

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JONATHAN M. ROGERS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13064
Trial Court No. 4FA-16-01192 CR

MEMORANDUM OPINION

No. 6923 — February 3, 2021

Appeal from the District Court, Fourth Judicial District,
Fairbanks, Ben A. Seekins, Judge.

Appearances: Megan R. Webb, Assistant Public Defender, and
Samantha Cherot, Public Defender, Anchorage, 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, and Wollenberg and Harbison,
Judges.

Judge ALLARD.

Jonathan M. Rogers was convicted, following a jury trial, of driving under
the influence of a controlled substance and refusal to submit to a chemical test.¹ On

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

appeal, Rogers challenges only the driving under the influence conviction, arguing that the evidence presented at trial was insufficient to support that conviction. For the reasons explained here, we agree that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that Rogers was driving under the influence of a controlled substance.

Underlying facts

At 9:30 a.m., Fairbanks Police Officer Billy Bellant observed a vehicle cross over the center line and the fog line while driving. The vehicle then stopped at an intersection with its front driver's side wheel fully over the center line. Officer Bellant pulled the car over and discovered that Rogers was the driver.

Officer Bellant explained to Rogers why he stopped him and asked him if he had consumed any alcohol or drugs. According to Bellant's testimony at trial, Rogers responded that he had taken some prescription medications earlier that morning. Specifically, Bellant testified that Rogers said that he had taken Adderall and "Klonopin or some other benzodiazepine." Bellant explained to the jury that Klonopin is a type of benzodiazepine, which is a central nervous system depressant, and that Rogers could not remember if he had taken Klonopin or some other type of benzodiazepine. Bellant stated, "I don't know if it was Klonopin specifically, or some other benzo . . . and [Rogers] couldn't tell me either."

Officer Bellant asked Rogers to perform field sobriety tests. Rogers agreed to take the tests. Rogers told Bellant that the situation was making him anxious. He also told Bellant that he felt the effects of the medication when he first took them.

Rogers performed poorly on the horizontal-gaze nystagmus test, the walk-and-turn test, and the one-leg-stand test. Officer Bellant concluded that Rogers was likely under the influence of drugs or alcohol and arrested Rogers for driving under the

influence. At the police station, Rogers refused to provide a breath sample, and he was subsequently charged with both driving under the influence and refusal to submit to a chemical test. Bellant did not apply for a search warrant to take a sample of Rogers' blood.

Officer Bellant was the only witness to testify at trial. There was no other testimony about what substances Rogers had consumed. Notably, the State did not introduce evidence of a blood test showing what exactly Rogers had consumed or how much he had consumed. Nor did the State present testimony from a qualified expert about the effect those substances could have on a typical individual, either singly or in combination.

In addition, the State did not introduce any evidence of the chemical composition of Adderall and Klonopin or the generic name of those drugs. The State also did not introduce any evidence as to whether all benzodiazepines qualified as controlled substances under AS 11.71.

At the close of evidence, Rogers moved for a judgment of acquittal on the driving under the influence charge.² Rogers pointed out that neither "Adderall" nor "Klonopin" appeared on the list of controlled substances contained in AS 11.71, and he argued that the State had failed to present any evidence that either of these drugs qualified as controlled substances. Rogers also argued that the State had failed to prove beyond a reasonable doubt that he had ingested Klonopin rather than "some other benzodiazepine," and he emphasized that there had been no evidence suggesting that all benzodiazepines were controlled substances.

The trial court noted that it had expected the motion for a judgment of acquittal and believed it was a "close call." The court nevertheless denied the motion for

² See Alaska R. Crim. P. 29.

judgment of acquittal. When deciding the motion, the court noted that Klonopin is the brand name for clonazepam, which is listed as a controlled substance under AS 11.71.³ Rogers objected to the trial court taking judicial notice that Klonopin was clonazepam when the State had introduced no evidence of that fact.

The jury was subsequently instructed that “controlled substance” was defined as “any substance listed as being controlled under AS 11.71 or 21 U.S.C. 812-813, or determined under federal regulations to be controlled for purposes of 21 U.S.C. 801-813 (Controlled Substance Act).”⁴ The jury did not initially receive any instructions regarding the trial court’s judicial notice that “Klonopin” was clonazepam, a controlled substance listed in AS 11.71. The jury also did not receive any instructions regarding the generic name or chemical composition of “Adderall.”

