska App. 2009)).

[10] *See id.*

Barenz's claim that the redacted police interview was inadmissible

Barenz argues that it was error for the State to redact portions of his interview with the trooper. According to Barenz, the State's redactions changed the meaning of some portions of the interview. But as the State points out and Barenz concedes, Barenz's defense attorney never objected to any of the redactions. To the contrary, it appears that most of the redactions were made in order to comply with the defense-requested protective order, which required the State to redact any portions of the interview that referenced Barenz's prior interactions with the police related to his prior drug charges.

Because there was no objection to the redactions at trial, Barenz must show plain error on appeal.[11] A finding of plain error on appeal requires that (1) the error be obvious, (2) the error was not the result of a tactical decision, (3) the error affected the defendant's substantial rights, and (4) the error prejudiced the fundamental fairness of the defendant's trial.[12]

We find no plain error here. Because there is nothing in the current record to suggest that the State overredacted the interview or that the redactions were made for reasons other than compliance with the protective order, there was no prejudice to Barenz at trial.

We note that Barenz also points out various discrepancies between the transcript of the interview that was originally prepared by the State and the transcript of this evidence prepared by the court system. The State asserts that these discrepancies were caused by the low quality of the recording. We have reviewed the alleged discrepancies and we see no reason to believe, based on the record currently before us,

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[11] *Adams v. State*, 261 P.3d 758, 770 (Alaska 2011).

[12] *Id.* at 773.

that these minor discrepancies in transcription would have resulted in any prejudice to Barenz.

Barenz's claim that his Miranda rights were violated

Barenz argues for the first time on appeal that his *Miranda* waiver was invalid and that the statements made by him during the police interview should be suppressed. This claim is not preserved for appeal because it was never raised in the trial court.[13] In *Moreau v. State*, the Alaska Supreme Court held that, absent "singularly egregious" circumstances, a defendant is not allowed to raise arguments for suppression of evidence for the first time on appeal, even under the rubric of plain error.[14] *Moreau* involved a Fourth Amendment claim raised for the first time on appeal, but this Court has applied the *Moreau* rule to a *Miranda* claim raised for the first time on appeal.[15]

The record shows that Barenz received full *Miranda* warning and that he waived his *Miranda* rights. On appeal, Barenz argues that this waiver was invalid because the officer failed to inform him of the specific criminal charges he was facing. The State argues that the officer was under no duty to do so.[16] The State also argues that this omission did not alter the voluntariness of Barenz's waiver.

We conclude that, even assuming *arguendo* that there is any merit to Barenz's *Miranda* claim, this claim does not represent the type of "singularly egregious"

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[13] *See* Alaska R. Crim. P. 12(b)(3), (e); *see also Moreau v. State*, 588 P.2d 275, 280 (Alaska 1978) (holding that claims involving the exclusionary rule cannot generally be raised for the first time on direct appeal).

[14] *See Moreau*, 588 P.2d at 280 n.13.

[15] *See id.* at 279; *Longley v. State*, 776 P.2d 339, 343-44 (Alaska App. 1989).

[16] *See Strehl v. State*, 722 P.2d 226, 228 (Alaska App. 1986).

violation that would justify departure from the general rule that such unpreserved claims of error cannot be heard on direct appeal. Accordingly, we find no basis to review Barenz's claim on direct appeal.[17]

Barenz's claims of prosecutorial misconduct

Barenz argues that the prosecutor in his case engaged in a course of prosecutorial misconduct. Many of the alleged instances of this prosecutorial misconduct have already been addressed in this decision. For example, Barenz argues that the prosecutor "intentionally" violated the protective order by failing to redact the portion of K.E.'s interview where she briefly referred to Barenz as "homeless." But, as already explained, the trial court found that the violation was "at most" negligent, and there is nothing in the record to support Barenz's assertion that it was intentional or that it caused him any prejudice. Likewise, Barenz argues that the prosecutor "knowingly" used "false/tainted" testimony. But, as already explained, Barenz has failed to establish that K.E.'s testimony was false or perjured. Barenz also argues that the prosecutor "intentionally" overredacted Barenz's police interview. But, as already explained, there has been no showing that the redactions were improper. Lastly, Barenz argues that the State knowingly used statements that had been obtained in violation of *Miranda*. But, as just explained, Barenz's attorney never argued that the statements had been obtained in violation of *Miranda*, and there was no litigation of the *Miranda* issue during the trial court proceedings.

Barenz also challenges various statements made by the prosecutor during her opening statement and closing argument. We have reviewed the challenged comments, none of which were objected to by Barenz's attorney and many of which

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[17] *See Moreau*, 588 P.2d at 280.

appear to be fair inferences to be drawn from the record. To the extent that some of these statements may have been inaccurate, we conclude that those inaccuracies were relatively minor and adequately addressed by the trial court's admonition to the jury that attorney statements are not evidence.[18]

Barenz also argues that the doctrine of cumulative error requires reversal of his conviction. In *Crawford v. State*, we explained that "a claim of cumulative error is really a claim of cumulative prejudice."[19] The doctrine of cumulative error "applies in cases where the total impact of the errors at trial is so prejudicial that the defendant was deprived of a fair trial, even if each individual error was harmless."[20] In the current case, we have not found any error, and the doctrine of cumulative error is therefore inapplicable.

Lastly, we note that Barenz's briefing on appeal is sometimes difficult to understand, and he may have intended to raise other claims of error besides the ones we have discussed here. To the extent that Barenz may be attempting to raise other claims in his brief, we conclude that these claims are inadequately briefed for purposes of appellate review.[21]

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[18] *See Bradley v. State*, 197 P.3d 209, 216 (Alaska App. 2008) (holding that jurors are presumed to follow the trial court's instructions).

[19] *Crawford v. State*, 337 P.3d 4, 34 (Alaska App. 2014).

[20] *Id.* at 34 (internal quotation marks omitted); *see also Sawyer v. State*, 244 P.3d 1130, 1137-38 (Alaska App. 2011).

[21] *See, e.g.*, *A.H. v. W.P.*, 896 P.2d 240, 243-44 (Alaska 1995); *Petersen v. Mutual Life Ins. Co. of New York*, 803 P.2d 406, 410 (Alaska 1990); *Nason v. State*, 102 P.3d 962, 964 (Alaska App. 2004).

Conclusion

For the reasons explained in this decision, the judgment of the superior court is AFFIRMED.