IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TRISTON ANTON DELANEY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11533 Trial Court No. 3PA-13-100 CR MEMORANDUM OPINION No. 6519 — August 30, 2017

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

Appearances: Michael T. Schwaiger, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Brittany L. Dunlop, Assistant District Attorney, Palmer, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

Triston Anton Delaney appeals his conviction for driving under the influence. At Delaney's trial, the jury heard inadmissible evidence suggesting that

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

Delaney had a history of driving under the influence. Nevertheless, given the record in this case, we conclude that the error was harmless, and we therefore affirm Delaney's conviction.

Underlying facts pertaining to the offense

In the early morning hours of January 10, 2013, the Alaska State Troopers received a report of a vehicle in a ditch in Houston. Trooper Daniel Sadloske was dispatched to the scene, where he encountered Triston Anton Delaney standing alone outside the vehicle. The vehicle belonged to Delaney.

When Sadloske contacted Delaney, he immediately detected an odor of alcoholic beverages. When Sadloske asked Delaney what had happened, Delaney began to say that he been driving — and then he quickly amended his statement to say that a friend of his had been driving, and the car had gone into the ditch.

During Sadloske's ensuing conversation with Delaney, Delaney once more started to tell Sadloske that he had been driving, only to correct himself again by saying that his friend had been driving. Delaney then yelled into some nearby woods, urging his friend to "get out of the woods" and come "help [him] out". There was no response.

At one point, Delaney declared that he could hear his friends in the woods, but Sadloske did not hear or see anyone else in the woods or the surrounding area. Sadloske also did not see any other footprints in the snow indicating that anyone else had gotten out of Delaney's vehicle. When Sadloske asked Delaney for the names of his friends, Delaney stated, "I don't know their names", and "I can't give that [information] to you."

Delaney readily conceded that he had been drinking, but he repeatedly declared that he had not been driving. Sadloske administered several field sobriety tests to Delaney, and Delaney failed all but one.

Based on these events, Sadloske arrested Delaney for driving under the influence. An ensuing DataMaster breath test showed that Delaney's blood alcohol level was .159 percent. Delaney was charged with misdemeanor driving under the influence. AS 28.35.030(a)(1)-(2).

The prosecutor's repeated introduction of inadmissible evidence at Delaney's trial

As part of its case, the State proposed to introduce the video recording of Trooper Sadloske's encounter with Delaney. Delaney's attorney asked the prosecutor to mute certain portions of the audio track of this videotape — because, at various points in the conversation, Delaney made statements which revealed that he had a prior conviction for driving under the influence and that he was on probation from that earlier conviction.

The prosecutor agreed that these portions of the conversation should not be played for the jury, and she assured the court, "I've isolated those [portions of the video]."

Trooper Sadloske was the only witness at Delaney's trial, and the prosecutor played the video recording during the trooper's testimony. On this video, at the point where Sadloske was explaining the walk-and-turn field sobriety test to Delaney, Delaney could be heard telling Sadloske, "I've never made it this far."

As soon as this video was played, Delaney's attorney approached the bench and she moved for a mistrial. The prosecutor did not try to argue that this evidence was

admissible. Rather, she told the trial judge that this particular statement was not one of the two segments of the video that the parties had previously agreed would be muted.

(Delaney's comment about having "never made it this far" occurs approximately four seconds before the start of the first portion that the prosecutor had prepared to mute.)

The trial judge offered to give a curative instruction to the jury, but the judge denied the defense attorney's request for a mistrial.

The prosecutor then continued to play the video. As Sadloske was giving Delaney instructions on how to blow into the portable breath test device, the jury heard the following colloquy between the trooper and Delaney:

> *Sadloske*: Have you ever used one of these [portable breath tests] before?
>
> *Delaney*: Yes, many times.
>
> *Sadloske*: You've had a DUI?
>
> *Delaney*: I ...
>
> [At this point, the prosecutor muted the audio.]

