IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SETH AUOD PHETAMPHONE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12964 Trial Court No. 4FA-16-02124 CR MEMORANDUM OPINION No. 6903 — October 28, 2020

Appeal from the District Court, Fourth Judicial District, Fairbanks, Patrick S. Hammers, Judge.

Appearances: Megan R. Webb, Assistant Public Defender, and Beth Goldstein Acting Public Defender, Anchorage, for the Appellant. Hazel C. Blum, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

Seth Auod Phetamphone was convicted, following a jury trial, of driving under the influence and refusal to submit to a chemical test.[1] He now appeals, arguing

[1] AS 28.35.030(a)(1) and AS 28.35.032(a), respectively.

that the district court committed plain error in anticipatorily addressing questions that might arise during the jury's deliberations. For the reasons explained in this opinion, we conclude that while some of the judge's comments were improper, this error does not require reversal of Phetamphone's convictions.

Background facts and procedural history

In September 2016, in the early morning hours, Fairbanks Police Officer Russell Fett heard two loud crashes in close succession, which he believed to be a vehicle collision. Moments later, a pickup truck emerged from a nearby alley driving at a high rate of speed. The truck drove over a sidewalk and a curb and failed to stop before entering the roadway. Despite the late hour, the truck did not have its headlights on, and Officer Fett noticed damage to the back of the vehicle consistent with a recent collision.

Officer Fett initiated a traffic stop, and he identified the driver of the truck as Phetamphone. Phetamphone's eyes were glassy and bloodshot, and he had a flushed face, slurred speech, and a very strong odor of alcohol. Phetamphone admitted that he had just backed his truck into his wife's vehicle. He also told the officer, "I've been drinking, I'm drunk," explaining that he had consumed a few "big shots" of Fireball whiskey. After Phetamphone failed two standard field sobriety tests, Officer Fett arrested him for driving under the influence.

At the police station, Officer Fett read Phetamphone an implied consent warning and asked him to provide a breath sample. Phetamphone indicated that he did not understand the implied consent warning. Although Officer Fett attempted to determine what, specifically, Phetamphone did not understand, Phetamphone was unable to articulate the source of his confusion and instead "smiled and chuckled" at the officer. Despite numerous attempts to clarify the implied consent warning, Phetamphone

continued to claim he did not understand. Ultimately, Officer Fett concluded that Phetamphone did understand and was simply trying to delay the test. When Officer Fett asked Phetamphone if he understood that he could be charged with an additional crime if he did not provide a breath sample, Phetamphone confirmed that he did understand. Phetamphone continued, however, to refuse to provide a breath sample.

The State charged Phetamphone with driving under the influence and refusal to submit to a chemical test.

At trial, Phetamphone argued that, although he had consumed a few drinks prior to driving, he was not too impaired to operate a vehicle. He also argued that his confusion about the implied consent warning was genuine and stemmed from the fact that English was not his first language; Phetamphone was originally from Laos, and he received assistance from Lao interpreters during trial. Phetamphone argued that his lack of comprehension negated any knowing refusal.

Before sending the jurors to deliberate, the judge read instructions on the law to be applied to the case — instructions previously discussed with the parties outside the jury's presence. After finishing these instructions, the judge commented on matters beyond what was contained in the written instructions, with particular emphasis on questions that might arise during the jury's deliberations. The judge explained that if the jury wanted to ask a question, the foreperson could write the question on a provided form, sign the form, and give it to the bailiff. He then continued:

> And any question you ask, can I answer the question? And the answer is maybe. And most times only with great difficulty.
>
> And at this time, I want you to know a few things. If you have a question, it usually takes 30 to 60 minutes before you get your answer. Why would that take so long? Why is it taking so long? Well, the problem is that before I can

> answer any question, I have to get a hold of the two attorneys and Mr. Phetamphone, we all meet together, we look at your question and then we try to figure out how we're going to answer your question. Then we have to go on to the record to discuss the question and, again, how we're going to answer it.
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> And the attorneys are not required to remain in this building. They're free to go back to their offices. And it will take some time to return to court, and so — and they could possibly be in some other hearing. It could take some time to finish and return to this courtroom to deal with your question.

