IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ALLISON CLAIR TENNYSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12352 Trial Court Nos. 3NA-14-116 CR & 3NA-14-031 MO MEMORANDUM OPINION No. 6542 — November 15, 2017

Appeal from the District Court, Third Judicial District, Naknek, Dawson Williams, Magistrate Judge.

Appearances: Charles M. Merriner, Anchorage, for the Appellant. Aaron C. Peterson, Assistant Attorney General, Office of Special Prosecutions, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

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

Allison Clair Tennyson appeals her convictions for taking salmon in closed waters and for failing to affix proper identifying markers to her set gillnet.[1] (Both of these offenses are strict liability minor offenses under 5 AAC 39.002.)

Tennyson claims that the evidence presented at her trial was legally insufficient to prove that she was operating the set gillnet in question. Tennyson also claims that the evidence was legally insufficient to prove that the net was in closed waters. In addition, Tennyson claims that her trial was rendered unfair because the trial judge made erroneous evidentiary rulings.

For the reasons explained in this opinion, we find no merit to Tennyson's claims of error, and we uphold her convictions.

Underlying facts

On June 26, 2014, the Naknek-Kvichak fishing district in Bristol Bay was opened to commercial fishing for 18½ hours. Tennyson and other members of her family were fishing in that district, near Graveyard Point.

Trooper Joseph Wittkop (accompanied by a commercial fisheries biologist) conducted a "line patrol" of the district during this opener, and Wittkop observed a fishing net that was set in closed waters. When Trooper Wittkop hovered his helicopter over the buoy that was attached to the far end of this net, his GPS unit indicated that the buoy was about 150 feet into closed waters.

Wittkop landed the helicopter and made contact with Tennyson and other members of her family on the shore. During their conversation, Tennyson admitted that the net was hers, and that she leased the site where the net was set.

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[1] 5 AAC 06.350(b) and 5 AAC 06.334(c), respectively.

The two buoys attached to Tennyson's net did not carry her Commercial Fisheries Entry Commission (CFEC) permit number. Instead, the buoys were marked with permit numbers belonging to her sisters: the inner buoy was marked with a permit number belonging to Janet Schlagel, while the outer buoy was marked with a permit number belonging to Nora Armstrong.

When Trooper Wittkop asked Tennyson about this, she admitted that she knew her net was not marked with her permit number. Tennyson told Wittkop that it was "hard to mark a net" because several members of her family "all fish together".

Trooper Wittkop cited Tennyson for fishing in closed waters and for failing to mark her net with her own CFEC permit number. Following a bench trial, Tennyson was found guilty of these two minor offenses.

The evidence was sufficient to establish that Tennyson was operating the gillnet

Tennyson contends that the evidence presented at her trial was legally insufficient to establish that she was operating the gillnet in question, in part because (according to Tennyson) there is too much ambiguity in the law regarding what conduct constitutes "operating" a set gillnet.

The evidence, construed in the light most favorable to the judge's verdict, shows that Tennyson was on the shore near the gillnet, and that she admitted the net was hers. It is true that the buoys attached to this net were marked with the permit numbers of Tennyson's sisters, but Tennyson told Trooper Wittkop that this was because the members of her family fished as a group, and thus it was "too hard" for each member of the family to mark their buoys with their own individual permit numbers.

On appeal, Tennyson argues that this evidence was legally insufficient because the State presented no testimony that Tennyson personally set the net, or that she personally removed fish from the net, or that she personally transported fish caught in the net to be sold. Thus, Tennyson argues, even if the State presented sufficient evidence that she was the permit holder for this gillnet, the evidence was insufficient to prove that she was "operating" her net.

We reject this contention. As defined in 5 AAC 39.975(a)(22)(A), the phrase "to operate fishing gear" includes the act of deploying the gear in the water, or having gear deployed in the water. (See also AS 16.05.940(4), which declares that the phrase "operate fishing gear" means "to deploy or remove gear from state water", and AS 16.05.940(35), which broadly defines the "taking" of fish as any attempt at "pursuing, ... fishing, ... or in any manner disturbing, capturing, or killing" fish.)

According to Trooper Wittkop's testimony, Tennyson's gillnet was deployed in the water, laid out to catch fish. The net was therefore being "operated".

There was no direct testimony that Tennyson personally deployed the gillnet. In fact, Tennyson told Trooper Wittkop that members of her family "all fish together". But even if Tennyson was assisted by other members of her family in the physical process of laying out her net, she would still be legally responsible, under the rules of complicity, for the operation of her net. *See* AS 11.16.110.

