

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.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JEREMY C. NELSON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11414  
Trial Court No. 3PA-11-170 CR

MEMORANDUM OPINION

No. 6336 — May 25, 2016

Appeal from the Superior Court, Third Judicial District, Palmer,  
Beverly Cutler, Judge.

Appearances: Michael Schwaiger, Assistant Public Defender,  
and Quinlan Steiner, Public Defender, Anchorage, for the  
Appellant. Diane L. Wendlandt, Assistant Attorney General,  
Office of Criminal Appeals, Anchorage, and Craig W. Richards,  
Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley,  
District Court Judge.\*

Judge ALLARD.

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\* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Jeremy C. Nelson was convicted of first-degree murder<sup>1</sup> and attempted first-degree murder<sup>2</sup> after he shot two neighbors at their cabin in Trapper Creek.<sup>3</sup> Nelson argues that the superior court impermissibly limited his cross-examination of two of the State’s witnesses, by ruling that his attorney had to disclose the witnesses’ prior inconsistent statements to them before the recordings of those statements were played to the jury. Nelson contends that he is entitled to a new trial because the court’s error diminished the witnesses’ “shock and embarrassment” at being confronted with their prior inconsistent statements.

We agree with Nelson that the superior court was mistaken about the procedure that governs impeachment of a witness with extrinsic evidence of a prior inconsistent statement. But we conclude that Nelson is not entitled to reversal of his convictions on this basis because the court’s error did not prejudice Nelson’s ability to attack the credibility of the two witnesses.

Nelson also argues that the superior court erred by allowing the State to call Nelson’s girlfriend as a rebuttal witness after she listened to the testimony of other rebuttal witnesses — which Nelson asserts was in violation of a court order excluding witnesses from the courtroom. For the reasons explained here, we conclude that the superior court did not abuse its discretion by allowing this witness to testify.

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<sup>1</sup> AS 11.41.100(a)(1)(A).

<sup>2</sup> AS 11.41.100; AS 11.31.100.

<sup>3</sup> Nelson was also convicted of first-degree assault, AS 11.41.200(a)(1), and second-degree assault, AS 11.41.210(a)(1), but those assault counts were merged with the attempted murder conviction at sentencing.

*Facts and proceedings*

On January 22, 2011, Verna and Robert Carey were living in a cabin in Trapper Creek. Around 10:00 p.m. that evening, the lights in their cabin went out. When the Careys went outside to investigate, they saw a neighbor, Jeremy Nelson, standing by their cabin's generator. According to Verna Carey, Nelson was wearing camouflage and snowshoes. He was holding a shotgun and a pistol.

Nelson told the Careys he was looking for someone. Robert Carey responded that Nelson was on private property and that he had to leave. After repeating that he was looking for someone, Nelson leveled the shotgun and shot Robert Carey in the chest, killing him.

Verna Carey turned and ran inside the cabin. She made it through the cabin's mud room, but Nelson shot her in the shoulder. Verna lay on the cabin floor and played dead. After Nelson left, she called 911 and told the operator that Nelson had shot her and Robert. She told the operator that the police would have to kill Nelson because he would not "go down" otherwise.

The troopers eventually located Nelson in the covered bed of a pickup truck parked on the nearby property of Rudy Gestl. According to Gestl, Nelson came to his cabin shortly after 11:00 p.m. and told him that he had killed Robert and Verna Carey. Nelson told Gestl he unplugged the Careys' generator and shot and killed them after they came outside to investigate. Nelson told Gestl that Robert Carey had been stalking Nelson's girlfriend, Kerry Cook.

The State charged Nelson with first-degree murder for shooting Robert Carey and with attempted first-degree murder, first-degree assault, and second-degree assault for shooting Verna Carey.

At Nelson's trial, Verna Carey identified Nelson as the shooter and Gestl testified to Nelson's confession. The State also presented physical and circumstantial

evidence of Nelson's guilt. A trooper testified that he observed snowshoe tracks leading from Nelson's cabin to the Careys' cabin and back. The tracks matched snowshoes found in Nelson's cabin, and Nelson's girlfriend Cook identified the snowshoes as belonging to Nelson. A bloodstain was found on one of the snowshoes and DNA testing did not exclude Robert Carey as a source of the blood.