After this explanation, the judge proceeded to address questions that he had received from past jurors, including whether the jury could have access to a dictionary ("The answer is no"), whether the jury could receive additional evidence ("No"), whether the jury could re-listen to the parties' arguments ("Yes") or the court's reading of the jury instructions ("No"), and whether the court could provide illustrative examples for any of the legal principles contained in the written instructions ("No"). The judge then returned to the topic of jury questions:

> [C]an I further explain a legal instruction? Answer, very rarely. . . . [I]s there anything that I can usefully give to you? The answer is, rarely.
>
> So you can ask questions, but there's not much that I can tell you. By telling you this now, I'm hoping to try to reduce questions. But if you really think that the court can answer a question for you, we will certainly try, but you should expect it to take probably an hour.

At the conclusion of these instructions, the jurors retired to deliberate. They asked no questions during their deliberations and subsequently returned guilty verdicts on both counts.

The trial judge erred in framing his comments in a way that risked discouraging the jurors from asking questions

On appeal, Phetamphone concedes that he did not object to the judge's comments. But he argues that the district court committed plain error in instructing the jury on matters beyond what the court and the parties had previously discussed and in discouraging the jurors from asking questions during their deliberations.[2]

We agree with Phetamphone that the judge should have elicited input from the parties before giving such lengthy and substantive jury instructions. In the context of jury questions, our supreme court has explained, and we have reiterated over the years, that the parties "should be allowed to consult with the trial court and to offer comments, suggestions, and objections to guide both the substance and phrasing of the court's response to the jury's request."[3] Similarly, with respect to jury instructions, Alaska Criminal Rule 30(a) requires the court to provide the parties with an opportunity to object to proposed jury instructions:

> The court shall inform counsel of the final form of jury instructions prior to their arguments to the jury. Following the close of the evidence, before or after the arguments of counsel, the court shall instruct the jury. Additionally, the court may give the jury such instructions as it deems necessary at any stage of the trial. The instructions must be reduced to writing and read to the jury and must be taken to the jury room by the jury. . . . Opportunity must be given to

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[2] *See Adams v. State*, 261 P.3d 758, 773 (Alaska 2011) (explaining that plain error is an error that (1) was not the result of intelligent waiver or a tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial).

[3] *Dixon v. State*, 605 P.2d 882, 887 (Alaska 1980); *Carpenter v. State*, 408 P.3d 1235, 1237 (Alaska App. 2017).

> make [an] objection out of the hearing of the jury by excusing the jury or hearing objections in chambers.[4]

Here, many of the judge's remarks were legally correct: the jury may not receive a dictionary or additional evidence, and written jury instructions obviate the need to re-listen to the court's oral recitation. But failing to consult the parties before instructing the jury increases the risk of improper instruction.

Phetamphone's primary claim of error relates to the judge's instructions on jury questions, in which the judge informed the jury that asking a question would cause an hour-long delay and likely would not result in a helpful answer. We agree with Phetamphone that such remarks pose a risk of discouraging jurors from asking questions. It is a judge's duty to provide clarification on the law when the jury encounters difficulty during deliberations. As the supreme court has explained, "When . . . the jury appears to be confused about a legal issue, and the resolution of the question is not apparent from an earlier instruction, the trial judge has a 'responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.'"[5] A judge cannot meet this

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[4] *Accord ABA Standards for Criminal Justice* § 15-4.4(e) (Approved Draft 1996) ("At a conference on instructions, which should be held out of the hearing of the jury, and, on request of any party, out of the presence of the jury, the court should advise counsel what instructions will be given by providing the instructions in writing prior to their delivery and before the arguments to the jury. Counsel should be afforded an opportunity to object to any instruction.").

[5] *Des Jardins v. State*, 551 P.2d 181, 190 (Alaska 1976) (quoting *Bollenback v. United States*, 326 U.S. 607, 612-13 (1946)); *see also ABA Standards for Criminal Justice* § 15-5.3(b) (Approved Draft 1996) ("If the jury, after retiring for deliberation, desires to be informed of any point of law, the court should give appropriate additional instructions in response to the jury's request unless (1) the jurors may be adequately informed by directing their attention to some portion of the original instructions; (2) the request concerns matters not in evidence or questions which do not pertain to the law of the case; or (3) the request (continued...)

duty by discouraging jurors from seeking the court's guidance on issues that arise during their consideration of the case.