Tennyson additionally argues that, because the State's evidence tying her to the operation of the gillnet was based exclusively on her own admissions, the State failed to satisfy the *corpus delicti* rule. This argument is based on a misunderstanding of the *corpus delicti* rule.

Under the *corpus delicti* rule, the government is not allowed to rely on a person's uncorroborated confession *to prove that a crime has been committed*. But if there is sufficient evidence to prove that a crime has been committed, the *corpus delicti*

rule does not limit the government's ability to rely on the person's confession to prove that the defendant *was the person who committed the crime*. As this Court explained in *Dodds v. State*, "While *corpus delicti* requires independent evidence that the charged crime occurred, it does not require independent evidence that the defendant participated in that crime." 997 P.2d 536, 538-39 (Alaska App. 2000).

Here, the crime was the operation of a gillnet in closed waters. Trooper Wittkop's testimony was sufficient to establish that this crime occurred. The State could therefore properly rely on Tennyson's admissions to establish that she operated the gillnet.

For these reasons, we conclude that the evidence presented at Tennyson's trial was sufficient to establish that she was operating her gillnet.

The evidence was sufficient to establish that Tennyson's net was being operated in closed waters

Tennyson alternatively argues that even if the evidence was sufficient to establish that she was operating the gillnet in question, the evidence was nonetheless insufficient to establish that the net was in closed waters.

Trooper Wittkop testified that the outer buoy of the gillnet was 150 feet "outside of the district" — *i.e.*, 150 feet into closed waters — and that the net's shoreward buoy was likewise in closed waters (although the trooper did not specify by how many feet).

Trooper Wittkop made these determinations by using his GPS unit — comparing the GPS coordinates of the buoys attached to the gillnet with the GPS coordinates of the demarcation line defined in 5 AAC 06.350(b)(1) for Graveyard Point. At the time of Tennyson's offense (*i.e.*, in June 2014), this regulation read:

> (b) The following locations in the Naknek-Kvichak District are closed to the taking of salmon:
>
> (1) those waters northeast of a line from an ADF&G regulatory marker located at 58° 52.07' N. lat., 157° 00.89' W. long. near Graveyard Point to an ADF&G regulatory marker located at 58° 53.24' N. lat., 157° 04.44' W. long.

Tennyson does not dispute that her net was on the wrong side of the boundary line defined by the latitude and longitude coordinates specified in this regulation. However, Tennyson argues that the latitude and longitude coordinates specified in the regulation do not actually define the legal boundary between the waters open to fishing and the waters closed to fishing.

In support of this argument, Tennyson cites 5 AAC 39.291, a regulation titled "Boundary markers". This regulation gives the Department of Fish and Game the discretionary authority to mark fishing boundary lines with physical markers:

> The department [of fish and game] may post a boundary described in regulation by an appropriate marker. The marker must be placed as close as possible to the location specified in the applicable regulation. Where markers have been lost or destroyed, the boundary is as specified in the applicable regulation.

According to Tennyson, this regulation means that when a fishing boundary regulation — such as the 2014 version of 5 AAC 06.350(b)(1) — defines a boundary in terms of physical markers located at specified latitude and longitude coordinates, then even when those markers are not placed at the latitude and longitude coordinates specified in the regulation, the markers will nevertheless take precedence over the

latitude and longitude coordinates specified in the regulation (unless the physical markers have been lost or destroyed).

Tennyson notes that the 2014 version of the regulation defined each end of the boundary line in terms of a "ADF&G regulatory marker located at" specified GPS coordinates. Based on this, Tennyson argues that the boundary line was not actually defined by the listed GPS coordinates, but rather by the physical location of the two regulatory markers that are mentioned in the regulation. Tennyson then reasons that, because the State introduced no evidence of the physical location of those two markers, the State's evidence was legally insufficient to establish that the gillnet was on the wrong side of the boundary line.

But in point of fact, the State *did* offer testimony regarding the current location of the two physical markers. According to that testimony, the markers are no longer there.

After the Department switched to defining the fishing boundary lines by GPS coordinates in 2001 (a switch that we describe in more detail later in this opinion), the Department apparently stopped maintaining many of its physical markers. According to the testimony at Tennyson's trial, the east-side marker of the boundary line at Graveyard Point was "long gone" due to erosion of the bank. And Tennyson's attorney told the trial court that the west-side marker was only there "until 2011" — and that the Department of Fish and Game "never put it back". (Tennyson's brief to this Court likewise refers to the west-side marker as the "1983-2011 marker".)

Because there were no physical markers in June 2014 (when Tennyson was charged with this offense), Tennyson's argument about physical markers taking precedence over latitude and longitude coordinates appears to be moot.