In addition, the State's ballistics expert identified a .45 caliber pistol found in Nelson's cabin as the gun that fired a bullet found lodged in the wall inside the Careys' cabin. The expert also determined that a shotgun shell found in the entryway of the Careys' cabin was fired from a 12-gauge shotgun found in Nelson's cabin, and that 12-gauge slugs discovered in Nelson's cabin matched the slug recovered from Robert Carey.

To suggest a motive for the shooting, the State presented evidence that Nelson told an employee of a local bank that Freddie Carey — the son of Verna and Robert — had been after his girlfriend Kerry Cook, and that if Freddie ever came near Cook, he would kill him. In closing argument, the State suggested that Nelson might have gone to the Careys' cabin looking for Freddie.

The State also presented evidence that the troopers found Nelson hiding in a truck outside Gestl's cabin, and that Nelson refused to come out for two hours. Lastly, the State introduced evidence that Nelson told various witnesses, including his girlfriend, an entirely different version of events than he related to Gestl — a version even the defense attorney conceded in closing argument was "total BS." The State pointed to this other, fabricated story as additional circumstantial evidence of Nelson's guilt.

In his defense, Nelson argued that the State's investigation was inadequate and that there were several other potential suspects who might have framed Nelson — including Verna Carey and Rudy Gestl. Nelson also argued that Verna Carey's testimony was so implausible that the jury could not be certain of Nelson's guilt.

The jury found Nelson guilty of all charges. He now appeals.

*Why we conclude that the superior court erred in limiting Nelson's cross-examination of two of the State's witnesses, but that the error was harmless*

Nelson argues that he is entitled to a new trial because he claims that the superior court precluded him from effectively impeaching Verna Carey and Rudy Gestl, two of the State's witnesses, with evidence of their prior inconsistent statements.

Nelson's first claim of error involves Verna Carey's statements to the 911 operator on the night of the shooting. When Nelson's attorney cross-examined Carey, he asked her if she told the 911 operator that "[the police are] going to end up having to kill Jeremy, Jeremy won't go down otherwise, he'll kill whoever he can." Carey responded that she might have made this statement, but that she did not remember making it. The attorney then asked Carey if she remembered telling the 911 operator that "[the police] shouldn't even hesitate, he'll shoot anybody." Carey answered "no."

The defense attorney then suggested that listening to the 911 recording might remind Carey of her prior statements. The judge then interrupted and told the defense attorney, in a bench conference, that if he wanted to play Carey's recorded statement, he had to give her a chance to review the statement first.

The defense attorney clarified that he was not simply offering the recorded statement to refresh Verna Carey's memory, but also as evidence of a "prior inconsistent statement." The judge maintained that, even so, the attorney had to allow Carey to review the statement before it was introduced. The judge then excused the jury and the defense attorney played the audio recording for Carey. Carey then indicated that she recalled making the statements.

The defense attorney then told the judge that he intended to play the 911 recording for the jury and to question Carey about her prior statements. The judge ruled

that the attorney could play the recording for the jury but only after he had allowed Carey to testify in the jury's presence whether she recalled making the statements. (This ruling was apparently based on the judge's belief that this procedure was required by Alaska Evidence Rule 801(d), the rule providing that a prior inconsistent statement is not hearsay and is admissible if "the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement.")

Nelson's attorney objected, arguing that Evidence Rule 613(b) allowed him to impeach a witness with extrinsic evidence of a prior inconsistent statement without this procedure. The judge declined to reconsider her ruling.

Thus, after the jury was recalled, Carey first testified that she made the statements at issue, and Nelson's attorney then played the recording of the 911 call.

The superior court made a similar procedural ruling during the defense attorney's cross-examination of Rudy Gestl. The attorney asked Gestl if he remembered telling the troopers on the night of the shooting that Nelson was high on drugs. Gestl said he did not remember telling the troopers that. The judge ruled that the attorney could not play the recording of Gestl's statement for the jury unless Gestl was first given the opportunity to hear the recording.

Following this ruling, Nelson's attorney elected not to cross-examine Gestl about his prior statement. Instead, the attorney called a trooper to testify that on the night of the shooting Gestl told him Nelson had been drinking and smoking marijuana.