During deliberations, the jury sent a note, asking the trial court whether a “benzo” was “a controlled substance by definition.” (Officer Bellant used the slang term “benzo” to describe the other benzodiazepine that Rogers may have taken.) The court noted that it did not know if all benzodiazepines were controlled substances, and the prosecutor acknowledged that he also did not know. Therefore, in response to the jury question, the court instructed the jury as follows:

Klonopin is the brand name for clonazepam which is a controlled substance by definition. Not all benzodiazepin[e]s are controlled substances.^[5]

³ See AS 11.71.170(b)(5) (listing clonazepam as a Schedule IVA drug); *see also* 21 C.F.R. § 1308.14(c)(12) (listing clonazepam as a Schedule IV drug under federal law).

⁴ See AS 28.33.190(5) (defining “controlled substance”).

⁵ We note that Alaska Statute 11.71 does not include the general term “benzodiazepine” although it lists several common types of benzodiazepines as controlled substances. See AS 11.71.170(b)(5), (17), (32) (listing clonazepam, diazepam, and lorazepam as Schedule IVA (continued...))

The prosecutor did not object to this instruction. Rogers objected to the instruction, arguing again that it was improper for the court to take judicial notice of the fact that Klonopin is the brand name for clonazepam.⁶

The jury subsequently convicted Rogers of driving under the influence and refusal to submit to a chemical test.

Rogers now appeals.

Why we reverse Rogers' conviction for driving under the influence

The State prosecuted Rogers for driving under the influence under the theory that he drove while impaired by a controlled substance. To convict Rogers of this charge, the State was required to prove beyond a reasonable doubt that Rogers was impaired *and* that his impairment was a direct result of his ingestion of “any controlled substance, singly or in combination.”⁷ On appeal, Rogers asserts that the State presented insufficient evidence to prove beyond a reasonable doubt that he was impaired by a controlled substance.⁸

⁵ (...continued)
controlled substances). Like the parties, we do not know whether all benzodiazepines are controlled substances.

⁶ Rogers also objected to the court taking “judicial notice” that “clonazepam” is a controlled substance. But clonazepam is specifically listed as a controlled substance under AS 11.71.170(b)(5), and this portion of the instruction was simply informing the jury of the relevant law.

⁷ See *McCord v. State*, 390 P.3d 1184, 1186 (Alaska App. 2017); *Adams v. State*, 359 P.3d 990, 994 (Alaska App. 2015) (holding that a controlled substance does not have to be the sole cause of impairment but must be a “substantial factor” in causing the impairment).

⁸ See *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (holding that due process requires that “no person shall be made to suffer the onus of a criminal conviction except upon
(continued...)

The State’s theory of prosecution was that Rogers was impaired based on a combination of Adderall and Klonopin. But the State’s main focus at trial was on the Klonopin. The State presented no evidence to prove that “Adderall” was a controlled substance and the evidence was therefore insufficient to prove that fact.⁹

The State also failed to present sufficient evidence that Adderall was “a substantial factor” in causing Rogers’ impairment, either singly or in combination with another controlled substance. Officer Bellant did not testify regarding the effects of Adderall on its own or in combination with another controlled substance. Nor did he correlate any of the impairments that he observed with the use of Adderall. To the contrary, he testified that the impairments could be the result of a central nervous system *depressant*, as opposed to a central nervous system stimulant such as Adderall.

The State’s case therefore turned on Rogers’ alleged use of Klonopin or “some other benzodiazepine.” Officer Bellant testified that Klonopin was a type of benzodiazepine and that benzodiazepines were central nervous system depressants.

⁸ (...continued)
sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense”).

⁹ *Cf. People v. Davis*, 303 P.3d 1179, 1183 (Cal. 2013). In *Davis*, the California Supreme Court held that there was insufficient evidence to prove that MDMA (3,4-methylenedioxymethamphetamine) or “Ecstasy” was a controlled substance. As the court explained:

All the jury had before it was a chemical name not listed in any schedule of the code. An appellate court cannot take judicial notice of additional facts the prosecution failed to prove at trial to affirm a conviction. The critical inquiry is whether “the *record* evidence could reasonably support a finding of guilt beyond a reasonable doubt.”

Id. (emphasis in original; internal citations omitted).

Bellant also correlated the impairments that Rogers exhibited with the use of a central nervous system depressant. However, Bellant did not testify that Klonopin is the brand name for clonazepam, a drug listed as a controlled substance under AS 11.71; nor did he testify that the impairment he observed was caused by Klonopin (as opposed to some other kind of benzodiazepine). He also did not testify that all benzodiazepines qualified as controlled substances.

This deficiency in the State's evidence led to the jury questioning whether all benzodiazepines are controlled substances. In response to its question, the jury was instructed that "Klonopin" is the brand name for clonazepam, a controlled substance, but that "not all benzodiazepin[e]s are controlled substances." In other words, the jury was instructed that proof that Rogers consumed a benzodiazepine was *not* sufficient to establish that Rogers consumed a controlled substance. Instead, to convict Rogers, the State had to prove beyond a reasonable doubt that Rogers consumed Klonopin (as opposed to another benzodiazepine that might not qualify as a controlled substance).

But the only evidence at trial about Rogers' consumption of Klonopin was Officer Bellant's testimony that Rogers had admitted that he had taken "Klonopin or some other benzodiazepine," and Bellant was clear that "[he did not] know if it was Klonopin specifically, or some other benzo . . . and [Rogers] couldn't tell [him] either."

On appeal, the State argues that the fact that Rogers named Klonopin as a drug that he may have ingested constituted proof *beyond a reasonable doubt* that Rogers had, in fact, ingested Klonopin. We do not agree that this constitutes proof beyond a reasonable doubt.

When we review the sufficiency of the evidence to support a criminal conviction, we are required to view the evidence presented at trial — and all reasonable inferences to be drawn from that evidence — in the light most favorable to the verdict,

and ask whether a reasonable juror could have concluded that the State proved its case.¹⁰ But our review is nevertheless limited to *reasonable* inferences — that is, to inferences that a person could reasonably draw from the evidence.¹¹ A criminal conviction cannot be based on speculation and surmise.¹² Likewise, “[a]n inference is not a suspicion or a guess,” and “[w]hile we must defer to a jury’s reasonable inferences, we give no deference to impermissible speculation.”¹³

Here, the jury was presented with equivocal evidence regarding what kind of medication Rogers had consumed, and it was provided with no evidence (either a blood test or some other evidence) that would allow it to determine, in a principled way, whether Rogers had ingested Klonopin or some other benzodiazepine.

The State argues that the jury could reasonably choose to disbelieve Rogers’s statement that he may have taken some other benzodiazepine rather than Klonopin. But this factual question did not turn on credibility. The testimony was clear that Rogers *himself* did not know whether he had ingested Klonopin rather than some other benzodiazepine. And there was no blood test or other evidence indicating what Rogers had actually consumed. Given this record, we conclude that no reasonable juror

¹⁰ See *Augustine v. State*, 355 P.3d 573, 590 (Alaska App. 2015); see also *Jackson*, 443 U.S. at 319.

¹¹ *Jackson*, 443 U.S. at 319; *United States v. Pauling*, 924 F.3d 649, 656-57 (2d Cir. 2019); see also *Davis v. State*, 499 P.2d 1025, 1034 (Alaska 1972) (“In the past we have cautioned that building inference upon inference without adequate data would present the very grave danger of a criminal conviction founded on speculation.” (internal quotation omitted)), *rev’d on other grounds*, 415 U.S. 308 (1974).

¹² See *Augustine*, 355 P.3d at 590 (concluding that child’s testimony of penetration was “so speculative and equivocal” as to be legally insufficient to support a finding of sexual penetration beyond a reasonable doubt).

¹³ *Pauling*, 924 F.3d at 656.

could find that the State had met its burden of proving, beyond a reasonable doubt, that Rogers consumed Klonopin rather than “some other benzodiazepine.” And, as we have explained, the State presented no evidence, and the jury received no instructions, suggesting that any benzodiazepine other than Klonopin was a controlled substance.

We acknowledge that, if the State had investigated and litigated this case differently, it may have been able to establish that Rogers was under the influence of a controlled substance at the time he drove. But, given the manner in which the State litigated this case and the particular manner in which the jury was instructed, we conclude that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that Rogers was guilty of driving under the influence.

Because we find that the evidence was insufficient to sustain Rogers’s conviction for driving under the influence, we do not reach the question of whether the trial court committed reversible error when it took conclusive judicial notice of the fact that Klonopin is the brand name for clonazepam, which is listed as a controlled substance under AS 11.71.170(b)(5).¹⁴

For the reasons stated above, Rogers’ conviction for driving under the influence is REVERSED. Our opinion has no effect on Rogers’ conviction for refusal to submit to a chemical test.

¹⁴ See Alaska R. Evid. 203(c) (requiring trial court in criminal case to instruct jury that “it may, but it is not required to, accept as conclusive any fact judicially noticed”); see also *Rae v. State*, 884 P.2d 163, 167 (Alaska App. 1994) (concluding that trial court’s taking of conclusive judicial notice of an element of the crime is structural error); *Fielding v. State*, 842 P.2d 614, 615-16 (Alaska App. 1992) (reversing conviction because trial court instructed jury, over defendant’s objection, that the Glenn Highway is a highway for purposes of the driving while license suspended statute); but see *Alvarado v. State*, 440 P.3d 329, 332-34 (Alaska App. 2019) (distinguishing *Rae* and *Fielding* and concluding that conclusive judicial notice of defendant’s birthdate was harmless beyond a reasonable doubt).