IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JASON NEIL DOWNARD, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11513 Trial Court No. 3SP-09-125 CR MEMORANDUM OPINION No. 6472 — May 24, 2017

Appeal from the Superior Court, Third Judicial District, Kodiak, Steve W. Cole, Judge.

Appearances: Doug Miller, Law Office of Douglas S. Miller, Anchorage, for the Appellant. Elizabeth T. Burke, 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 Suddock, Superior Court Judge.[*]

Judge MANNHEIMER.

Jason Neil Downard appeals his convictions for first-degree sexual assault and second-degree assault. These convictions arose from an episode in which Downard beat, strangled, and raped a woman while he was a social guest in the woman's home.

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

Downard raises two claims on appeal. First, he contends that the trial judge committed error by removing one of the jurors from the panel and replacing this juror with an alternate. Second, Downard contends that the trial judge committed error when the judge allowed the jurors to continue listening to a replay of certain trial testimony for about half an hour beyond the previously agreed cut-off point of 8:00 p.m.

For the reasons explained in this opinion, we conclude that neither of the trial judge's actions requires a reversal of Downard's convictions.

Underlying facts pertaining to the trial judge's removal of juror A.C.

Downard's first trial on these charges was held in Sand Point. After that trial ended in a mistrial, the venue in Downard's case was moved to Kodiak, and Downard's second trial began in November 2011.

By the late afternoon of Thursday, November 10th, jury selection was completed, and the panel of jurors (consisting of twelve regular jurors and two alternates) had taken their oath. But when the court reconvened a few days later to begin the presentation of the case, the prosecutor alerted the judge and the defense attorney that there was a potential problem with one of the regular jurors, A.C.

During jury selection, A.C. (like the other potential jurors) was asked if he or any member of his family had ever been "involved in a lawsuit or had come to court." In response to this question, A.C. stated that no one in his family had ever been involved in a lawsuit or had come to court.

The prosecutor informed the court that, while jury selection was taking place in Downard's case, a longtime employee of the Division of Juvenile Justice had been sitting in the courtroom, waiting for a hearing in another case. This employee alerted the district attorney's office that she recognized juror A.C. Eight years before,

A.C. had been prosecuted as a juvenile for first-degree sexual assault and fourth-degree sexual abuse of a minor, and he was ultimately adjudicated a delinquent minor based on the sexual abuse charge.

In response to this information, the trial judge took testimony from the Division of Juvenile Justice employee, and the judge also examined A.C.'s juvenile records. The Juvenile Justice employee reiterated that A.C. had been adjudicated a delinquent minor for sexual abuse of a minor, and the employee added that A.C.'s brother, with whom A.C. lived, had been convicted of sexual abuse of a minor (as an adult) and was required to register as a sex offender.

Based on this evidence, and on A.C.'s responses during jury selection, the trial judge found that juror A.C. had committed a "serious violation" of his duty to provide truthful answers to the jury selection questions.

The prosecutor asked the trial judge to re-designate A.C. as an alternate juror, and then discharge him from the jury and have one of the previously designated alternate jurors take his place.

Downard's attorney conceded that, at least with regard to A.C.'s own prior juvenile prosecution for sexual assault and sexual abuse, "we would have thought that he would have disclosed that" during jury selection. But Downard's attorney took the position that it would be improper to discharge A.C. and replace him with one of the alternate jurors. The attorney argued that, once the jury panel was sworn, there was only one legal method to deal with this kind of problem: declare a mistrial.

The trial judge rejected the defense attorney's position that the only thing to do was declare a mistrial. Instead, the judge re-designated A.C. as an alternate juror, and then the judge immediately discharged A.C. from the jury and replaced him with one of the previously designated alternates.

Following this incident, the actual trial of the case began, and the jury ultimately found Downard guilty.

Downard's arguments on appeal regarding the removal of juror A.C.

On appeal, Downard abandons his trial attorney's position that the trial judge's only option under these circumstances was to declare a mistrial. Instead, Downard argues that the trial judge committed error by not pursuing one of the following courses of action: (1) conducting or allowing additional *voir dire* examination of A.C., *or* (2) leaving A.C. on the jury, *or* (3) allowing Downard's trial counsel time to petition this Court for review, *or* (4) declaring a mistrial.

Although Downard now argues that the trial judge should not have made any finding regarding A.C.'s violation of his duty as a juror without questioning A.C. further (or allowing the parties to question A.C. further), Downard's trial attorney did not press the judge to pursue this approach. Rather, the record of the trial proceedings shows that, once the judge and the parties heard the testimony of the Division of Juvenile Justice employee, and once they examined A.C.'s juvenile records, none of them doubted that A.C. had violated his duty to answer questions truthfully.

On appeal, Downard suggests that when A.C. was asked whether he had ever been "involved in a lawsuit", he might not have understood what the word "lawsuit" meant. But there is nothing to suggest that A.C. failed to understand the concept of "coming to court" — and A.C. denied under oath that he or any member of his family had ever come to court.