But in any event, we disagree with Tennyson's interpretation of 5 AAC 39.291. This regulation does not say that physical boundary markers take precedence

over the latitude and longitude coordinates specified in a boundary regulation, no matter how greatly the positions of those markers vary from the specified GPS coordinates. Rather, 5 AAC 39.291 gives the Department the discretion to mark a boundary with physical markers — and if the Department chooses to do so, those markers "must be placed as close as possible to the location specified in the applicable regulation." Thus, for example, the physical markers for the Graveyard Point boundary line mentioned in 5 AAC 06.350(b)(1) would have to be placed as close as possible to the latitude and longitude coordinates specified in 5 AAC 06.350(b)(1).

In other words, if the location of the markers varies significantly from the latitude and longitude coordinates specified in the boundary regulation, then those markers are improperly placed.

But most importantly, there is a *different* boundary line regulation that applies specifically to the waters of Bristol Bay. In 2001, the Department of Fish and Game promulgated 5 AAC 06.206, a regulation that governs fishing boundaries in the Bristol Bay Area.[2] This regulation, titled "Use of global positioning system (GPS)", declares:

> In the Bristol Bay Area, boundaries, lines, and coordinates are identified with the global positioning system (GPS). If the global positioning system is not operating, the boundaries, lines, and coordinates are as identified by ADF&G regulatory markers.

Under this regulation, even in locations where the Department has placed physical regulatory markers, fishing boundary lines are defined by the specified GPS coordinates unless "the global positioning system is not operating".

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[2] *See* Alaska Administrative Code Register 158, effective June 22, 2001.

This regulation, which is specifically directed to boundaries in the Bristol Bay Area, takes precedence over 5 AAC 39.291, which is a regulation of more general application. (When two regulations, one of general application and the other of specific application, seemingly apply to the same situation and seemingly call for different results, the more specific regulation controls.[3]) Thus, Tennyson's case is controlled by 5 AAC 06.206 — which means that the boundary line at issue in her case is defined by the GPS coordinates specified in 5 AAC 06.350(b)(1).

Tennyson makes one further argument: she contends that the Department of Fish and Game made a mistake when it established the latitude and longitude coordinates of the Graveyard Point boundary line specified in 5 AAC 06.350(b)(1).

Tennyson points out that, about one year after she committed her offense, the Department amended the GPS coordinates of the western end-point of the Graveyard Point boundary line. The amended coordinates moved the western end-point several hundred feet to the north and east — from 58° 53.24' North latitude, 157° 04.44' West longitude to 58° 53.37' North latitude, 157° 04.26' West longitude. *See* Alaska Administrative Code Register 214, effective May 24, 2015.

According to Tennyson, the Department amended the GPS coordinates of the western end-point in 2015 because the Department concluded that the surveyors made a mistake years ago — in 2001 — when the Department began defining its boundary lines in the Bristol Bay Area by GPS coordinates.[4] In conjunction with that

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[3] *See Lamkin v. State*, 244 P.3d 540, 541 (Alaska App. 2010): "One general rule of statutory construction is that 'where one statute deals with a subject in general terms and another deals with a part of the same subject in more detail, the two should be harmonized if possible, but if there is any conflict, the more specific statute will prevail.'" (Quoting *Waiste v. State*, 808 P.2d 286, 289 (Alaska App. 1991).)

[4] The regulation declaring that boundary lines in Bristol Bay would henceforth be (continued...)

switch to GPS coordinates, surveyors were sent to ascertain the geographic locations of the Department's old physical markers. The surveyors apparently made a mistake concerning the position of the west-side marker in the Graveyard Point area.

But even if all of this is true, it does not absolve Tennyson of the fishing violation. The pertinent boundary line is *not* the current amended one; rather, the pertinent boundary line is the line that was defined in the 2014 version of 5 AAC 06.350(b)(1) — *i.e.*, the boundary line that was in effect at the time of Tennyson's offense. This remains true even if the location of that 2014 boundary line was based on a 2001 surveying mistake. [5]

Tennyson does not dispute that her gillnet was on the wrong side of that 2014 boundary. She therefore fished in closed waters.

Tennyson's challenges to the trial court's evidentiary rulings

At Tennyson's trial, Trooper Wittkop testified that, after he observed the gillnet in closed waters, he landed his helicopter and contacted Tennyson and the other members of her family who were present at the site. Wittkop testified that when he spoke to Tennyson, "she told [him] that that was her site, and that it was her net."

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[4] (...continued)
defined by GPS coordinates, 5 AAC 06.206, became effective on June 22, 2001. *See* Alaska Administrative Code Register 158.

