IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RICHARD CARL DEMELLO JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12817 Trial Court No. 3KN-15-00843 CR MEMORANDUM OPINION No. 6893 — August 19, 2020

Appeal from the District Court, Third Judicial District, Kenai, Sharon A.S. Illsley, Judge.

Appearances: Bradly A. Carlson, The Law Office of Bradly A. Carlson LLC, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Paul S. Morin, Assistant District Attorney, Kenai, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

Richard Carl Demello Jr. was convicted of violating a domestic violence protective order that prohibited him from contacting or communicating with his former son-in-law, Robert Lloyd.[1]

Demello raises three claims on appeal. First, he argues that the trial court erred when it denied his request to instruct the jury, under *Thorne v. Department of Public Safety*, to presume an audio recording that the State failed to preserve would have been favorable to him.[2] We conclude that the trial court did not abuse its discretion in declining to give an adverse-inference instruction under *Thorne*.

Demello next argues that the trial court's evidentiary ruling prohibiting him from cross-examining Lloyd about a prior protective order violated his constitutional right to confront the witnesses against him. We conclude that the trial court did not abuse its discretion in finding under Alaska Evidence Rule 403 that the danger of confusing the issues and misleading the jury outweighed any limited probative value of this evidence.

Finally, Demello argues that the trial court's ex parte response to a jury question violated his right to be present during all stages of the trial. The State concedes error. We have independently reviewed the record, and we find this concession to be well-founded.[3] However, under the circumstances of this case, we conclude that any error was harmless beyond a reasonable doubt.

We therefore reject Demello's claims of error and affirm his conviction.

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[1] AS 11.56.740(a)(1).

[2] *See Thorne v. Dep't of Public Safety*, 774 P.2d 1326, 1331-32 (Alaska 1989).

[3] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess whether a concession of error "is supported by the record on appeal and has legal foundation").

Background facts and procedural history

In January 2015, Robert Lloyd obtained a long-term protective order against his former father-in-law, Richard Demello Jr. The order remained in effect for one year, *i.e.*, until January 2016.

In May 2015, almost five months after Demello was served with the order, he encountered Lloyd in the parking lot of a hospital in Soldotna. Lloyd testified that Demello approached him, yelling profanities, and refused to leave until Lloyd contacted a bystander for help. Hospital surveillance video confirmed the confrontation between Demello and Lloyd, although it did not record the words exchanged between the two parties.

Demello was charged with violating a domestic violence protective order. At trial, Demello argued that Lloyd had initiated the contact, thus provoking Demello to respond. Demello also testified that he suffered from "pseudo-dementia," which resulted in chronic and severe memory lapses. According to Demello, at the time of this incident, he had no memory of being served with the protective order, and therefore could not have known he was violating it.

The jury rejected Demello's defense and convicted him of violating the protective order.

The trial court did not abuse its discretion in declining to give a Thorne instruction

Prior to trial, the officer who had originally served Demello with a copy of the protective order deleted an audio recording documenting the service. The officer explained that, while attempting to delete an unrelated file, he accidentally erased approximately sixty recordings created between 2009 and 2015, including the recording in Demello's case.

On the basis of this deletion, Demello asked the trial court to dismiss the charge against him or, in the alternative, to instruct the jury to presume that the deleted recording would have been favorable to him.

The trial court declined to impose either of these sanctions. Although the court recognized the State's duty to preserve the recording, the court found that the officer had not acted in bad faith, and the recording would not have aided Demello's defense.[4] Accordingly, while the trial court allowed Demello to cross-examine the officer about the deletion and argue to the jury that the failure to preserve the recording was an "egregious error" undercutting the State's case, the court denied Demello's request for a *Thorne* instruction.

We review for abuse of discretion the denial of a *Thorne* instruction, in light of "the degree of the prosecution's culpability, the importance of the lost evidence, and the prejudice to the defense."[5]

On appeal, Demello does not contest the facts surrounding the deletion, but he argues that the deleted recording was so important to his defense, and its loss so prejudicial, that the trial court abused its discretion in denying his request for a *Thorne* instruction.

In the context of Demello's defense at trial, the trial court did not err in finding that the absence of the recording caused Demello no prejudice. Demello did not dispute that the officer had properly served the protective order; he argued only that, as

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[4] *See Wagner v. State*, 2018 WL 5840510, at *3 (Alaska App. Nov. 7, 2018) (unpublished) (defining "bad faith" for purposes of *Thorne* as "'a deliberate attempt to avoid production' of the evidence" (quoting *State v. Ward*, 17 P.3d 87, 90 (Alaska App. 2001) (additional citations omitted))).

[5] *Sawyer v. State*, 244 P.3d 1130, 1134-35 (Alaska App. 2011); *see also Riney v. State*, 935 P.2d 828, 840 (Alaska App. 1997).

a result of severe memory issues, Demello did not *recall* being served. In closing argument, Demello's attorney told the jury that whether Demello had been properly served with the protective order was irrelevant, since Demello could not have knowingly violated an order of which he had no memory. In other words, Demello adopted a trial strategy that downplayed service of the protective order and urged the jury to disregard it entirely. The absence of a recording of that service did not prejudice Demello.

In light of the lack of prejudice to Demello's chosen defense, and the lack of bad faith on the part of the officer, which is not challenged on appeal, we conclude that the trial court did not abuse its discretion in declining to give a *Thorne* instruction.

