IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STEAVIN REED MARTIN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13447 Trial Court No. 3AN-18-02492 CR MEMORANDUM OPINION No. 7018 — August 3, 2022

Appeal from the Superior Court, Third Judicial District, Anchorage, Dwayne W. McConnell, Judge.

Appearances: Jay A. Hochberg, Attorney at Law, 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 Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge WOLLENBERG.

Following a jury trial, Steavin Reed Martin was convicted of first-degree vehicle theft, first-degree failure to stop at the direction of a peace officer, and driving under the influence.[1] Martin appeals his convictions, raising two claims.

First, Martin argues that the trial court erred in denying his motion to dismiss his case under Alaska Criminal Rule 45. Second, Martin contends that the trial court's refusal to instruct the jury on the crime of negligent driving as a lesser included offense of first-degree failure to stop (*i.e.*, felony eluding) and driving under the influence requires reversal of those convictions.

For the reasons explained in this opinion, we reject Martin's claims, and we affirm his convictions.

Background facts and proceedings

On March 15, 2018, Angelia Blow drove her daughter's Hyundai Sonata to work. Some time later, she discovered that the car was missing from its parking space. Security videos showed Steavin Martin and Cherilyn Serradell — two individuals Blow had assisted at the office earlier in the day — driving the car out of the parking lot after Serradell took the keys off the front desk.

The next day, Anchorage Police Officer David Noll was patrolling the Seward Highway near Girdwood when he encountered a Sonata that was speeding. Noll drove up behind the car, activated his lights, and — when the car did not pull over — turned on his siren. The Sonata continued driving for several miles, drifting back and forth in its lane. When the two-lane road expanded to four lanes, Noll pulled up alongside the car, which then swerved into Noll's lane and almost collided with his vehicle. Noll slammed on his brakes to avoid a crash. According to dashcam footage

[1] AS 11.46.360(a)(1), AS 28.35.182(a), and AS 28.35.030(a)(1), respectively.

from a few moments later, the Sonata then veered into oncoming traffic and nearly collided with a pick-up truck. At that point, Noll stopped giving chase out of concern for public safety. Over the police radio, he learned that the Sonata had been reported stolen.

Eventually, Noll found the Sonata stopped at the side of the road, straddling the fog line. Martin was walking away from the car, and Noll told him that he was under arrest. As Noll took Martin into custody, Noll observed that Martin was perspiring heavily, his breath had a chemical odor that Noll associated with the use of drugs like methamphetamine, his speech was rapid and slurred, his eyes were bloodshot, his pupils were constricted, and his eyelids were droopy. Martin then fell asleep on the way to the station. A search of Martin's person yielded car keys, hypodermic needles, and a glass pipe.

At the station, Martin performed poorly on field sobriety tests. For example, he swayed during the one-leg-stand test, and he had trouble completing the walk-and-turn test. Noll obtained a warrant to collect a blood sample, which later tested positive for amphetamine and methamphetamine.

On March 17, 2018, the State charged Martin with first-degree vehicle theft, first-degree failure to stop at the direction of a peace officer, and driving under the influence.[2] Martin's case proceeded to a jury trial, which began on September 17, 2018 — 184 days later. Martin objected to the speedy trial calculation in his case and filed a motion to dismiss under Alaska Criminal Rule 45. The trial court denied Martin's motion.

[2] Martin was also charged with second-degree theft, but the State later dismissed that charge.

At trial, Martin's counsel proposed a jury instruction on negligent driving in relation to the felony eluding charge. The court declined to give this instruction, reasoning that — while negligent driving was a lesser included offense of reckless driving — negligent driving was not a lesser included offense of felony eluding.

The jury returned guilty verdicts on all three counts.

Why we uphold the trial court's denial of Martin's motion to dismiss

We first address Martin's argument that the trial court erred in denying his motion to dismiss under Criminal Rule 45, Alaska's speedy trial rule. Under Criminal Rule 45, a defendant must generally be brought to trial within 120 days of being served with the charging document.[3] Martin was originally arraigned on March 17, 2018, and his trial commenced on September 17, 2018 — 184 days later.

Martin acknowledges that, under Criminal Rule 45(d), certain periods of time were properly excluded in his case from the 120-day speedy trial calculation. However, he challenges the trial court's exclusion of two discrete periods of time. The State disputes Martin's claims, but asserts that, in any event, Martin's case complied with Rule 45 because sufficient time tolled even absent the disputed periods.

Having reviewed the record, we agree with the State that we need not resolve Martin's challenges to the two disputed periods of time. Even assuming time should have run during these periods, there was no Rule 45 violation entitling Martin to dismissal.

