IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOSHUA DYLAN VARS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13231 Trial Court No. 3KN-17-01499 CR MEMORANDUM OPINION No. 6955 — June 30, 2021

Appeal from the Superior Court, Third Judicial District, Kenai, Anna M. Moran, Judge.

Appearances: Bradly A. Carlson, Law Office of Bradly A. Carlson, LLC, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Clyde Sniffen Jr., Acting Attorney General, Juneau, for the Appellee.

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

Judge ALLARD.

Joshua Dylan Vars was convicted, following a bench trial, of third-degree misconduct involving weapons and fourth-degree misconduct involving weapons, for residing in a dwelling that contained a concealable firearm after he was convicted of a

felony, and for possessing a firearm while impaired by a controlled substance.[1] He raises four claims of error on appeal.

Vars argues first that the superior court erred when it considered a witness's out-of-court statements for the truth of the matter asserted. But given that Vars's attorney essentially invited the error that Vars now complains of, and because the statements were admissible as the witness's prior inconsistent statements, we find no merit to this claim.

Vars argues next that the evidence was insufficient to establish that he did anything other than "fleetingly" possess the firearm. We disagree. Having reviewed the evidence at trial in the light most favorable to upholding the verdict, we conclude that a fair-minded factfinder could reasonably find that the State proved beyond a reasonable doubt that Vars possessed the firearm in more than a fleeting manner.

Vars also argues that the superior court erred when it denied his untimely motion to suppress, which was raised for the first time during the parties' closing arguments. For the reasons explained here, we conclude that the superior court did not abuse its discretion in declining to hear Vars's untimely motion.

Lastly, Vars argues that his sentence is excessive and that the superior court erred when it rejected his proposed mitigator that his conduct was among the least serious conduct within the definition of the offense.[2] We affirm Vars's sentence as not clearly mistaken and find no error in the superior court's rejection of the proposed mitigator.

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[1] AS 11.61.200(a)(10) and AS 11.61.210(a)(1), respectively. Vars was also found guilty of third-degree misconduct involving weapons under AS 11.61.200(a)(1) for being a felon in possession of a concealable firearm, but this count was merged with his other third-degree weapons misconduct charge.

[2] *See* AS 12.55.155(d)(9).

Background facts and proceedings

In December 2017, Joshua Vars, who had previously been convicted of various felonies, was living at his mother's house while on felony probation. Because he had been convicted of prior felonies, Vars was prohibited from possessing a concealable firearm, and he was also prohibited from residing in a dwelling with a concealable firearm.[3] (The terms of his felony probation also prohibited him from residing in a dwelling with a concealable firearm or from possessing a concealable firearm.)

On the morning of December 5, Vars was under the influence of methamphetamine when he began to believe that there were intruders in and around his mother's home. To protect himself from potential intruders, Vars picked up a handgun that belonged to his mother's husband and began walking around the residence with the handgun in his hoodie. This alarmed Vars's mother, causing her to leave the residence.

After his mother left, Vars called 911 and relayed his suspicions that there were "people outside and . . . somebody in the home." He asked the dispatcher to "send somebody out." During this call, Vars stated that "[t]here's weapons in the home" and "[w]e have self-protection." The dispatcher then inquired about the weapons, asking, "[A]re they all put away?" Vars responded, "Yes, there — there — there are sidearms sitting out but for the most part, the weapons are put away." Vars also said that he knew there was "protection" in the home and he was "letting [the dispatcher] know that we are armed and we'll use it if we have to."

Alaska State Trooper Ryan Tennis and two probation officers responded to Vars's call. Vars stayed outside the house with one probation officer while the trooper and the other probation officer searched the house. Vars was visibly under the influence

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[3] *See* AS 11.61.200(a)(1) & (a)(10).

of drugs — he was sweating profusely, he would not make eye contact, his mouth was dry and white around the lips, and he talked about people hiding in the woods. Vars completed a urinalysis later that day that tested positive for methamphetamine.

The trooper and probation officer searched the home and found no intruders. However, they did find a gun holster and a bullet in Vars's bedroom. When they returned to the front of the home where Vars was waiting with the other probation officer, the probation officer who searched the home asked Vars where the gun was located, and Vars replied that it was in the pantry. The probation officer then located a loaded handgun in a box on the right side of the pantry. (The handgun was a different caliber than the bullet found in Vars's bedroom.)

While the officers were searching the home, Vars's mother called the house and one of the probation officers answered the phone and spoke to her. During the call, she indicated there was a gun in the house. During a later recorded call with the trooper, Vars's mother told the trooper that Vars had been "carrying [the gun] around and he also had it in his pocket of his hoodie." She said that she left the house because she was uncomfortable with Vars carrying a firearm while under the influence of drugs. She also said that the gun was normally kept in the entryway (which was fifteen steps away from the pantry where the gun was found), that Vars was the only person in the home when she left, and that she did not move the gun to the pantry.