The trial court did not abuse its discretion in precluding inquiry into prior protective orders

In 2011, four years before the incident that formed the basis of Demello's conviction, both Demello and Lloyd committed violations of separate protective orders. Concluding that these earlier orders had "very limited relevance," which was outweighed by "the danger of confusion of the issues [and] misleading the jury," the trial court prohibited either party from introducing evidence of the prior orders at trial.[6]

On appeal, Demello argues that the trial court's ruling violated his right to cross-examination. According to Demello, Alaska Evidence Rule 403 should not apply when a criminal defendant seeks to introduce evidence pertaining to a witness's bias or motive to fabricate. He characterizes his right to confront Lloyd with the prior protective

[6] *See* Alaska R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

order violation as "greater than the trial court's concern about confusing the issues or wasting time."

We have previously rejected the argument that proper application of Evidence Rule 403 violates a defendant's right to confrontation.[7] Even when a defendant seeks to cross-examine a witness regarding bias, "the analytical framework governing the trial court's decision . . . remain[s] that spelled out in Evidence Rule 403."[8]

The question before this Court, therefore, is not whether Evidence Rule 403 applies in this context, but whether the trial court abused its discretion in concluding that the danger of confusing the issues and misleading the jury outweighed what the trial court characterized as the "very limited relevance" of the 2011 protective orders.

The trial court concluded that re-litigation of events that had happened four years earlier would "do little to further the jury [in] making a decision in this case" and would only "add confusion as to what the issues are." The trial court also noted that granting Demello's request to admit evidence of Lloyd's 2011 protective order violation, while excluding evidence of Demello's 2011 protective order violation, "would give the jury a skewed view" of the case — and admitting Demello's prior protective order violation to offset this imbalance would be "extremely prejudicial."

We conclude that the exclusion of the 2011 protective orders was not an abuse of discretion under these circumstances. The trial court did not preclude Demello

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[7] *See, e.g.*, *Brown v. State*, 779 P.2d 801, 804 (Alaska App. 1989) ("Although the defendant's right to confrontation is fundamental, there is nothing to suggest that the application of Rule 403 violates this right."); *Larson v. State*, 656 P.2d 571, 575 (Alaska App. 1982) ("We specifically hold that Alaska Rule of Evidence 403, when properly applied, does not violate a defendant's constitutional right to confront the witnesses against him and present evidence in his own behalf.").

[8] *Brown*, 779 P.2d at 804.

from establishing Lloyd's bias through other means; the only restriction on Demello's cross-examination prohibited inquiry into a single incident that had occurred four years earlier. Although Demello remained otherwise free to elicit testimony on the interpersonal conflict between Lloyd and Demello, he made no effort to do so. On this record, the trial court did not abuse its discretion in excluding evidence of the 2011 protective orders as more prejudicial than probative.

The violation of Demello's right to be present for a jury question was harmless beyond a reasonable doubt

Finally, Demello challenges the trial court's ex parte communication with the jury during deliberations. As the State concedes, it was error for the trial court to respond to a jury question without first notifying counsel and Demello. We have previously held that the "[f]ailure to notify the defendant of a jury communication is constitutional error that requires reversal on appeal unless the error is found harmless beyond a reasonable doubt."[9]

In the unusual procedural posture of Demello's case, we conclude that the error was harmless beyond a reasonable doubt.[10] The error occurred not during the jury's deliberations on Demello's guilt, but during a second phase of trial following Demello's conviction, in which the jury was asked to determine whether the offense was a crime involving domestic violence. The prosecutor argued to the jury that Demello's

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[9] *Jones v. State*, 719 P.2d 265, 266-67 (Alaska App. 1986).

[10] *See Carpenter v. State*, 408 P.3d 1235, 1237 (Alaska App. 2017) (evaluating whether a violation of a defendant's right to be present was harmless beyond a reasonable doubt).

offense met the definition of a crime involving domestic violence because Demello and Lloyd had once lived together, and were thus "household members" under Alaska law.[11]

Within fifteen minutes of retiring to deliberate, the jury sent a note asking: "Are we just being asked [whether] or not we believe that Robert Lloyd and Richard Demello ever lived together?" Rather than notifying the parties of the jury's question, the trial court replied: "Household member includes 'adults or minors who live together or who have lived together.' If you find that Robert Lloyd and Richard Demello lived together at any point in time, the answer would be 'yes.' If you do not make this finding, the answer would be 'no.'"

The trial court's answer was a correct statement of the law.[12] Demello conceded at trial that Lloyd was his former son-in-law and that he and Lloyd had previously lived together for years in the same house. The record reveals no dispute about the relationship between the two men, or their former living situation.[13]

The jury had already concluded its deliberations and returned a unanimous guilty verdict prior to the ex parte communication. In light of the fact that the jury had already determined Demello's guilt beyond a reasonable doubt, and since the undisputed facts conclusively establish that the offense was a crime involving domestic violence

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[11] *See* AS 18.66.990(3)(G) (defining "crime involving domestic violence" to include a violation of a protective order under AS 11.56.740(a)(1) when committed by a household member against another household member); AS 18.66.990(5)(B) (defining "household member" to include "adults or minors who live together or who have lived together").

[12] *See* AS 18.66.990(5).

[13] At trial, Demello's attorney questioned the necessity of a jury finding on whether the offense was a crime involving domestic violence. On appeal, the parties do not ask us to determine whether this finding was in fact necessary. We accordingly express no opinion about the trial procedure used in this case.

under Alaska law, we conclude that the ex parte communication was harmless beyond a reasonable doubt.

The judgment of the district court is AFFIRMED.