On appeal, Nelson argues that the superior court's rulings were mistaken and that he should have been allowed to play Verna Carey's and Gestl's prior inconsistent statements to the jury without first giving them the opportunity to hear the statements.

We agree that the superior court was mistaken about the procedure required to impeach a witness with extrinsic evidence of a prior inconsistent statement. At

common law, the proponent of a witness's prior inconsistent statement *was* required to show the witness the statement before questioning the witness about the statement.<sup>4</sup> But as we have previously explained, that common law rule was abolished by Alaska Evidence Rule 613(b).<sup>5</sup> Under Rule 613(b), before extrinsic evidence of a prior inconsistent statement may be admitted, the examiner must “afford[] the witness the opportunity, while testifying, to explain or deny [the] prior statement,” but the statement “need not be shown nor its contents disclosed to the witness at that time[.]”<sup>6</sup> As the commentary to Rule 613(b) explains, in general the only foundation required to impeach a witness with a prior inconsistent statement is to ask the witness “to identify the statement after being reminded of its substance and to whom it was made, and either to admit having made the statement and explain the circumstances, or to deny it.”<sup>7</sup>

As noted earlier, the superior court appeared to believe that Evidence Rule 801(d) required the defense attorney to give the witness a chance to review the prior inconsistent statement outside the jury's presence. But the commentary to Evidence Rule 801(d) does not suggest that any greater foundation is required to introduce extrinsic evidence of a prior inconsistent statement under that rule; indeed, the commentary to Rule 801(d) references the foundation required by Evidence Rule 613(b)(2).<sup>8</sup>

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<sup>4</sup> See Alaska Evid. R. 613(b), cmt. para. 5 (citing *Queen Caroline's Case*, 2 B. & B. 284, 286-90, 129 Eng. Rep. 976 (1820)).

<sup>5</sup> See *Active v. State*, 153 P.3d 355, 362 (Alaska App. 2007).

<sup>6</sup> Alaska Evid. R. 613(b)(2).

<sup>7</sup> See Alaska Evid. R. 613(b) cmt. para. 2. When the witness admits to making the prior inconsistent statement, the trial court has discretion to admit extrinsic evidence of the statement. *Clifton v. State*, 758 P.2d 1279, 1283 (Alaska App. 1988).

<sup>8</sup> Alaska Evid. R. 801(d)(1)(A) cmt; *Vaska v. State*, 135 P.3d 1011, 1016 & n.18 (Alaska 2006).

The superior court therefore erred in ruling that, before the defense attorney could impeach the witnesses with extrinsic evidence of their prior inconsistent statements, those statements had to be disclosed to the witnesses. As we just explained, under Alaska law it is sufficient that, during the witness's testimony, the witness be apprised of the substance and circumstances of the statement and be given the opportunity to explain or deny the statement.

We nevertheless conclude that the court's error was harmless in this case. Nelson argues that the court's rulings infringed upon his constitutional right to cross-examine the State's witnesses for bias, and that the State therefore must prove that the court's error was harmless beyond a reasonable doubt. We do not view the judge's rulings as constitutional error, but even if they were, we conclude that the errors were harmless beyond a reasonable doubt given the way in which this case was argued and presented to the jury.

As we recounted, before Nelson asked Carey about her prior statements, the attorney recited the statements to her, apparently verbatim, and Carey said she did not remember saying them. The judge then interrupted the cross-examination and the 911 recording was played to Carey outside the presence of the jury. When the jury was recalled, Carey testified that she did, in fact, make the statements, and Nelson's attorney played the 911 recording for the jury. We conclude that even if the court had allowed Nelson's attorney to "surprise" Carey in front of the jury with the recording of her statements to the 911 operator, this would not have altered the jury's assessment of Carey's credibility.

