IN THE COURT OF APPEALS OF THE STATE OF ALASKA

AARON MICHAEL SULLIVAN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-12781 & A-12794 Trial Court Nos. 3AN-14-09136 CR & 3PA-11-02588 CR MEMORANDUM OPINION No. 6863 — April 1, 2020

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: Jason A. Weiner, Gazewood & Weiner, Fairbanks, for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

Aaron Michael Sullivan fled at high speed from a police officer who was attempting to stop Sullivan's vehicle. A short time later, Sullivan came barreling out of

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

an alley and crashed into the officer's patrol car. The officer got out of his patrol car, unholstered his sidearm, and approached Sullivan. As he approached, the officer ordered Sullivan to put his hands up and in plain sight. In response, Sullivan aimed a revolver at the officer and fired three shots at him. Based on this conduct, Sullivan was convicted of a number of offenses, including attempted murder and third-degree assault.

Soon after Sullivan was found guilty, Sullivan's attorney filed a motion for a new trial, based primarily on an e-mail that the attorney had received from one of the jurors at Sullivan's trial. The contents of this e-mail suggested that the juror might have misunderstood one of the jury instructions on the "intent" element of attempted murder. Sullivan's attorney also argued, in the alternative, that the jury's verdict on the attempted murder charge was against the weight of the evidence.

The trial judge denied this motion, and Sullivan challenges the judge's decision on appeal. For the reasons explained in this opinion, we affirm the judge's denial of Sullivan's motion for a new trial.

Sullivan also argues that he should not have received separate convictions for attempted murder and third-degree assault — that the trial court should have merged the jury's verdicts on these two charges. The State concedes error, and (for the reasons explained here) we conclude that the State's concession is well-founded. Sullivan should have received only one merged conviction for attempted murder.

Finally, Sullivan argues that his composite sentence is excessive. For the reasons explained here, we conclude that Sullivan's sentence is not clearly mistaken.

Factual background

While on patrol early one morning in September, Anchorage Police Officer Patrick Michael O'Connor observed a blue Saturn speed through an intersection. O'Connor attempted to follow this vehicle, but the driver successfully evaded him. O'Connor later ran a check on the Saturn's license plate and discovered that the owner of the vehicle, Sullivan, was on parole and probation, and that he had an outstanding felony warrant for his arrest.

Two weeks later, O'Connor observed Sullivan's vehicle in the same residential neighborhood. O'Connor pursued the vehicle a short distance before Sullivan pulled into a driveway. O'Connor activated his overhead lights but, as O'Connor was preparing to get out of his patrol car to make the traffic stop, Sullivan turned his headlights off and sped away. A high-speed chase ensued through the neighborhood, but O'Connor soon abandoned the chase because of the danger to public safety.

A short while later, Sullivan came speeding out of an alley and crashed his vehicle into O'Connor's patrol car. Sullivan then attempted to drive away, but O'Connor accelerated his patrol car and pinned Sullivan's vehicle against a sign post, with the front of the patrol car up against the passenger-side door of Sullivan's vehicle.

O'Connor stepped out of his patrol car; he drew his weapon and ordered Sullivan to show his hands. When Sullivan did not comply with this order, O'Connor moved behind Sullivan's car toward the driver's side of the vehicle, but when he got there he found himself staring down the barrel of a handgun that Sullivan was pointing at him.

O'Connor stepped to his right and slipped, falling to the ground. As he fell, O'Connor heard the pop of a firearm. On hands and knees, O'Connor crawled behind his patrol car, and then he heard a second pop. When O'Connor returned fire, Sullivan

was able to maneuver his vehicle and drive off. O'Connor was injured from the fall and from the vehicle collision, but he was not shot.

Sullivan was arrested later that day. In a statement to the police, Sullivan admitted firing the shots, but he denied that he had intended to kill the officer. The police discovered a .44 Magnum revolver in Sullivan's car; three bullets had been fired from this gun. One bullet went through the headrest of Sullivan's car and out the back window. The other two bullets were found lodged in apartment buildings across the street.