Moreover, Downard's trial attorney did not ask the judge for an opportunity to question A.C. about his answers during jury selection, or about his prior delinquency adjudication for sexual abuse of a minor. Rather, the defense attorney acknowledged that

"we would have thought that [A.C.] would have disclosed" his prior delinquency prosecution during jury selection.

On appeal, Downard points out that, at one point during the trial judge's ruling, the judge declared that A.C. "knew or *should have known*" that he needed to disclose his prior delinquency prosecution for sex offenses. Downard argues that if A.C. was merely negligent when he failed to disclose this delinquency prosecution — that is, if A.C. somehow subjectively failed to understand that he was being asked about this prior adjudication — then the trial judge was wrong to find that A.C. had committed a "serious violation" of his duty as a prospective juror.

But the judge later clarified his ruling, by declaring that the scope of the question about prior lawsuits and about ever coming to court was "really clear to [A.C.]" — and that A.C. "knew" that he was being asked if he or other members of his family had ever had to come to court.

Taking the trial judge's remarks as a whole, and given the evidence in front of the court, the record shows that the judge found that A.C. knowingly concealed his prior delinquency prosecution.

Downard also argues that, after the trial judge ruled that A.C. should be dismissed from the jury, the judge should have stayed the trial for a time, so as to give Downard's trial attorney the opportunity to immediately petition this Court for review of the judge's decision. But Downard's trial attorney was free to seek an emergency stay from this Court regardless of the trial judge's willingness to delay the proceedings himself.

Finally, Downard argues that even if there was good reason to remove A.C. from the jury, the trial judge should not have re-designated A.C. as an alternate juror before discharging him from the jury. Downard contends that "if a trial judge concludes[,] after the jurors have been selected and sworn, that there has been serious

misconduct by a juror, the [judge] should simply remove the juror, letting the chips fall where they may" — in other words, letting the trial proceed if there are still the minimum number of jurors, or declaring a mistrial if there are no longer the minimum number of jurors (and the parties do not stipulate to a smaller jury).

It is unclear from the record why the prosecutor and the trial judge believed that the judge needed to formally re-designate A.C. as an alternate juror before the judge dismissed A.C. from serving on the jury. It wasn't as though the judge wanted to keep A.C. as an alternate juror until the end of the trial, against the possibility that his services might be needed. The judge clearly had decided to remove A.C. from the jury — because, in a single sentence, the judge re-designated A.C. as an alternate and then dismissed him from the jury:

> *The Court*: Mr. [C.], ... some information has been provided to us ... about prior legal issues, legal difficulties that you had, ... that are similar in nature to the offense [Mr. Downard] is charged with[.] ... [So] we have decided to designate you as one of the alternates, and we're going to go ahead and excuse you from sitting in as a juror in this case.
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> *Juror A.C.*: Okay.

Even though the judge may have verbally re-designated A.C. as an alternate juror during this short exchange, the practical effect of the judge's action was to immediately dismiss A.C. from the jury — thus creating an opening on the jury that had to be filled by one of the two previously selected alternates.

This is exactly what Downard now claims the judge should have done: "simply remove the juror, letting the chips fall where they may".

Finally, Downard offers no argument in favor of declaring a mistrial, much less any reason to believe that a mistrial was required under these circumstances.

For these reasons, we uphold the trial judge's ruling in this matter.

The underlying facts pertaining to the trial judge's decision to let the jurors listen to a replay of testimony past 8:00 p.m.

One of the witnesses who testified at Downard's trial was Amy Anderson, the nurse practitioner who performed the sexual assault examination on the victim in this case. Around 7:15 p.m. on the first day of jury deliberations — Friday, November 18th — the jurors asked to hear a replay of the defense attorney's cross examination of Anderson.

The court alerted the prosecutor and the defense attorney that the jurors had made this request, but neither attorney wanted to attend the replay.

By the time the judge, jurors, and court clerk were assembled in the courtroom and the playback of the cross examination was accomplished, it was 8:06 p.m.

The judge had earlier told the jurors that "we usually try to cut [proceedings] off at 8 o'clock, because we don't want jurors to be really tired when they deliberate". The judge noted that it was six minutes past 8 o'clock, and he asked the jurors whether they wished to continue.

The jurors told the judge that they wished to hear the two concluding portions of Anderson's testimony: the prosecutor's re-direct examination and the defense attorney's re-cross examination. Without notifying the attorneys, the judge allowed the jurors to hear these concluding portions of Anderson's testimony. This took another twenty minutes.

(The prosecutor's re-direct examination of Anderson occupies fifteen pages of the transcript, and the defense attorney's re-cross examination of Anderson occupies just over one page.)

After listening to the defense attorney's re-cross examination, the jurors returned to the jury room. A few minutes later, they retired for the evening (after sending a note to the judge asking permission to resume their deliberations two days later, on Sunday).