(This colloquy occurs approximately six seconds before the start of the second portion that the prosecutor had prepared to mute.)

Once more, Delaney's attorney objected to this evidence and moved for a mistrial.

This time, the prosecutor told the court that she had simply made a mistake regarding the exact time when the audio needed to be muted. She then argued that any error was really the defense attorney's fault: she told the judge, "If there were particular

times [in the video recording] that [the defense attorney] intended to have suppressed, [she] should have [specified] those times."

The trial judge again declined to grant a mistrial — "in part because it sounds ... like the [prosecutor] did not play any portion that was objected to previously." The judge told the defense attorney that she should have "put [the exact] counter times on [the] record."

The judge again offered to give "some sort of a curative instruction", but the defense attorney did not seek one.

When the defense attorney argued the case to the jury, she conceded that Delaney was intoxicated, but she argued that Delaney was not the driver of the vehicle — that Delaney had been truthful when he told the trooper that someone else had been driving.

The jury found Delaney guilty, and this appeal follows.

Why we conclude that these errors were harmless

Before Delaney's trial began, the judge ruled that the jury should not hear any evidence suggesting that Delaney had a history of driving under the influence. The prosecutor assured the judge that this would not happen. She promised that when she played the video recording of the encounter between Delaney and Trooper Sadloske, she would mute the pertinent portions of the audio track. But in spite of this promise, the prosecutor played two portions of the video which referred to Delaney's history of drunk driving.

In the State's brief, the State argues that the prosecutor was not even aware (before the video was played in court) that Delaney had told Trooper Sadloske, "I've never made it this far." The State contends that this portion of the audio was "so fleeting

and muffled" that the prosecutor "was unaware that it even existed ... before [the audio recording] was played [in court]". But the State provides no citation to the trial court record for these assertions.

This type of appellate argument is improper. The State is essentially asking this Court to make findings of fact regarding the prosecutor's good faith and lack of knowledge that there was any problem. But this Court is not authorized to resolve issues of fact. Nor are we allowed to rely on an attorney's assertions of fact when those assertions rest on information outside the record on appeal.

Here, the trial court never made any finding as to whether the prosecutor was subjectively aware, beforehand, of the contents of this portion of the audio track. Indeed, there is nothing in the record to support the State's current assertions about the prosecutor's state of mind.

Moreover, even if we were to assume that the prosecutor was unaware of the contents of this portion of the audio until it was played in court, that fact would not be particularly relevant. The defense motion for mistrial was not based on an assertion of bad faith on the part of the prosecutor. Rather, the mistrial motion was based on the fact that the jury was not supposed to hear evidence of Delaney's prior history of driving under the influence.

With regard to the second portion of inadmissible audio, the State argues on appeal that the prosecutor failed to mute this portion because "[t]he time marker was inadvertently just a few seconds off". Again, the State's argument is improper. The district court made no finding on this issue of fact, and the State does not support its assertion with any citation to the record.

In fact, the State's current assertion — that "the time marker was inadvertently just a few seconds off" — seemingly contradicts the explanation that the prosecutor offered at Delaney's trial. At that time, the prosecutor suggested that the

defense attorney should be blamed for failing to specify the precise recording times of the segments that she objected to. And the trial judge seemingly endorsed the prosecutor's position, for the judge admonished the defense attorney to be more careful in the future. But now the State apparently concedes that it was improper to blame the defense attorney for what occurred.

In any event, even if the prosecutor played the inadmissible audio as a result of inadvertence or a good-faith mistake, this is not particularly relevant. Again, the defense request for a mistrial was not based on an assertion of bad faith on the part of the prosecutor, but rather on the fact that the jury was not supposed to hear this evidence.

In its brief to this Court, the State also relies on the principle that, when inadmissible evidence happens to be presented to the jury, the question of whether a mistrial is required is entrusted to the trial judge's discretion. The State argues that, in Delaney's case, the trial judge was present when the inadmissible portions of the audio were played to the jury, the judge evaluated the degree of prejudice caused by this inadmissible evidence, and the judge decided that no mistrial was required.

We acknowledge that our review of the trial judge's decision is governed by the deferential "abuse of discretion" standard. [1] But here, the record shows that the judge's ruling was based on dubious reasoning.

With respect to the first inadmissible portion of audio (the portion where, during the administration of the field sobriety tests, Delaney declared that he had "never made it this far"), the trial judge denied the motion for mistrial because he found that Delaney's statement "could be interpreted [in] a whole ... bunch of different ways". We are not sure what other interpretations the trial judge may have been thinking of, but the

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[1] *See, e.g., Bylers Alaska Wilderness Adventures, Inc. v. City of Kodiak*, 197 P.3d 199, 204 (Alaska 2008).

obvious implication of this evidence is that Delaney had been asked to perform field sobriety tests in the past, and that he had not done as well on those prior occasions.

With respect to the second inadmissible portion of audio (the portion where Delaney admitted that he had blown into portable breath test devices "many times"), the trial judge stated that he was denying the defense motion for mistrial "in part because ... the [prosecutor] did not play any portion [of the audio] that was objected to previously." The judge advised the defense attorney to be more careful when objecting to inadmissible audio or video in the future: "In the future, you may want to ... put actual counter times on [the] record."

We do not agree with the trial judge's view that the blame for this incident should be placed on the defense attorney's shoulders. The defense attorney asked the prosecutor to excise any statements indicating that Delaney had been charged with DUI before, and the prosecutor agreed that she would. The two statements at issue in this case clearly suggest that Delaney had been stopped for DUI in the past. Moreover, both of these statements occur within seconds of the start of the portions already identified by the parties as being inadmissible. One would think that a careful prosecutor would have listened to the audio for 30 seconds to a minute on either side of these portions, to make sure that she reviewed all of the relevant conversation.

But the major problem with the judge's ruling is that it really did not matter whether the inadmissible audio was played as a result of good-faith error or inadvertence on the part of *either* the prosecutor or the defense attorney. The parties had agreed — and the judge had ruled — that Delaney's jury was not supposed to hear any reference to Delaney's history of driving under the influence. Even if the jury heard this inadmissible evidence because of good-faith error or inadvertence, the damage was done.

Nevertheless, we agree with the State that, given the record in this case, the playing of the two improper portions of audio was harmless.

As we have already noted, Delaney conceded that he was under the influence when Trooper Sadloske found him. The only contested issue at trial was whether Delaney had been driving the vehicle.

Sadloske was the only witness at Delaney's trial. He testified that when he asked Delaney what had happened, Delaney began to say that he had been driving — and then Delaney quickly amended his statement to say that a friend of his had been driving. Later during their conversation, Delaney once more started to tell Sadloske that he had been driving, and then corrected himself to say that his friend had been driving.

Sadloske described how Delaney yelled into the nearby woods, urging his friend to come out of the woods and "help [him] out" — but there was no response, and Sadloske did not see or hear anyone in the woods. Additionally, Sadloske testified that, aside from Delaney's footprints, he did not see any footprints in the snow surrounding Delaney's vehicle — nothing to indicate that anyone else had gotten out of the vehicle. And when Sadloske asked Delaney for the names of his friends, Delaney stated, "I don't know their names", and "I can't give that [information] to you."

Given this record, we are convinced that even though the jury heard two brief references to Delaney's prior experiences with DUI processing, the playing of this improper evidence did not appreciably affect the jury's decision in Delaney's case. [2]

Accordingly, the judgement of the district court is AFFIRMED.

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[2] *See Love v. State*, 457 P.2d 622, 634 (Alaska 1969) (holding that, in instances of non-constitutional error, the test for harmlessness is whether the appellate court "can fairly say that the error did not appreciably affect the jury's verdict").