

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

SARAH E. HODGES,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12966
Trial Court No. 3PA-17-00900 CR

MEMORANDUM OPINION

No. 6935 — April 14, 2021

Appeal from the District Court, Third Judicial District, Palmer,
William L. Estelle, Judge.

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Donald Soderstrom, 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.

Sarah E. Hodges was convicted, following a jury trial, of driving under the influence (DUI).¹ Hodges appeals her conviction, arguing that the trial court committed plain error by failing to provide the jury with a factual unanimity instruction as to the specific conduct constituting her offense. For the reasons we explain in this opinion, we affirm the judgment of the trial court.

Underlying facts

Shortly after midnight on June 3, 2017, an Alaska State Trooper observed a red SUV driving with its headlights off alongside a fence bordering a storage facility. The trooper turned his patrol car around to investigate, and as he did so, he observed the SUV drive out of view around the back of the storage building. About twenty-five seconds later, the trooper pulled into the area behind the storage building and observed a parked red SUV. A woman, later identified as Hodges, was the sole occupant of the SUV and was sitting in the driver's seat. The video recording from the trooper's dashboard camera shows that less than one minute elapsed from the time the trooper first observed the SUV by the fence to the time he observed a red SUV parked around the corner of the facility.

The trooper contacted Hodges and noticed that she had bloodshot, watery eyes, her speech was slurred, and she emitted a strong odor of alcohol. The trooper informed Hodges that he saw her vehicle moving with its headlights off. When the trooper asked her why she was driving, Hodges responded that she lived in an apartment on the property and that she drove to that location in order to “dump trash.”

While she was talking to the trooper, Hodges answered a phone call from her sister. She told her sister that she had been pulled over by the police after drinking

¹ AS 28.35.030(a).

a couple of beers and that their mother would be mad. She then confirmed, “[Y]ep, drinking and driving is what they’re going to get me for.” After Hodges performed poorly on her field sobriety tests, the trooper arrested her for DUI. Hodges was transported to the trooper post where she submitted to a breath test that revealed a breath alcohol content of .235 percent.

Procedural history

At trial, the State presented an audio recording of the trooper’s contact with Hodges and a video recording from the trooper’s dashboard camera. These recordings both began with the trooper’s first view of the red SUV and continued through his contact with Hodges. The trooper also testified about his observations of Hodges and about what she said during his on-scene investigation.

Hodges testified on her own behalf at trial. She told the jury that she lived in an apartment above the storage building, that her apartment had a strict no-smoking policy, and that she had entered her vehicle — a red SUV — only to smoke a cigarette. During her testimony, she denied driving the vehicle and asserted that she did nothing more than sit in the vehicle. She explained that the statements she made to the trooper when he contacted her — which seemed to be admissions that she had been driving — were the result of her confusion and intoxication. Hodges also testified that, when the trooper first observed her, the keys were not in her hand and instead were on the back seat of the vehicle.

The State argued that Hodges was guilty of both driving and operating the motor vehicle when she drove the red SUV, parked it, and then removed the key from the ignition. The prosecutor told the jury that it could convict Hodges if it found that Hodges was intoxicated and either drove or operated the red SUV.

By contrast, Hodges’s theory of defense was that she did not drive or operate the SUV on the night in question. She argued that, although she entered the vehicle while it was parked behind the storage building in order to smoke a cigarette, she did not exercise any control over the vehicle.

The court instructed the jury that it could find Hodges guilty of DUI if it found that Hodges knowingly drove or operated a vehicle while under the influence of alcohol or if a breath test, taken within four hours of driving, revealed a breath alcohol content of at least .08 percent. Hodges did not request, and the jury was not given, a factual unanimity instruction—an instruction advising the jury that it could only convict Hodges if it unanimously agreed on the specific conduct underlying the charge.

The jury convicted Hodges of driving under the influence, and this appeal followed.

Why we reject Hodges’s claim of error

On appeal, Hodges claims that the court’s failure to provide an appropriate instruction deprived her of her right to have a jury agree unanimously as to the act constituting her offense.²

In our cases addressing factual unanimity in the context of a charge of driving under the influence, we have found error where the jury heard evidence

² See, e.g., *Moreno v. State*, 341 P.3d 1134, 1138 (Alaska 2015) (noting that under Alaska’s due process clause, a defendant has a right to have jurors agree that the defendant committed a single offense).

suggesting separate acts but was not given a proper unanimity instruction.³ But those cases are distinguishable from the present case.

Here, the evidence showed that Hodges engaged in a single course of conduct rather than two separate acts. The trooper testified that he observed a red SUV driving without its headlights on and, less than one minute later, after turning to follow the SUV, observed Hodges sitting in the front seat of her parked red SUV with the keys in her hand. In addition to the trooper's testimony that the red SUV he saw driving by the fence of the storage unit was the same SUV that he saw moments later, parked behind the storage building, the State presented an audio recording in which Hodges stated that she was "just pulling in" and had driven "because [she] wanted to go home."

While the State argued that the jury could convict Hodges if it found beyond a reasonable doubt that she had either driven or operated the vehicle while intoxicated, the evidence presented by the State supported only a single continuous criminal act.

³ See, e.g., *Castillo v. State*, 821 P.2d 133, 137 (Alaska App. 1991) ("Because the prosecution presented different theories to the jury which described different criminal events, it is unclear whether the jury agreed on 'just what the defendant did.'"); *Grace v. State*, 2018 WL 4908372, at *3 (Alaska App. Oct. 10, 2018) (unpublished) ("[T]he jury heard evidence that [the defendant] engaged in two legally distinct acts of operating a motor vehicle: the drive from Anchorage to Palmer, and the return drive back to Anchorage."); *Cathey v. State*, 2017 WL 3126735, at *1-2 (Alaska App. July 19, 2017) (unpublished) (finding error in the failure to give a unanimity instruction where the State presented evidence that the defendant's vehicle had been driven into a ditch and evidence that the defendant, after a bystander declined to offer assistance, had later attempted to drive out of the ditch); *Elia v. State*, 2016 WL 3600216, at *3 (Alaska App. June 29, 2016) (unpublished) (finding that although the State argued the defendant had engaged in one prolonged act of driving, the evidence presented to the jury came from eyewitnesses whose observations of the defendant's driving were separated by an hour).

Hodges compares the facts of her case to the facts of our unpublished opinion, *Hicks v. State*.⁴ But in *Hicks*, there was evidence that the defendant had been driving or operating her vehicle during two separate incidents.⁵ The evidence there supported a conclusion that an appreciable amount of time had passed between two different acts that could constitute operating or driving a vehicle.⁶

By contrast, in the present case, the parties agree that Hodges engaged in only one course of conduct. According to Hodges, she entered her car to smoke a cigarette but did not drive or operate the car. And according to the State, Hodges drove behind the storage building, parked the car, and removed the keys. Accordingly, under either Hodges's theory of the case or under the State's theory of the case, Hodges did not commit two separate acts necessitating a factual unanimity instruction.

Conclusion

We AFFIRM the judgment of the district court.

⁴ *Hicks v. State*, 2013 WL 203264 (Alaska App. Jan. 16, 2013) (unpublished), *rev'd on other grounds*, *Moreno*, 341 P.3d 1134.

⁵ *Id.* at *3.

⁶ *Id.*