[5] *See Division of Workers' Compensation v. Titan Enterprises, LLC*, 338 P.3d 316, 321 (Alaska 2014), *Division of Insurance v. Alyeska Pipeline Service Co.*, 262 P.3d 593, 597-98 (Alaska 2011), and *McKinley v. State*, 275 P.3d 567, 573 (Alaska App. 2012) — all holding that even if legislation is enacted in reliance on mistaken information, a court will not re-write the statute or disregard its plain meaning.

However, during the defense attorney's cross examination of Trooper Wittkop, the defense attorney suggested that Tennyson had not made a straightforward admission that the net was hers. Here are the defense attorney's question and the trooper's answer:

> *Defense Attorney*: So after [you had been] there three hours or so, at the end, am I right [that Tennyson] told you, "Hey, I'm the leaseholder of [this] site ... , so I guess I'm more responsible than anybody else." Would that be a fair characterization (indiscernible)?
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> *Trooper Wittkop*: I won't say that that's exactly what she told me, but ... you're accurate in saying that it was two or three hours of conversation [concerning] various things, from the markings on the three sites (indiscernible) family decision (indiscernible). And at multiple points throughout the conversation, [Tennyson] had identified that site as hers, as did the other family members.
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> *Defense Attorney*: Objection. [I ask you to] strike the last [comment] as being non-responsive, Judge. "As did the family members." He knows (indiscernible) defendant said.
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> *The Court*: The motion to strike is denied.

On appeal, Tennyson contends that the trooper's answer violated her rights under the confrontation clause, because the trooper made an assertion about what other family members told him.

It is true that the trooper's answer contained hearsay. But Tennyson's attorney did not raise a hearsay objection, much less a confrontation clause objection. Hearsay is admissible if there is no hearsay or confrontation clause objection.[6]

Here, the defense attorney's only objection was that Trooper Wittkop's answer was "non-responsive". The trial judge concluded that the trooper's answer *was* responsive to the defense attorney's question — and the judge's conclusion is not clearly wrong.

Finally, the hearsay element of the trooper's answer could not possibly have affected the verdict.

Trooper Wittkop did not testify that Tennyson's family members identified *the gillnet* as Tennyson's. Rather, the trooper said that Tennyson's family members identified *the lease site* as hers. (The trooper's answer was, "[Tennyson] had identified that site as hers, as did the other family members.")

The portion of the trooper's testimony regarding Tennyson's own statements — the fact that Tennyson *herself* identified the fishing site as hers — was obviously admissible. Indeed, this was simply a repetition of the trooper's earlier (and unobjected-to) testimony that Tennyson "told [him] that that was her site".

Moreover, there was no dispute at trial that Tennyson was the leaseholder of the site. The defense attorney's question — the leading question that elicited Trooper Wittkop's challenged response — assumed that Tennyson was the leaseholder.

(The defense attorney's question was: "Am I right [that Tennyson] told you, 'Hey, I'm the leaseholder of [this] site ... , so I guess I'm more responsible than anybody else.' Would that be a fair characterization (indiscernible)?")

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[6] *See*, *e.g.*, *Christian v. State*, 276 P.3d 479, 489 (Alaska App. 2012).

For these reasons, we reject Tennyson's contention that this evidentiary ruling constituted reversible error.

Tennyson also argues that the trial judge improperly restricted her right of cross examination when the judge prevented the defense attorney from asking Trooper Wittkop about whether the State's other witness, Trooper Sgt. Scott Quist, had been opposed to the Department's granting the fishing site lease to Tennyson.

To analyze Tennyson's claim, one must know Sgt. Quist's earlier testimony about this issue. During the defense attorney's cross examination of Sgt. Quist, the defense attorney asked him if he had been "against [the Department of Natural Resources] issuing a lease for Site One" (*i.e.*, Tennyson's lease). Sgt. Quist answered:

> *Sgt. Quist*: Well, I wouldn't say that I was against it. Mr. Hickel, the [Department of Natural Resources] representative, asked if we thought that the site could be fished legally. And ... we couldn't say definitively that it couldn't, but I thought that it was very unlikely, based on the distance from shore and ... the boundary [line established in 5 AAC 06.350(b)(1)].
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> . . .
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> *Defense Attorney*: Okay, so am I right that you told Ryan Hickel (indiscernible) not issue that lease?
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> *Sgt. Quist*: I told him that I didn't think that the lease (indiscernible) legally, so (indiscernible) possibly shouldn't be (indiscernible).

Despite the indiscernibles in the transcript, it appears that Sgt. