IN THE COURT OF APPEALS OF THE STATE OF ALASKA

OSCAR FABELA VILLA II, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12578 Trial Court No. 3AN-14-05875 CR MEMORANDUM OPINION No. 6816 — August 28, 2019

Appeal from the Superior Court, Third Judicial District, Anchorage, Warren W. Matthews, Judge.

Appearances: Marilyn J. Kamm, Attorney at Law, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Judge HARBISON.

Following a jury trial, Oscar Fabela Villa II was convicted of one count of attempted first-degree murder, two counts of third-degree assault, and one count of second-degree misconduct involving weapons.[1] He now appeals his convictions.

First, Villa argues that the superior court erred in denying his motion to dismiss the indictment and his motion for judgment of acquittal. Second, Villa contends that at his trial, the superior court erroneously admitted evidence of felony charges that were pending against him at the time of the events in this case and evidence of his act of absconding from a halfway house where he was required to reside while those charges were pending. Last, Villa argues that the superior court's failure to *sua sponte* declare a mistrial was plain error.

We reject Villa's claims and affirm his convictions.

The underlying incident

In June 2014, Villa had several criminal charges pending against him, and he was required to live in a halfway house. During this time, Villa's sister, Elvira Villa, was dating and living with Bobby Jackson.

Late in June, Villa left the halfway house without permission, and he spent a night or two at Elvira Villa and Jackson's residence in the week that followed. During that time, Elvira Villa asked Jackson if she could use his debit card to pay Villa's cell phone bill, and she promised to reimburse Jackson. Jackson agreed.

Several days later, Jackson received his bank statement, which showed many unauthorized charges on his debit card. Jackson confronted Elvira Villa about the charges, and she told him to talk to Villa. When Jackson asked Villa about the charges,

[1] AS 11.41.100(a)(1)(A) & AS 11.31.100(a), AS 11.41.220(a)(1)(A), and AS 11.61.195(a)(3)(A), respectively.

Villa said he would repay him the next day. Jackson responded that if Villa did not repay him by then, he would report the matter to the police. As they talked, Villa was holding a silver revolver that he juggled between his hands and then put in his back pocket.

Jackson heard nothing from Villa the next day. On the following day, Jackson called Elvira Villa and asked to speak to Villa. Elvira Villa told Jackson that Villa did not have the money to repay him, and Jackson repeated his intention to report the matter to the police. Villa then got on the phone and angrily told Jackson that, if Jackson went to the police, he (Villa) would "put a bullet in [Jackson's] head."

Later that day, Villa and another man showed up unannounced outside Jackson's apartment. Speaking to Jackson through the apartment window, Villa said he had Jackson's money. He told Jackson to come outside to receive it. While they spoke, Villa kept one hand in his pocket, and Jackson could see something shiny, which he believed to be a gun. Jackson told Villa to toss the money through the window, but Villa refused, saying that the money would "just fly everywhere."

Ending the short conversation, Jackson closed the window and turned away and then Villa started shooting. He shot three times, with the bullets passing through the window and the ceiling of Jackson's apartment. Police found two bullets and pieces of the blinds on the floor of Jackson's apartment. Jackson believed he could have been shot if he had not moved away from the window.

Villa was indicted for attempted first-degree murder, two counts of third-degree assault, and one count of second-degree misconduct involving weapons. A jury convicted him of all counts, and this appeal followed.

The State presented sufficient evidence of Villa's intent to kill Jackson to support the grand jury's indictment and the trial jury's verdict for attempted murder

Before his trial, Villa filed a motion to dismiss the attempted murder charge, arguing that there was insufficient evidence of his intent to kill Jackson. Villa claimed that because he had ample opportunity to shoot Jackson while Jackson was standing at the open window, but instead shot after the window was closed, he could not have intended to murder him. The superior court denied Villa's motion.

To prove an intent to kill, the State must prove that the defendant's "conscious objective" was to kill.[2] Thus, to indict Villa for attempted murder, the State was required to establish that Villa had a conscious objective to cause Jackson's death and that he took a substantial step toward doing so.[3]

Under Alaska Criminal Rule 6(q), a grand jury "shall find an indictment when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant." This Court has held that "in challenges to the sufficiency of the evidence before a grand jury, every legitimate inference that may be drawn from the evidence must be drawn in favor of the indictment."[4]

In denying Villa's motion to dismiss the indictment, the superior court wrote:

> Simply because [Villa] lost an easier opportunity to shoot [Jackson] before does not mean he lacked the intent to kill when he fired later. . . . Villa had threatened to kill [Jackson] earlier in the day. After apparently failing to lure [Jackson]

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[2] *See* AS 11.81.900(a)(1).

[3] *See Dandova v. State*, 72 P.3d 325, 331 (Alaska App. 2003).

[4] *State v. Williams*, 855 P.2d 1337, 1346 (Alaska App. 1993).

> outside, he fired three bullets through the window where [Jackson] had been standing just seconds before. Viewing the evidence in the light most favorable to the indictment, a reasonable juror could conclude that [Villa] formed the conscious objective to kill [Jackson].

We have reviewed the grand jury proceeding, and we agree with the superior court.

The evidence presented at trial of Villa's intent to kill Jackson was virtually identical to the evidence that was presented to the grand jury. At the close of the State's case, Villa moved for a judgment of acquittal on the attempted murder charge. Villa again argued that there was insufficient evidence that he intended to kill Jackson.

The superior court denied Villa's motion, reasoning that "the assailant didn't fire when Jackson first was standing at the window because he was hoping to lure Jackson down to the door, and there might have been some advantage, if there was an intent to kill, to do it that way."

Evidence is sufficient to convict a defendant when a fair-minded juror exercising reasonable judgment could conclude that the State had proved the defendant's guilt beyond a reasonable doubt.[5] When assessing the sufficiency of the evidence, this Court views "the evidence . . . and all reasonable inferences from that evidence in the light most favorable to [upholding] the jury's verdict."[6]

Viewed in this light, the evidence presented to the superior court demonstrated that Villa had a motive to kill Jackson — to avoid being turned in to the police. The evidence further showed that when Jackson first spoke to Villa about the charges on his debit card, Villa stated that he would pay him back, but he also brandished what appeared to be a silver revolver. After Jackson told Villa that he would contact the

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[5] *Hinson v. State*, 199 P.3d 1166, 1170 (Alaska App. 2008).

[6] *Id.*

police, Villa threatened to kill Jackson. That same day, Villa went to Jackson's apartment with a gun and shot several times at the place in the apartment where Jackson had been standing moments before.

We agree with the superior court that this evidence was sufficient to support the trial jury's verdict.

For these reasons, we uphold both the superior court's denial of Villa's motion to dismiss the indictment for attempted murder and its denial of his motion for a judgment of acquittal on this charge.

The superior court did not abuse its discretion in admitting evidence of Villa's pending charges and evidence of his absconding from the halfway house

Before trial, the State moved for permission to introduce evidence under Alaska Evidence Rule 404(b)(1) that Villa was facing felony charges at the time of the shooting and that Villa had walked away from the Cordova Center halfway house about a week before the shooting. The prosecutor argued that this evidence was relevant to show Villa's motive, intent, and lack of mistake or accident. The prosecutor further contended that, although a jury might not accept that the possibility of being charged with misuse of a debit card would give Villa a sufficient motive for murder, the fact that Villa had recently walked away from a halfway house while facing felony charges would provide an additional motive for him to kill Jackson — to prevent Jackson from revealing his location to the police. Villa opposed the State's motion, but the superior court found that the evidence was relevant to Villa's motive and intent and was not outweighed by unfair prejudice.

The prosecutor introduced this disputed evidence during trial through the testimony of an employee of the Department of Corrections (DOC). The DOC employee

told the jury that Villa had been placed at a halfway house because of "pending criminal charges" and that he left the halfway house "without authorization" about a week before the shooting. The trial court gave the jury the following limiting instruction about this evidence:

> You have heard evidence that the defendant was facing criminal charges and had absconded from custody at the time of the offenses charged in this case. This evidence is offered only because it may be relevant on the issue of the defendant's motive or intent. You may consider this evidence for that purpose only. In doing so, you should weigh it in the same way as you do all of the other evidence in this case, and only give it the weight that you believe it deserves for that limited purpose. If you find that this evidence has no weight, then you should disregard it entirely. Do not use this evidence for any other purpose, or even talk about it for other purposes in your deliberations. It would be improper and unfair for you to do so.

On appeal, Villa argues that evidence of his pending charges and absconding from the halfway house should have been excluded because the potential for undue prejudice outweighed the probative value of the evidence.[7]

Alaska Rule of Evidence 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is generally not admissible if the sole purpose is to prove the character of a person in order to show that the person acted in conformity therewith." But such evidence is admissible "for other purposes, including, but not limited to, proof of motive, . . . intent, . . . or absence of mistake or accident."[8] Even if there is a valid, non-propensity purpose for the evidence to be admitted, the evidence may only be

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[7] Alaska Evid. R. 403.

[8] Alaska Evid. R. 404(b)(1).

admitted if the superior court analyzes the evidence under Alaska Rule of Evidence 403 and determines that its probative value exceeds its potential for unfair prejudice.

In this case, the superior court found that the evidence was relevant for the non-propensity purposes of showing motive and intent, and that its probative value outweighed the risk of prejudice. We agree that the evidence had a tendency to show that Villa intended to kill Jackson to avoid being returned to custody on his prior charges.

We acknowledge that the challenged evidence posed a risk that the jury would infer that Villa was more likely to have committed the charged crimes because he had other pending criminal charges and had absconded from the halfway house. But in this case, the superior court's limiting instruction and the manner in which the evidence was used at trial sufficiently reduced the risk that the jury would draw an improper inference from the evidence.

The judge in this case gave the jury a detailed and lengthy instruction explaining the limited purpose for which it could consider the evidence and prohibiting the jury from "us[ing] the evidence for any other purpose, or even talk[ing] about it for other purposes" during deliberations. Jurors are presumed to understand and follow the court's instructions.[9]

Additionally, the challenged evidence received no particular emphasis during trial and occupied very little of the overall trial time. During direct examination, the DOC employee did not identify the charges against Villa or explain the circumstances surrounding Villa's departure from the halfway house. And the prosecutor, in his closing argument, gave little emphasis to the evidence, focusing his

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[9] *Coffin v. State*, 425 P.3d 172, 175 (Alaska App. 2018).

short discussion exclusively on the limited relevance of the evidence — to explain why Villa might have wanted Jackson dead.

For the reasons we have explained, we conclude that the superior court did not abuse its discretion by admitting the challenged evidence.[10]

The superior court's failure to sua sponte declare a mistrial was not plain error

Villa's attorney devoted a significant portion of his opening statement to telling the jury that Jackson was not honest about the unauthorized debit card purchases. He told the jury that the bank statement reflecting those charges was unavailable for trial and that Jackson had repeatedly failed to cooperate with the police when they asked him to give them a copy of the statement. Villa's attorney described the repeated requests for the bank records that the police made to Jackson, as well as Jackson's evasive responses and his overall lack of compliance.

The next day, just before Jackson testified, the prosecutor notified the court that Jackson had brought the bank statement to court with him. The prosecutor explained that his office obtained the bank statement for the first time that morning when Jackson brought it to court.

Villa's attorney moved for a mistrial. Villa's attorney told the trial court that the prosecutor had emailed him the evening before, saying that Jackson would bring the bank statement to court and also that Jackson told the prosecutor that he had given the records to the State back in November. Villa's attorney argued that the State had committed a discovery violation and that Villa was entitled to a mistrial because he had

[10] *See Morrell v. State*, 216 P.3d 574, 578 (Alaska App. 2009).

adopted a theory of the case in his opening statement that was predicated on the non-existence of the bank statement.