We reach the same conclusion with respect to Gestl's prior statement that Nelson was "high" on the night of the shooting. Nelson's attorney ultimately chose not to confront Gestl with this statement; instead, the attorney elicited the prior inconsistent statement through the testimony of a trooper, who testified that Gestl told him Nelson

had smoked marijuana that night. To challenge the credibility of Gestl’s prior assertion, Nelson’s attorney pointed to evidence that a test of Nelson’s hair conducted after the shooting did not reveal the presence of marijuana. The attorney also attacked Gestl’s credibility through other means — pointing out that Gestl asked for an attorney and invoked his right against self-incrimination on the night of the shooting; that he said nothing to the troopers about Nelson’s confession until months later; and that he laughed during his initial interview when the troopers suggested that Verna Carey might have suffered a life-threatening injury, as if he already knew that Carey’s wound was superficial. Given this record, we conclude that the jury’s assessment of Gestl’s credibility would also have been no different if Nelson’s attorney had been permitted to “surprise” Gestl with his statement to the troopers that Nelson was high on the night of the shooting.

We conclude that the superior court’s erroneous evidentiary rulings were harmless because they had no effect on the jury’s verdict.

*Why we conclude that the superior court did not abuse its discretion by allowing Nelson’s girlfriend to testify in the State’s rebuttal case*

Nelson next argues that the court erred in allowing the State to recall Kerry Cook, Nelson’s girlfriend, as a rebuttal witness, because Cook had been sitting in the courtroom listening to the testimony of other rebuttal witnesses.

Under Alaska Evidence Rule 615, if a party requests it, or on the court’s own motion, a court may exclude witnesses from the courtroom. The purpose of this rule is to prevent the “fabrication, inaccuracy and collusion” that might result if a witness is exposed to another witness’s testimony.<sup>9</sup>

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<sup>9</sup> Alaska Evid. R. 615 cmt. para. 1.

Here, before the defense presented its case, the prosecutor asked the court to exclude all “civilian witnesses” (that is, non-law enforcement witnesses) from the courtroom under Evidence Rule 615. Nelson did not object, and the court ordered the witnesses to sit in the hallway.

After the defense rested its case, the State called several rebuttal witnesses, including Cook, who had testified earlier in the State’s case-in-chief. The defense attorney objected to Cook’s testimony, pointing out that she had been present in the courtroom that day while several rebuttal witnesses testified — in violation, the defense attorney argued, of the judge’s exclusion order.

In response, the court pointed out that the defense attorney never moved to exclude the State’s witnesses. The defense attorney did not dispute this, but he argued that he had concurred in, and relied on, the State’s motion.

The superior court declined to exclude Cook as a witness. The judge said “I would feel differently if I thought there was some bad faith here and some advantage trying to be gained. But it seems to be an inadvertence and my ruling is [the] defense does not get the relief of having [Cook] excluded.” The judge noted that Nelson’s attorney could cross-examine Cook about her presence in the courtroom during rebuttal and whether it affected her testimony.

On appeal, Nelson argues that he was prejudiced by Cook’s rebuttal testimony that she and Nelson were “still very much in love.” He points out that the State relied on this testimony in closing argument to suggest that Cook was protecting Nelson when she testified that she had little memory of the night of the shooting.

Nelson contends that this testimony and the State’s related closing argument undermined Cook’s credibility with the jury. Even if this is true, Nelson has not established any nexus between Cook’s testimony that she and Nelson were still in love and her exposure to the testimony of other rebuttal witnesses. That is, Nelson has not

shown, or even suggested, that Cook's testimony was influenced by her presence in the courtroom while other rebuttal witnesses testified. Nor are we persuaded by Nelson's argument that the implication of bias from Cook's testimony that she loved Nelson was significantly greater because she had heard the rebuttal testimony of other witnesses.

The record supports the superior court's findings that there was no bad faith on the prosecutor's part and that the failure to exclude Cook from the courtroom was based on inadvertence. The record also shows that Nelson did not propose any remedy less drastic than exclusion of Cook's testimony, such as a cautionary instruction to the jury. Given these circumstances, we conclude that the court did not abuse its discretion in permitting Cook to testify in the State's rebuttal case.<sup>10</sup>

### *Conclusion*

We AFFIRM the judgment of the superior court.

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<sup>10</sup> See *Babcock v. State*, 685 P.2d 721, 726-27 (Alaska App. 1984); *Schroff v. State*, 627 P.2d 653, 655-56 (Alaska App. 1981).