Based on this episode, Sullivan was charged with attempted first-degree murder, third-degree assault, second-degree misconduct involving a weapon, failure to stop at the direction of a peace officer, and reckless driving. [1]

At Sullivan's trial, the primary disputed issue was whether Sullivan intended to kill Officer O'Connor when he fired his weapon. The defense theory was that Officer O'Connor started shooting first, and that when Sullivan fired his revolver in the officer's direction, he was not trying to hurt the officer. Rather, according to the defense attorney, Sullivan was engaging in "cover fire" — that is, gunfire that would make the officer stop shooting and seek cover, thus giving Sullivan an opportunity to flee. In response, the prosecutor argued that even if Officer O'Connor shot first, and even if one of Sullivan's motives was to flee, Sullivan nevertheless intended to kill O'Connor when he fired the shots at him.

The jury returned verdicts of guilty on all charges. This appeal followed.

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[1] AS 11.41.100(a)(1)(A) and AS 11.31.100 (attempted first-degree murder), AS 11.41.-220(a)(1)(A) (third-degree assault), AS 11.61.195(a)(3)(B) (second-degree misconduct involving weapons), AS 28.35.182(a)(1) (failure to stop), and AS 28.35.400 (reckless driving).

Why we affirm the trial court's denial of Sullivan's motion for a new trial

As we noted earlier, Sullivan's attorney filed a motion for a new trial shortly after Sullivan's trial ended. In this motion, the defense attorney made two claims. First, the attorney argued that the jury's guilty verdict on the attempted murder charge was against the weight of the evidence. Second, based on the wording of the e-mail that the defense attorney had received from one of the jurors after the trial, the attorney asserted that at least one of the jurors had misunderstood the trial judge's instructions on the issue of whether Sullivan acted with intent to kill (which was a necessary element of the attempted murder charge).

With regard to Sullivan's claim that the jury's verdict on attempted murder was against the weight of the evidence, the trial judge concluded that the evidence supported the jury's verdict. The record in this case amply justifies the trial judge's decision.

As our supreme court has explained, a trial judge's power to grant a new trial on the ground that the verdict is against the weight of the evidence "should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict"[2] — only when "the evidence so weigh[s] against the verdict that the interest of justice require[s] a new trial."[3] Here, Sullivan's trial judge did not abuse his discretion when he concluded that the jury's verdict was consistent with the evidence and that a new trial was not warranted.[4]

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[2] *Dorman v. State*, 622 P.2d 448, 454 (Alaska 1981).

[3] *Hunter v. Philip Morris USA Inc.*, 364 P.3d 439, 452 (Alaska 2015).

[4] *See Hash v. Hogan*, 453 P.2d 468, 472 (Alaska 1969), quoting *National Bank of Alaska v. McHugh*, 416 P.2d 239, 244 (Alaska 1966): "In order for [an appellate court] to (continued...)

With regard to Sullivan's separate claim, based on the juror's e-mail, that at least one of the jurors misunderstood the "intent" element of attempted murder, we conclude that the juror's e-mail was inadmissible and the trial judge should not have considered it.

Alaska Evidence Rule 606(b) prohibits a court from considering post-trial evidence concerning the jurors' thought processes during deliberations, unless that evidence concerns extraneous information that was improperly brought to the jurors' attention or to outside influences improperly brought to bear upon the jurors. Neither exception applies here. When the prosecutor correctly pointed out that the juror's e-mail was barred by Evidence Rule 606(b), the trial judge should have sustained the prosecutor's objection and should have refused to consider Sullivan's claim based on the e-mail.

Instead, Sullivan's trial judge expressly considered the juror's e-mail and then denied Sullivan's claim on other grounds. But we are not bound by the trial judge's mistaken decision to consider the e-mail. Rather, we can affirm the judge's denial of Sullivan's claim based on the fact that the juror's e-mail was barred by Evidence Rule 606(b) and should not have been considered at all. An appellate court is authorized to affirm a trial judge's decision on any legal basis revealed by the record[5] — even a legal basis that the trial judge expressly (and mistakenly) rejected.[6]

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[4] (...continued)
hold that [a] trial judge has abused [their] discretion, [the court] would have to be left with the definite and firm conviction on the whole record that the judge made a mistake in refusing to ... grant a new trial in response to [the] appellant's motion."