We note that Alaska Criminal Pattern Jury Instruction 1.53 discusses the delay that will occur prior to answering a jury question and the fact that the judge may not be able to answer every question to the jury's satisfaction. However, the language of the pattern instruction is carefully crafted to ensure that jurors do not misinterpret this explanation of the practical realities of the trial process as an attempt to discourage questions:

> If it becomes necessary during your deliberations to communicate with me, you may send a note by the bailiff, signed by your foreperson or by one or more members of the jury. . . .
>
> Judges frequently receive written questions about the case by jurors during their deliberations. Although I cannot always answer those questions, I am free to tell you that if you desire to be informed on any point of law arising in the case, you may write which point of law you wish to be instructed about on a piece of paper, hand it to the bailiff, and I will convene the court for consideration of the question. The court has recorded the proceedings in this trial. If you need to re-hear the testimony of a particular witness, you may write which witnesses' testimony you wish to have played back and we will arrange for you to hear it. No new evidence will be presented.
>
> A delay will occur prior to a response to your question or request, since I must first convene the defendant, attorneys, clerk, and myself for consideration of the question. I tell you

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[5] (...continued)
would call upon the court to express an opinion upon factual matters that the jury should determine.").

> this not to discourage your writing a question but so that you will understand any delay which might occur.[6]

While the judge's remarks in this case covered the same content as the pattern jury instruction, the remarks failed to take the same care to avoid discouraging the jurors from asking questions. This was obvious error.[7]

In concluding that the judge should not have expounded on the jury instructions in a manner that risked discouraging the jury from asking questions, we do not mean to suggest that the judge's goal of anticipating jury questions and seeking to provide answers to these questions was improper. The purpose of jury instructions is to ensure that jurors understand all matters of law necessary to render a verdict.[8] And judges have broad discretion in how they choose to instruct the jury.[9] We simply caution judges that, where possible, the parties should be given an opportunity to weigh in on potential jury instructions and that jurors should not be discouraged from seeking clarification if they have questions about the law.

The error does not require reversal of Phetamphone's convictions

Although the judge's remarks were error, we conclude that the improper remarks were harmless in the context of this case.

As an initial matter, Phetamphone and the State disagree on whether the error in this case is constitutional in nature, and thus whether we should apply the "harmless beyond a reasonable doubt" standard or the lesser "appreciably affects the

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6 Alaska Criminal Pattern Jury Instruction 1.53 (2013).

7 *See Adams*, 261 P.3d at 773.

8 Alaska R. Crim. P. 30(b).

9 *See Young v. State*, 374 P.3d 395, 405 (Alaska 2016).

outcome" standard in determining whether plain error occurred.[10] We question whether a constitutional standard applies here. But because we conclude that the error is harmless under either standard, we need not decide which standard applies in this case.

When assessing whether an error is harmless, we evaluate the effect of the error on the jury.[11] In this case, we conclude that there is no reasonable possibility that the jury would have reached a different verdict had the judge refrained from making the improper comments.

At trial, Phetamphone conceded many of the elements of the driving under the influence charge. He did not contest that he was driving; in fact, his attorney urged the jury to convict him of the lesser-included offense of negligent driving.[12] Phetamphone also did not contest that he had been drinking: in addition to his admissions to the officer that he had consumed a few "big shots" of Fireball whiskey and was "drunk," Phetamphone's wife testified that she saw him drink "two big size cups" of alcohol prior to driving. Phetamphone's defense to the driving under the influence charge was solely that his admitted consumption of alcohol had not resulted in impairment.

But on this issue, the evidence was overwhelming. Phetamphone backed into his wife's car — an act established by Phetamphone's own admission as well as the matching damage to his vehicle and the fact that Officer Fett heard the collision moments before Phetamphone sped out of the alleyway. Phetamphone also violated multiple

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[10] *See Adams*, 261 P.3d at 771 (explaining that "constitutional violations are always prejudicial unless the State proves they are harmless beyond a reasonable doubt, while other errors are only prejudicial if the defendant proves that the error appreciably affected the outcome").