Villa's attorney did not ground his mistrial motion in a claim that the prosecutor's office had been in possession of the bank statement for several months. Instead, Villa's attorney accepted the prosecutor's assertion that the records did not come into the possession of the State until that morning when Jackson brought them to court. But Villa's attorney argued that the State had been in "constructive possession" of the records because it had not made sufficient efforts to obtain the records from the complaining witness even though it "knew these records might be out there." When given an opportunity to dispute that the records came into the possession of the State just that morning, rather than months before as Jackson was claiming, Villa's attorney did not dispute the prosecutor's assertion and continued to rely on his theory that if the State wished to use the records, the court must declare a mistrial because Jackson had not given them to the State at any time before the trial.

The superior court denied Villa's motion for a mistrial. The court found that Villa knew the evidence existed, that the evidence was not "ephemeral," and that the evidence had been in the hands of a third party, not the State. The court ruled that because Villa had the same opportunity as the State to subpoena or otherwise obtain the evidence, the State had no duty to obtain the evidence and, accordingly, there was no discovery violation.[11]

After this ruling, the prosecutor called Jackson as a witness. During his testimony, Jackson testified that he had obtained the bank statement from his bank and brought it to court with him. The bank statement was admitted over Villa's objection.

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[11] *See Carter v. State*, 356 P.3d 299, 301-02 (Alaska App. 2015).

When Villa's attorney cross-examined Jackson, Jackson stated that he previously brought the bank statement to the grand jury proceeding and gave it to a representative of the State. Jackson testified that he did not know what happened to that document. Villa's attorney did not renew his motion for mistrial after this testimony, and the court did not take any action *sua sponte.*

In this appeal, Villa does not challenge the superior court's ruling denying his motion for a mistrial. Rather, he essentially argues that the superior court erred by not *sua sponte* reversing its prior ruling and declaring a mistrial after Jackson testified that he had given the bank record to the State's representative months before the trial.

In his briefing, Villa frames this issue as an error by his lawyer, rather than an error by the court. He argues that "[i]t was obvious that [defense counsel] should have renewed his motion for a mistrial," and that "it was plain error for Villa not to renew his motion for a mistrial[.]" But when we examine a claim of plain error, "the question is whether, based on what the *trial judge* knew, the *judge's* failure to recognize the problem and take corrective action *sua sponte* was unreasonable or incompetent."[12] We therefore interpret Villa's argument to be a claim that the superior court erred by not *sua sponte* declaring a mistrial at the point during the trial when Villa argues that his attorney should have renewed the mistrial motion. (To the extent Villa believes that his attorney was incompetent for failing to renew the motion for a mistrial, Villa may raise this issue in an application for post-conviction relief.[13])

In order to find plain error, we must conclude that the error "(1) was not the result of intelligent waiver or a tactical decision not to object; (2) was obvious; (3)

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[12] *Burton v. State*, 180 P.3d 964, 969 (Alaska App. 2008) (emphasis in original).

[13] *Id.* at 968.

affected substantial rights; and (4) was prejudicial."[14] Here, we note that the record shows that during cross-examination Villa's attorney impeached Jackson with the bank statement, seriously undermining Jackson's credibility and providing a clear tactical reason for Villa to abandon his efforts to obtain a mistrial.

In any event, any error was not obvious. The superior court knew when it ruled on the mistrial motion that Jackson claimed that he had provided a copy of the bank statement to the State months before the trial. Jackson's testimony did not provide new information to the court, and similarly the testimony did not call into question the validity of the court's original ruling denying the motion for mistrial.

For these reasons, we conclude that the superior court's failure to declare a mistrial *sua sponte* was not plain error.

Conclusion

The judgment of the superior court is AFFIRMED.

[14] *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).