[5] *Rutherford v. State*, 605 P.2d 16, 21 n. 12 (Alaska 1979); *Ransom v. Haner*, 362 P.2d 282, 285 (Alaska 1961); *Millman v. State*, 841 P.2d 190, 195 (Alaska App. 1992).

[6] *Ransom v. Haner*, 362 P.2d at 285; *Millman*, 841 P.2d at 195.

To the extent that Sullivan's attorney might have been arguing that, regardless of the juror's e-mail, the jury instructions on the element of intent were so unclear or confusing that a new trial was warranted, we uphold the trial judge's decision that the jury instructions were clear and that a new trial was not warranted.

Because we are upholding the trial judge's denial of Sullivan's motion for a new trial, we reject Sullivan's related argument that we should reverse his probation revocation in an earlier case because of the purported flaw in his conviction for attempted murder (since that probation revocation was based on Sullivan's convictions in the present case).

Why we vacate Sullivan's separate conviction for third-degree assault and remand Sullivan's case to the superior court for re-sentencing

The State concedes that, given the facts of Sullivan's case, Sullivan should not have received separate convictions for attempted murder and third-degree assault, since the conduct that constituted the assault (aiming and firing the gun at Officer O'Connor) was the same conduct that constituted the attempted murder.

We have a duty to independently assess any concession of error by the State in a criminal case.[7] Here, the State's concession of error is well-founded. See *Starkweather v. State*, 244 P.3d 522, 530–33 (Alaska App. 2010), where this Court held that the Alaska legislature did not intend to have defendants convicted and punished separately for both attempted murder and assault when an attempted murder results in physical injury to the victim. Rather, the nature and extent of the victim's injuries are factors that a sentencing judge is to consider when assessing the defendant's term of imprisonment within the broad sentencing range for attempted murder.

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[7] *See Marks v. State*, 496 P.2d 66, 67–68 (Alaska 1972).

For this reason, we direct the superior court to merge the jury's verdicts for attempted murder and third-degree assault into a single conviction for attempted murder. Because the superior court imposed a separate sentence for the third-degree assault conviction, that sentence must be vacated, and the superior court must re-sentence Sullivan. [8]

However, Sullivan received a total sentence of 38 years to serve, and only 1 year of this sentence was imposed for the third-degree assault. Because the third-degree assault sentence is such a small portion of Sullivan's 38-year composite sentence, we have decided to address Sullivan's claim that his composite sentence is excessive.

The sentencing range for Sullivan's most serious crime, attempted murder, is a minimum of 5 years and a maximum of 99 years to serve. [9] Sullivan contends that his composite sentence of 38 years to serve is clearly excessive, given the fact that Officer O'Connor sustained no gunshot wounds but only injuries stemming from his fall and from the vehicle collision, and because (according to Sullivan) he acted without premeditation, but rather in panic, when he attempted to kill O'Connor.

But Sullivan was a third felony offender, and he had been in and out of jail during the seven years preceding his present offenses. Moreover, the sentencing judge found that the facts of Sullivan's case established three of the aggravating factors codified in AS 12.55.155(c): (c)(13) — that Sullivan knowingly directed his conduct toward a police officer who was engaged in his duties; (c)(20) — that Sullivan was on felony probation at the time he committed the crimes in the present case; and (c)(31) — that Sullivan had five or more prior convictions for class A misdemeanors.

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[8] *See Allain v. State*, 810 P.2d 1019, 1021–22 (Alaska App. 1991) (holding that, in these circumstances, the sentencing judge is authorized, but is not required, to impose the same composite sentence).

[9] AS 12.55.125(b).

For these reasons, we conclude that Sullivan's current composite sentence is not clearly mistaken. [10]

Conclusion

We direct the superior court to vacate Sullivan's separate conviction and sentence for third-degree assault. The superior court must enter a single merged conviction for attempted murder (based on the jury's guilty verdicts for attempted murder and third-degree assault), and the court must re-sentence Sullivan.

Except for this, the judgements of the superior court in the present case and in Sullivan's probation revocation case are AFFIRMED.

[10] *See McClain v. State*, 519 P.2d 811, 813–14 (Alaska 1974).