[11] *Anderson v. State*, 337 P.3d 534, 540 (Alaska App. 2014).

[12] *See* AS 28.35.410.

traffic laws, including failing to stop before entering a roadway, driving over a curb and a sidewalk, and failing to activate his headlights during hours of darkness.[13] He exhibited several indicia of intoxication, including glassy, bloodshot eyes; a flushed face; slurred speech; and a very strong odor of alcohol. He also failed two field sobriety tests. Given the weight of this evidence and Phetamphone's limited defense at trial, there is no reasonable possibility that the jury, if properly instructed, would have reached a different conclusion as to whether Phetamphone's level of impairment had affected his ability to operate his vehicle "with the caution characteristic of a person of ordinary prudence who is not under the influence."[14]

We similarly conclude that the judge's remarks did not impact the jury's deliberations on the charge of refusal to submit to a chemical test. The record shows that the jury reached a decision quickly and that the issues were not complex. Indeed, the evidence against Phetamphone was overwhelming.

Officer Fett read the implied consent warning to Phetamphone, provided a written copy for Phetamphone to read himself, and made numerous attempts to dispel Phetamphone's purported confusion. Although Phetamphone blamed his lack of comprehension on language difficulties, he had been able to converse with Officer Fett on a wide variety of topics during the traffic stop and the drive to the police station. He told Officer Fett that he had come to the United States when he was eighteen years old, had graduated from a high school in California, and had lived in Alaska since 1999. And

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[13] *See* AS 28.35.191 (requiring the use of headlights between a half-hour after sunset and a half-hour before sunrise); 13 AAC 02.257 (requiring drivers to stop prior to entering the roadway when emerging from an alley, driveway, or private road); 13 AAC 02.487 (prohibiting driving on a sidewalk).

[14] *Molina v. State*, 186 P.3d 28, 29 (Alaska 2008) (quoting *Gundersen v. Anchorage*, 762 P.2d 104, 114 n.7 (Alaska App. 1988)).

when Officer Fett showed Phetamphone a written copy of the implied consent warning, Phetamphone appeared to read it for himself, in addition to listening to Officer Fett's explanations. Phetamphone was never able to articulate what, precisely, he did not understand about the warning, though he admitted he did understand that he could be charged with an additional crime if he did not provide a breath sample. With this understanding, he nonetheless refused to provide a breath sample.

On appeal, Phetamphone relies on a line of cases concerning improper ex parte responses to jury questions. These cases are relevant to the extent they demonstrate the principle that parties "should be allowed to consult with the trial court and to offer comments, suggestions, and objections to guide both the substance and phrasing" of the court's remarks to the jury.[15] But they are also easily distinguishable from Phetamphone's case, which did not involve an ex parte communication. Although Phetamphone did not have the opportunity to review the remarks before the judge addressed the jury, Phetamphone was present, with counsel, at all stages of the trial proceedings, and he sat through the judge's remarks without raising any of the issues he identifies for the first time on appeal. His failure to make a contemporaneous objection deprived the judge of the ability to issue a curative instruction or otherwise clarify the remarks prior to the jury's deliberations. In stark contrast to an ex parte communication of which a defendant has no knowledge, the error in this case occurred in Phetamphone's presence, in open court, and in spite of his opportunity — and duty — to object to any instructions with which he disagreed.[16]

Additionally, the error in this case involved a jury instruction, rather than a jury question. This is an important distinction in assessing whether the error was

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[15] *Dixon v. State*, 605 P.2d 882, 887 (Alaska 1980).

[16] *See* Alaska R. Crim. P. 30(a).

harmless beyond a reasonable doubt: while a jury question may demonstrate a reasonable possibility of the jury's confusion on a specific issue,[17] the fact that the judge in this case phrased his remarks in the form of frequently asked questions does not suggest any confusion on the part of the jury. Phetamphone does not dispute that the written jury instructions fully and accurately described the law applicable to his offenses, including the elements and definitions relevant to the jury's consideration of Phetamphone's guilt.

Under these circumstances, we conclude that the error does not require reversal of Phetamphone's convictions.

The judgment of the district court is AFFIRMED.

[17] *See Jones v. State*, 719 P.2d 265, 267 (Alaska App. 1986).