Vars was subsequently arrested and indicted on two counts of third-degree weapons misconduct for possessing a concealable firearm, and for residing in a dwelling that contains a concealable firearm, after having been convicted of a felony. The State also charged Vars with fourth-degree weapons misconduct for possessing a firearm while impaired by a controlled substance.

Vars waived his right to a jury trial and agreed to a bench trial. At the bench trial, Vars was found guilty of all three charges.

At sentencing, the superior court merged the two third-degree weapons misconduct counts into a single conviction and found multiple aggravators proposed by the State.[4] The superior court accepted Vars's proposed mitigator under AS 12.55.155(d)(3) (defendant committed the offense under some degree of duress insufficient to constitute a complete defense), but found that it did not outweigh the several aggravators the court also found. The superior court rejected Vars's proposed mitigator under AS 12.55.155(d)(9) (defendant's conduct was among the least serious included in the definition of the offense), finding that Vars's conduct of possessing a firearm in violation of his felony probation while intoxicated did not qualify as "among the least serious." The court imposed a sentence of 5 years' imprisonment with 2 years suspended on the third-degree weapons misconduct conviction and 30 days, to run concurrently, on the fourth-degree weapons misconduct conviction — a composite term of 3 years to serve.

Vars now appeals.

Vars's claim that the superior court erred in relying on Vars's mother's out-of-court statements that Vars was carrying a handgun

During the cross-examination of Trooper Tennis, Vars's defense attorney questioned Tennis extensively about what Vars's mother said to him on the phone. The defense attorney elicited testimony from Trooper Tennis that Vars's mother had said that

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[4] The court found five statutory aggravators proposed by the State under AS 12.55.155 — (c)(7) (a prior felony conviction considered for the purpose of invoking a presumptive range was of a more serious class of offense than the present offense), (c)(8) (criminal history includes conduct involving repeated instances of assaultive behavior), (c)(15) (defendant has three or more prior felony convictions), (c)(20) (defendant was on probation for another felony conviction at the time the current offense was committed), and (c)(31) (criminal history includes convictions for five or more class A misdemeanor crimes).

Vars was carrying the gun around in his hand and also in the pocket of his hoodie. The defense attorney did not assert that he was eliciting this testimony for a non-hearsay purpose. As a general matter, hearsay evidence that is not objected to can be considered by the factfinder for the truth of the matter asserted.[5]

After eliciting significant testimony from the trooper regarding what Vars's mother said to the trooper, the defense attorney asked the prosecutor whether he intended to play the audio recording of the trooper's conversation with Vars's mother. The prosecutor said yes, and Vars's attorney said "great." However, when the prosecutor attempted to play the audio recording during redirect, the defense attorney objected and argued that the recording should not come in without Vars's mother testifying. The superior court overruled the objection, ruling that the defense attorney had already "opened the door" to this evidence. The court then allowed the prosecutor to play the portions of the audio recording that were directly related to the testimony already elicited by the defense attorney.

On appeal, Vars argues that this was error, and that the audio recording was inadmissible hearsay that should not have been admitted. But Vars's argument on appeal is based on a gross distortion of the record. Vars's appellate attorney does not acknowledge that the defense attorney elicited essentially the same statements that were on the audio recording and that he did so without specifying that they were being elicited for a non-hearsay purpose. Vars's appellate attorney also does not acknowledge that Vars's mother testified later in the trial and her testimony was inconsistent with the audio recording. Vars's mother listened to the audio recording and acknowledged that it was her voice, but continued to claim that she had no memory of the statements she made to

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[5] *See Byrd v. State*, 626 P.2d 1057, 1058 (Alaska 1980) ("[H]earsay evidence is admissible if the opposing party does not object to it." (citing *Anchorage v. Nesbett*, 530 P.2d 1324, 1336 (Alaska 1975))).

the trooper. As the State points out, this means that the relevant portions of the audio recording would have been admissible at that point as prior inconsistent statements. And under Alaska law, a prior inconsistent statement is admissible both to impeach a witness's credibility and as substantive evidence.[6]

Thus, given that the defense attorney essentially invited the error that Vars now complains of,[7] and the evidence was otherwise admissible as a prior inconsistent statement, we find no merit to Vars's claim of error on appeal.

Vars's claim that the evidence was insufficient to show that his possession was more than fleeting

Vars argues that, without the audio recording of his mother's statements that he claims was inadmissible hearsay, there was insufficient evidence presented at trial that his possession of the handgun was anything more than "fleeting."[8] But as we just explained, the superior court did not err when it relied on Vars's mother's out-of-court statements as substantive evidence that Vars was carrying a handgun that morning.