The jury reconvened at 9:00 a.m. on Sunday the 20th. At that time, they requested a playback of Amy Anderson's *direct* examination (the only portion of Anderson's testimony that they hadn't reviewed on Friday evening). This request was granted — and, after the playback, the jurors resumed their deliberations. Shortly before noon, the jury notified the court that they had reached their verdicts.

Two and a half months later, Downard's attorney filed a motion to set aside the verdicts, arguing that the trial judge had committed error by allowing the jurors to deliberate past 8:00 p.m. without consulting the defense attorney. Specifically, Downard's attorney argued that, when the jurors indicated that they wanted to hear the concluding portions of Anderson's testimony, the judge was required to tell the jurors that there would be no further playback of testimony that evening — and that the jurors would have to convene another day if they wished to hear the remaining portions of Anderson's testimony.

However, the defense attorney did not assert that he had any objection to the jury's *hearing* the remaining portions of Anderson's testimony. Rather, the defense attorney argued only that the 8:00 p.m. cut-off should have been enforced — "to ensure that the jurors did not overtax themselves" and to ensure that the jurors did not become "so rushed as to reach a verdict just for the sake of ending their deliberations."

In other words, the defense attorney never disputed that it was proper to let the jurors hear the requested testimony. Rather, the defense attorney claimed that the jurors should have been required to wait until another day to hear the playback of this testimony.

The trial judge denied the defense attorney's motion on two alternative grounds. First, the judge concluded that it was proper to allow the jurors to continue listening to the replay of Anderson's testimony past 8:00 p.m., even without the defense attorney's express approval. But second, the judge concluded that even if it had been error to allow the jurors to continue listening to Anderson's testimony past 8:00 p.m., and even if the jurors should have been required to reconvene another day to hear the remaining portions of Anderson's testimony, there was no reasonable possibility that the timing of the replay affected their verdicts.

Downard's arguments that the judge committed error by letting the jurors listen to a replay of testimony past 8:00 p.m.

On appeal, Downard renews his claim that the judge committed error by allowing the jurors to stay past 8:00 p.m. to listen to the last two portions of Anderson's testimony (*i.e.*, the re-direct examination and the re-cross examination).

In the superior court, the judge and the parties did not draw a distinction between a playback of testimony and the jury's actual deliberations — *i.e.*, the jurors' discussion of the facts of the case and their active efforts to reach agreement regarding the proper verdicts to be rendered. We therefore assume, for purposes of this case only, that when Downard's trial judge stated that jury deliberations would run no later than 8:00 p.m., he intended to include the playback of testimony.

As we have explained, Downard's trial attorney did not voice any objection to the *fact* that the jurors had heard a replay of these portions of Anderson's testimony. The defense attorney's only objection was to the *timing* of the replay — because the judge had previously announced that jury deliberations should not run past 8:00 p.m.

But in his brief to this Court, Downard's appellate attorney raises new objections to the playback. Primarily, he suggests that when the trial judge acceded to the jurors' request to hear the concluding portions of Anderson's testimony, the judge's action "may have been taken by the jurors as a sign that this particular testimony was especially significant." Downard's appellate attorney also suggests that, had Downard and his trial attorney been personally present to object, the judge might have wholly or partially denied the jurors' request to hear the concluding portions of Anderson's testimony.

Because Downard's trial attorney did not voice either of these objections, Downard's appellate attorney is essentially raising these objections as claims of plain error. And we find Downard's claims of prejudice to be completely speculative.

There was an obvious reason why the jurors asked to hear the concluding portions of Anderson's testimony: the jurors had just listened (with the defense attorney's approval) to the defense attorney's cross examination of Anderson, and the jurors wished to hear the conclusion of Anderson's testimony.

Moreover, the trial judge did not direct the jurors to listen to these concluding portions of Anderson's testimony. Rather, the judge reminded the jurors that it was already several minutes past 8:00, and the judge then let the jurors choose whether to continue listening to the concluding portions of Anderson's testimony.

Given this record, we agree with the trial judge that there is no reasonable possibility that the jury's verdicts were affected by the judge's decision to let the jurors stay another twenty minutes and hear the concluding portions of Anderson's testimony,

rather than requiring the jurors to go home and come back another day to listen to this testimony.

And with respect to Downard's current argument that his trial attorney might have successfully objected to the playback — *i.e.*, that the trial judge might have wholly or partially denied the jurors' request to hear the concluding portions of Anderson's testimony — we again note that, even after Downard's trial attorney learned of the playback, he never voiced any objection to the *fact* that the jurors had heard a replay of these portions of Anderson's testimony. The defense attorney's only objection was to the *timing* of the replay. And even now, on appeal, Downard's appellate attorney does not suggest any plausible objection that might have been raised.

We therefore uphold the trial judge's ruling on this matter.

Conclusion

The judgement of the superior court is AFFIRMED.