Because Martin was brought to trial within 184 days of his arraignment, Rule 45 would generally only be satisfied if 64 of those days were properly excluded. But under Alaska Criminal Rule 40(a), if the last day of a period of time falls on the

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[3] Alaska R. Crim. P. 45(b), (c)(1).

weekend, then the period runs until the next business day.[4] Because Martin's trial began on September 17 — a Monday — Rule 45 was satisfied even if the speedy trial period ended on the preceding Saturday or Sunday. That is, so long as at least 62 days were properly excluded, then Martin's right to a speedy trial under the criminal rules was satisfied. A review of the record demonstrates that 62 days were, in fact, properly excluded from the Rule 45 calculation.

Martin had his first appearance in court on March 17, 2018, and his case was scheduled for a pre-indictment hearing on March 20. Martin's attorney subsequently continued the March 20 hearing off-record, until March 27. Under Rule 45(d)(2), the trial court properly tolled the speedy trial clock during this one-week period, from March 20 to March 27.[5]

(In his reply brief, Martin contends that on March 20, his trial attorney set his case for a Criminal Rule 5 hearing, declining to waive time under Rule 45. But Martin mistakenly cites to the log note for the March 27 hearing, which occurred one week later. Indeed, when Martin's attorney filed his motion to dismiss in the trial court,

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[4] Alaska Criminal Rule 40(a) provides, in relevant part: "Except as otherwise specifically provided in these rules, in computing any period of time, the day of the act or event from which the designated period of time begins to run is not to be included. The last day of the period is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday."

[5] *See* Alaska R. Crim. P. 45(d)(2) (excluding from the Rule 45 speedy trial calculation "[t]he period of delay resulting from an adjournment or continuance granted at the timely request or with the consent of the defendant and the defendant's counsel"); *State v. Jeske*, 823 P.2d 6, 8 (Alaska App. 1991) ("[T]his court and the Alaska Supreme Court have repeatedly stated that the trial court can rely on a defense attorney's request for a continuance and need not seek a separate, personal consent from the defendant unless the defendant affirmatively objects to the defense attorney's action.").

he did not dispute that time tolled under Rule 45 for the period of time between March 20 and March 27.)

At the subsequent Rule 5 hearing, the State dismissed the felony counts after failing to present Martin's case to a grand jury. The misdemeanor charge of driving under the influence remained, and, after being released on bail, Martin failed to appear at a pretrial conference on May 7. The court continued Martin's case for one week, to a pretrial conference on May 14. When Martin again failed to appear, the court issued a bench warrant. Martin was arraigned on the bench warrant six days later, on May 20, 2018.

On appeal, Martin does not contest that the period of time from May 7 to May 20 — a period of 13 days — was properly excluded from the Rule 45 clock under Rule 45(d)(4) due to Martin's unavailability.[6]

A grand jury subsequently returned an indictment, and Martin was arraigned in the superior court on June 4, 2018. At the next pretrial conference on June 18, Martin's attorney requested a continuance until July 23, and the court excluded an additional 35 days from the Rule 45 calculation. Martin does not challenge this ruling.

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[6] *See* Alaska R. Crim. P. 45(d)(4) (excluding from the Rule 45 speedy trial calculation "[t]he period of delay resulting from the absence or unavailability of the defendant"). In the trial court, Martin's attorney conditionally challenged this time, suggesting that "if Martin was under the supervision of [the] Pretrial Enforcement Division and residing at the Cordova Center," the speedy trial clock should have run. But Martin's attorney never argued or asserted that this condition actually applied, and the court clerk informed the court and the parties at the May 7 hearing that Martin had been released from custody following his April 11 bail hearing.

At a later pretrial conference, on August 13, 2018, Martin's attorney again requested another continuance — this time, of one week. Martin also does not challenge the exclusion of this 7-day period of time from the speedy trial calculation.

All together, the time that was excluded — 7 days from March 20 to March 27, 13 days from May 7 to May 20, 35 days from June 18 to July 23, and 7 days from August 13 to August 20 — totaled 62 days. That is, at least 62 days were properly tolled. We therefore conclude that there was no Rule 45 violation, and the court did not err in declining to dismiss Martin's case under Rule 45.

Why we reject Martin's claims that he was entitled to an instruction on negligent driving as a lesser included offense

Martin also argues that he was entitled to an instruction on negligent driving as a lesser included offense of both first-degree failure to stop and driving under the influence.

First-degree failure to stop (*i.e.*, felony eluding) is an aggravated form of second-degree failure to stop. A person commits second-degree failure to stop, the base-level offense, if the person knowingly fails to stop their vehicle as soon as practical and in a reasonably safe manner under the circumstances when requested or signaled to do so by a peace officer.[7] The crime is elevated to first-degree failure to stop if one of three statutory circumstances is present.[8] Two are relevant here — that the person failing to stop was also committing the crime of either (1) reckless driving, or (2) vehicle theft. Martin was charged with first-degree failure to stop under both of these theories.

