IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CAMERON BRIAN IVON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11817 Trial Court No. 4BE-13-785 CR MEMORANDUM OPINION No. 6525 — September 27, 2017

Appeal from the District Court, Fourth Judicial District, Bethel, Bruce Ward, Magistrate Judge.

Appearances: Megan Webb, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Bailey J. Woolfstead, Assistant District Attorney, Bethel, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

Cameron Brian Ivon appeals his conviction for fourth-degree assault upon his long-term girlfriend, Charlene Kiunya. He contends that the use of the word "victim," which occurred several times during voir dire and trial, violated the judge's

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

protective order against the use of that term, and was unfairly prejudicial. We have reviewed the record, and it shows that the prosecutor's use of the word "victim" was not in reference to Kiunya specifically, but rather in reference to crime victims as a group. Accordingly, the trial court did not err in denying Ivon's motion for a mistrial.

Ivon also argues that he was denied his right to a jury trial on the sentencing question of whether his assault on Kiunya was a crime of domestic violence. After the jury returned a guilty verdict on the assault charge, Ivon's attorney, but not Ivon himself, waived a jury finding on this question, leaving the determination to the judge. We hold that any error was not obvious, and additionally that any error was harmless beyond a reasonable doubt. We accordingly affirm the judgment of the district court.

Background facts

The State charged Ivon with fourth-degree assault[1] for striking Kiunya in her face with his fist. Magistrate Judge Bruce Ward granted a pretrial defense motion to preclude the prosecution and its witnesses from referring to Kiunya as the "victim" in the case. On three occasions during voir dire and witness testimony, the prosecution used the word "victim," although not in reference to Kiunya personally. The judge denied a defense motion for a mistrial based on these claimed violations of the protective order.

At the conclusion of the trial, the jury returned a guilty verdict. Outside the presence of the jury, the judge asked Ivon's defense attorney whether he wanted to submit a sentencing issue — whether the assault was a crime of domestic violence — to the jury for decision. The defense attorney responded, "No, we'll just waive our right to a jury trial on that issue. We won't concede the issue, but we will waive the right to

[1] AS 11.41.230(a)(1).

a jury trial on that." Without asking Ivon to personally ratify this waiver, the judge then excused the jury.

Based on the evidence at trial and the statutory definition of a crime of domestic violence, the judge found beyond a reasonable doubt that Ivon's assault of Kiunya was in fact a crime of domestic violence. This finding had the effect of raising the minimum sentence that the judge could impose to 60 days.[2]

The judge sentenced Ivon to 300 days with 180 days suspended. This appeal followed.

The trial court did not err in denying Ivon's motion for a mistrial based on the prosecution's use of the word "victim"

Ivon claims that the district court erred in denying his motion for a mistrial based on the prosecution's use of the word "victim" during voir dire and trial. Prior to trial, Ivon moved for a protective order precluding reference to Kiunya as the "victim." Magistrate Judge Ward granted the motion.

The word "victim" was used by the prosecutor several times during voir dire and trial. First, during voir dire, the prosecutor noted that, at times, crime victims engage in questionable behavior such as drinking to excess. The prosecutor inquired whether the jurors could be fair to such a victim. The defense objected, and the prosecutor explained that she was not referring to Kiunya specifically. The judge instructed the prosecutor to rephrase the question. The prosecutor then posed the question substituting "someone" for "victim."

The prosecutor later questioned the arresting officer about his failure to record his initial conversation with Kiunya. The officer explained that this was

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[2] AS 12.55.135(a), (g).

inadvertent. The prosecutor then inquired whether the officer recorded every contact: "Generally, is every conversation with victims — I'll start with victims — witnesses, defendants, is everything recorded?" After a brief bench conference, the prosecutor rephrased her question, asking the officer, "Are conversations with every witness recorded?"

Moments later, the prosecutor asked the officer, "What's the purpose of these audio recordings?" The officer responded, "To record the statements of ... the victims or suspects, whoever's involved ... so you can go back and — and do your report accurately." The defense objected, and the prosecutor responded that the officer's comment was general in nature. The judge denied the defense attorney's mistrial motion, ruling that the officer had employed the word abstractly rather than in reference to Kiunya.

In previous unpublished decisions, this Court disapproved of references to "a complaining witness as a 'victim' when the question before the jury is whether that person was the victim of a crime."[3] We have noted the potential for reversible error where the word "victim" is "used multiple times or is attended by other prejudicial error or misconduct."[4] In this case, the prosecutor used the word "victim" twice, once during voir dire and once during direct examination. On both occasions, the judge took immediate action that resulted in the prosecutor rephrasing her questions. The judge's

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[3] *Alto v. State*, 2013 WL 1558157, at *2 (Alaska App. Apr. 10, 2013) (unpublished); *accord Tolen v. State*, 2012 WL 104477, at *3 (Alaska App. Jan. 11, 2012) (unpublished); *cf. Liska v. Anchorage*, 1998 WL 191166, at *1-2 (Alaska App. Apr. 22, 1998) (unpublished) (holding that the prosecutor's use of the word "victim" during opening and witness examination was harmless because the prosecutor followed the judge's instruction to use the words "alleged victim" instead once the defendant objected).

