IN THE COURT OF APPEALS OF THE STATE OF ALASKA

WYNTER J. CATHEY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12102 Trial Court No. 3PA-13-3322 CR MEMORANDUM OPINION No. 6495 — July 19, 2017

Appeal from the District Court, Third Judicial District, Palmer, John Wolfe, Judge.

Appearances: David T. McGee, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

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

Wynter J. Cathey appeals his convictions for driving under the influence (DUI), first-degree endangering the welfare of a child, and driving in violation of an instructional permit.[1]

Cathey raises three arguments on appeal. First, he contends that the district court committed plain error by failing to instruct the jury on the need for factual unanimity, in light of Cathey's defense that another person had driven the car during part of the time period in question. Second, Cathey challenges the pattern jury instruction on operating a motor vehicle. Third, Cathey argues that the court erred in denying his motion for a mistrial after the State inadvertently violated a protective order by playing an audio clip for the jury where Cathey stated that he was once a convict.

For the reasons we explain here, we reject Cathey's arguments and affirm his convictions.

Background facts

Shortly before midnight on December 2, 2013, James Jimenez was driving to his home near Wasilla. He came upon a vehicle in a ditch, well off the roadway. Jimenez asked if the occupants needed help. Cathey, one of the car's occupants, asked Jimenez to help pull the car out of the ditch. Jimenez found Cathey's behavior to be erratic and declined to help because Jimenez did not think Cathey should be driving in his seemingly impaired state. Jimenez called the police.

Two Alaska State Troopers investigated the incident and then arrested Cathey for driving under the influence. Cathey's blood tested positive for .10 milligrams of methamphetamine per liter of blood.

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[1] AS 28.35.030(a)(1), AS 11.51.100(b), and AS 28.15.051(a), respectively.

The State charged Cathey with driving under the influence (DUI), endangering the welfare of a child (for committing a DUI with a child in the vehicle), and driving in violation of an instructional permit (because he did not have a licensed driver with him while driving).[2]

The State's theory at trial was that Cathey drove the car into the ditch, and that later, after talking to Jimenez, he again operated the vehicle by attempting unsuccessfully to drive it out of the ditch. Cathey's defense was that a friend of his drove the car into the ditch, and then left to get a shovel to dig the car out of the snow. Cathey contended that he never drove the car.

Jimenez testified that the vehicle was well off the roadway when he arrived. One of the investigating troopers also explained that the vehicle was off the roadway, out of the way of plow trucks or other cars.

There was no testimony suggesting that Cathey was able to extricate the vehicle from the ditch. On the contrary, Jimenez testified that the car was high-centered there. Cathey did not cross-examine Jimenez on this point or otherwise suggest that the vehicle ever returned to the road.

The jury convicted Cathey of all three charges.

Cathey's factual unanimity claim

Even though Cathey's defense raised the possibility that two different drivers had driven the car at different times, Cathey did not request, and the trial court did not give, a factual unanimity instruction. Cathey is correct (and the State does not

[2] AS 28.35.030(a)(1), AS 11.51.100(b), and AS 28.15.051(a), respectively.

dispute) that, in light of Cathey's defense, the trial court should have given a factual unanimity instruction.[3]

But the jury found Cathey guilty of driving in violation of his instructional permit, and an element of this charge was that Cathey drove the car "on a highway or vehicular way."[4] The uncontradicted evidence in the case was that Cathey's car came to rest well off the roadway. Thus, of the two alleged instances of driving — the act of driving along the road and into the ditch and the act of attempting to drive out of the ditch — only the act of driving along the roadway before the car went into the ditch could qualify as driving "on a highway or vehicular way."

Since the jury unanimously found that Cathey drove the car on the roadway and into the ditch, the omission of a factual unanimity instruction was, beyond a reasonable doubt, harmless error.[5]

Cathey's challenge to the operating instruction

Prior to trial, Cathey filed a motion objecting to the jury instruction on what conduct amounted to operating a motor vehicle. The trial court overruled Cathey's objection and gave the instruction, which included three factual scenarios and instructed the jury that if the State proved that Cathey had at least as much control as someone in

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[3] *See, e.g.*, *Moreno v. State*, 341 P.3d 1134, 1138 (Alaska 2015) (noting that under Alaska's due process clause, defendant has a right to have jurors agree that defendant committed a single offense); *Covington v. State*, 703 P.2d 436, 440-41 (Alaska App. 1985) (requiring trial court to instruct jury on need for factual unanimity where jury could convict for distinct factual acts).

[4] AS 28.15.051(a).

[5] *Adams v. State*, 261 P.3d 758, 773 (Alaska 2011) ("A constitutional violation ... will be prejudicial unless the State proves that it is harmless beyond a reasonable doubt.").

one of those scenarios, the jury should find him guilty of operating under the influence. On appeal, Cathey renews his challenge to the operating instruction.

In the context of this case, the operating instruction was given to guide the jury's deliberation on whether Cathey operated the vehicle if the jury found that he only sat behind the wheel while in possession of the key. But as we just discussed, the guilty verdict for driving in violation of the instructional permit means that the jury unanimously agreed that Cathey actually drove the vehicle into the ditch while under the influence of methamphetamine. Thus, any arguable error in the operating instruction did not affect the jury's decision.

Cathey's argument that the trial court erred in declining to grant a mistrial

Prior to trial, Cathey filed a motion to exclude statements from his police interview in which he mentioned that he was a felon. The trial court granted Cathey's motion but ordered him to identify the exact portions of the audio to be redacted. Cathey's defense attorney sent the prosecutor an email identifying two audio segments for redaction.

But when the prosecutor played the tape for the jury, the defense attorney objected to another segment where he perceived Cathey to say, "I'm a convict."

Even though the defense attorney had not directed the State to redact this segment, he moved for a mistrial. During a bench conference, the trial judge informed the defense lawyer that the judge had not heard the "convict" statement that the attorney was objecting to. After the judge excused the jury and listened to the disputed segment again, the judge stated that he still could not hear any reference to Cathey being a convict. Ultimately the judge stated that even though he could not discern the reference, he would assume that the defense lawyer had heard it.

The judge denied Cathey's motion for a mistrial. The judge noted that the statement was very difficult to hear. The judge also faulted Cathey's attorney for failing to flag that audio clip for the State despite the court's order to do so. The judge offered to give a curative jury instruction, but Cathey never requested one.

On appeal, Cathey renews his argument that the trial court erred in denying his motion for a mistrial.

We have listened to the audio of Cathey's interview with the state trooper. The trial judge's conclusion that the "convict" statement was very difficult to hear is well-supported and not clearly erroneous.[6] And it was the defense attorney's oversight that allowed the challenged clip to be played in court. Under these circumstances, the judge did not abuse his discretion in denying Cathey's motion for a mistrial.[7]

Conclusion

We AFFIRM Cathey's convictions.

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[6] *See Gundersen v. Anchorage*, 769 P.2d 436, 438 n.2 (Alaska App. 1989).

[7] *See Tritt v. State*, 173 P.3d 1017, 1019 (Alaska App. 2008).