Moreover, at trial, Vars's mother's testified that she "assumed that [Vars] had a gun in his pocket" because Vars said he had a gun, Vars had his hand in his pocket,

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[6] *See* Alaska R. Evid. 801(d)(1)(A); *see also Van Hatten v. State*, 666 P.2d 1047, 1049-50 (Alaska App. 1983), *abrogated on other grounds by Adams v. State*, 261 P.3d 758, 773 (Alaska 2011) (recording of witness's prior inconsistent statement was admissible for impeachment and as substantive evidence).

[7] *See Schlosser v. State*, 372 P.3d 272, 278 (Alaska App. 2016) (explaining that in cases of invited error by complaining party, a "clear injustice" must be present to prompt appellate intervention).

[8] *Cf. Adams v. State*, 706 P.2d 1183, 1186-87 (Alaska App. 1985) (comparing cases and acknowledging that "more is required than momentary or fleeting possession of a controlled substance; some sort of dominion or control of the substance is required").

and Vars talked about needing "protection" from intruders. Vars's mother's out-of-court statements and trial testimony were further corroborated by Vars's own statements in the 911 call played at trial about having "protection" and being "armed."

Viewing this evidence in the light most favorable to upholding the verdict — as we are required to do on appeal — we conclude that a fair-minded factfinder could find that the State had proved beyond a reasonable doubt that Vars's possession of the gun was more than "fleeting."[9]

Vars's claim that the superior court erred when it denied his untimely motion to suppress

Vars's defense attorney at trial did not file any pretrial motions. However, during closing argument, the defense attorney argued that the superior court should suppress Vars's statements directing the officers to the gun in the pantry. According to the defense attorney, these statements were obtained in violation of Vars's *Miranda* rights. Vars's attorney did not provide any explanation for why the motion had not been raised earlier.

The prosecutor objected to Vars raising a motion to suppress during closing arguments — after the evidence was already closed and the prosecutor had no notice or opportunity to respond. The superior court agreed and denied the motion to suppress as untimely.

On appeal, Vars argues that it was error to deny his motion to suppress. However, Vars's appellate attorney does not acknowledge the superior court's actual ruling. Instead, Vars's appellate attorney proceeds to argue the merits of the motion as if the motion had been decided on its merits. In the reply brief, the appellate attorney

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[9] *See Dailey v. State*, 65 P.3d 891, 898 (Alaska App. 2003).

finally acknowledges that the motion was denied as untimely, but he asserts that the untimeliness ruling was an abuse of discretion because the trial was a bench trial.

We disagree with Vars's contention that the rules of criminal procedure governing motions to suppress are different in a bench trial than they are in a jury trial.[10] And we find no abuse of discretion in the superior court's denial of the motion as untimely given that it was not raised until closing argument after the evidence in this case was closed.

Vars's sentence claims

As already mentioned, Vars received a composite sentence of 5 years' imprisonment with 2 years suspended (3 years to serve). On appeal, Vars argues that the superior court erred when it rejected his proposed mitigator that his conduct was "among the least serious conduct included in the definition of the offense."[11]

The existence of a mitigating factor is a mixed question of law and fact.[12] We review the superior court's findings of fact under a clearly erroneous standard of review; however, we review de novo the legal question of whether those facts establish

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[10] *See* Alaska R. Crim. P. 12(b)(3) ("Motions to suppress evidence on the ground that it was illegally obtained . . . shall be raised prior to trial."); 12(d) ("A motion made before trial shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. Where factual issues are involved in determining a motion to suppress evidence, the court shall state its essential findings on the record."); and 12(e) ("Failure by the defendant to . . . make requests which must be made prior to trial . . . shall constitute waiver thereof [. . .].").

[11] AS 12.55.155(d)(9).

[12] *Michael v. State*, 115 P.3d 517, 519 (Alaska 2005).

the statutory mitigator.[13] Here, the superior court found that Vars was a felon who had possessed a handgun while under the influence of methamphetamine. The court also found that Vars had resided in a dwelling with a concealable weapon. These findings are well-supported by the record, and we agree with the superior court's legal conclusion that this conduct did not qualify as among the least serious conduct included in the definition of the offense.

Vars also argues that his sentence is excessive. We review a criminal sentence under the "clearly mistaken" standard, a deferential standard of review that recognizes a "permissible range of reasonable sentences which a reviewing court, after an independent review of the record, will not modify."[14] Having independently reviewed the record in this case, we conclude that the sentence is not clearly mistaken.

Conclusion

The judgment of the superior court is AFFIRMED.

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[13] *Id.*

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