[4] *Tolen*, 2012 WL 104477, at *4 (citations omitted).

enforcement of the protective order by instructing the prosecutor to rephrase was an adequate remedy and was not an abuse of discretion.

As for the officer's use of the word "victim," we agree with the State that the word was used in the abstract and did not allude to Kiunya. The judge did not abuse his discretion in denying Ivon's motion for a mistrial.

Any error in the judge's failure to obtain Ivon's personal waiver of his right to a jury determination of whether his crime was a crime of domestic violence was not obvious error, and it was harmless

Ivon was subject to a mandatory minimum sentence if his assault on Kiunya was proven to be a crime of domestic violence, and if he had previously been convicted of one or more crimes against a person or crimes involving domestic violence.[5] In that event, the mandatory minimum sentence was 30 days if Ivon had one such prior conviction, or 60 days if he had two or more.[6] Because the judge found that Ivon and Kiunya were in a sexual relationship (they had a child together), and because Ivon had two prior domestic violence convictions, he faced a minimum sentence of 60 days. But the judge imposed a lengthier sentence: 300 days with 180 days suspended, 120 days to serve.

In *Alleyne v. United States*, the United States Supreme Court held that defendants have a Sixth Amendment right to jury trial on any finding of fact that increases the mandatory minimum sentence for their crime.[7] Accordingly, Ivon had a right to have a jury decide whether his assault on Kiunya was a crime of domestic violence. That characterization hinged on whether he was living with Kiunya, whether

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[5] AS 12.55.135(a), (g).

[6] AS 12.55.135(a), (g) (1)-(2).

[7] *Alleyene v. United States*, 133 S.Ct. 2151, 2158 (2013).

they had a sexual relationship, or whether they had a child together.[8] Kiunya testified that all those things were true.

During the trial, Ivon did not contest Kiunya's testimony about their relationship, nor does he contend on appeal that her testimony was false. Instead, he insists that any waiver of his right to a jury trial on this issue required his personal assent — and that the trial judge committed error by accepting his defense attorney's waiver of a jury trial without inquiring of Ivon himself.

Because Ivon did not object to his attorney's waiver of a jury trial on the domestic violence issue, he must show plain error.[9]

In *Malutin v. State*, we addressed the issue of whether the defendant's waiver of jury trial was required as to a particular statutory aggravator.[10] We found that no plain error occurred because there is no judicial consensus regarding the point:

> [C]ourts around the country have reached differing conclusions as to whether, in light of *Blakely* [*v. Washington*], a sentencing judge can rely on a defense attorney's concession of aggravating factors without also addressing the defendant personally. Because reasonable judges can (and do) differ on the legality of this procedure under *Blakely*, any arguable error in this procedure is not "plain."[11]

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[8] *See* AS 18.66.990(5) (defining "household member" for the purpose of determining whether a crime was a crime of domestic violence to include dating and sexual relationships, and relationships where the persons had a child together).

[9] *See Adams v. State*, 261 P.3d 758, 764 (Alaska 2011) ("Plain error is an error that (1) was not the result of intelligent waiver or tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial.").

[10] *Malutin v. State*, 198 P.3d 1177, 1179 (Alaska App. 2009).

[11] *Id.* at 1184.

We conclude that this reasoning applies with equal force to a sentencing factor that raises the statutory floor rather than the statutory ceiling. For lack of a judicial consensus, any error was not obvious — and thus, no plain error occurred.

We conclude that the judge did not commit plain error in Ivon's case for a second reason: any error was harmless beyond a reasonable doubt. We have repeatedly held that even when a defendant is wrongfully deprived of a jury trial on an aggravating factor, there is no plain error if the evidence supporting the aggravator is not subject to reasonable dispute.[12] In other words, if there is no reasonable possibility that a jury would have found in the defendant's favor had the issue been submitted to a jury, there is no plain error.

In Ivon's case, the evidence was undisputed that Ivon and Kiunya had been dating each other for seven years and that they had a six-year-old child together. Indeed, Ivon's appellate brief refers to Kiunya as his "girlfriend." Since these facts were not disputed at trial, it is clear that Ivon's assault on Kiunya constituted a crime of domestic violence, thus, any procedural error in not obtaining Ivon's personal waiver of the right to jury trial was harmless beyond a reasonable doubt.

Conclusion

We AFFIRM the judgment of the district court.

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[12] *See, e.g.*, *Active v. State*, 153 P.3d 355, 367 (Alaska App. 2007); *Milligrock v. State*, 118 P.3d 11, 17 (Alaska App. 2005).