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[7] AS 28.35.182(b).

[8] AS 28.35.182(a). First-degree failure to stop is a class C felony; second-degree failure to stop is a class A misdemeanor. AS 28.35.182(e).

We need not decide whether negligent driving is a lesser included offense of first-degree failure to stop because any failure to instruct on this offense is harmless beyond a reasonable doubt in this case.[9] Martin was convicted of driving under the influence under an impairment theory after driving poorly in traffic, thus effectively establishing his guilt of the crime of reckless driving — one of the charged theories of felony eluding.[10] The jury also found Martin guilty of vehicle theft — the second charged theory of felony eluding — and Martin did not argue to the jury, nor does he contend on appeal, that he had already completed the crime of vehicle theft at the time he engaged in eluding.[11] For these reasons, any error in failing to instruct the jury on negligent driving as a lesser included offense of felony eluding did not prejudice Martin.

With respect to Martin's claim that the trial court should have instructed the jury on negligent driving as a lesser included offense of driving under the influence, we conclude that this claim is not preserved. Although the trial court and the parties discussed the jury instructions for the vehicle theft and eluding charges at length, the record is devoid of any substantive discussion about the instructions for the driving under the influence charge — except a single remark by defense counsel asking the court to move the definition of "under the influence" from one instruction to another.

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[9] *See Christie v. State*, 580 P.2d 310, 320 (Alaska 1978) (applying harmless error review to erroneous failure to give a lesser included offense instruction).

[10] *See Comeau v. State*, 758 P.2d 108, 114-15 (Alaska App. 1988) (holding that a person who drives on a public roadway, in the presence of other traffic, while actually impaired by alcohol, is guilty of reckless driving); *see also Bertilson v. State*, 64 P.3d 180, 183 (Alaska App. 2003).

[11] Indeed, in his reply brief, Martin concedes that the jurors "would have logically had to conclude" that his act of eluding was elevated to first-degree failure to stop on this basis, but asserts that the error was structural and thus not susceptible to harmless error review.

Since this issue is not preserved, we review Martin's claim for plain error.[12] In *Heaps v. State*, we declined to find plain error from the failure to *sua sponte* instruct the jury on lesser included offenses, suggesting that it was not the trial court's role to potentially alter the parties' litigation strategies by offering alternative verdicts to the jury in the absence of a request.[13] We also noted that the majority of jurisdictions had rejected the view that trial judges have an independent duty to instruct the jury on lesser included offenses in the absence of a request from either party.[14]

We similarly decline to find plain error here. Martin defended against the charge of driving under the influence on the ground that he was not impaired by methamphetamine. And he never requested a lesser included instruction on the offense of reckless driving.[15] Under the circumstances of this case, we decline to find plain error.

Finally, we note that Martin contests the application of a prejudice analysis, arguing that the absence of an instruction on negligent driving entitles him to automatic reversal because it denied him the right to have the jury deliberate on "all the available legal options." For support, he relies on *Jordan v. State*, in which the Alaska Supreme

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[12] *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

[13] *Heaps v. State*, 30 P.3d 109, 115-16 (Alaska App. 2001).

[14] *Id.*

[15] *See Lajiness v. State*, 1997 WL 129084, at *1 (Alaska App. Mar. 19, 1997) (unpublished) ("[W]hen a defendant charged with DWI elects to bypass a lesser-included offense instruction on the intermediate offense of reckless driving, neither elemental similarity nor legislative mandate compels a lesser-included offense instruction on negligent driving. In short, negligent driving is not a stand-alone lesser-included offense of DWI.").

Court held that "the omission from jury instructions of a contested and essential element of the offense [is] structural error."[16]

But the supreme court has previously applied harmless error review to the failure to give a lesser included offense instruction.[17] Moreover, the central right protected by the supreme court's decision in *Jordan* is the right to a jury determination on every contested element of the offense.[18] Negligent driving is not an element of any of the offenses with which Martin was charged. For these reasons, we reject Martin's application of *Jordan* to this case.

Conclusion

The judgment of the superior court is AFFIRMED.

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[16] *Jordan v. State*, 420 P.3d 1143, 1159 (Alaska 2018).

[17] *See Christie v. State*, 580 P.2d 310, 320 (Alaska 1978).

[18] *See Jordan*, 420 P.3d at 1156 (endorsing the dissenting position in *Neder v. United States*, 527 U.S. 1 (1999)); *Neder*, 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in part) (contending that the omission of an element from the jury instructions is structural error because the omission prevents the jury from reaching a decision on every element of the offense, which in turn means that the jury will have failed to return a verdict amenable to harmless error review).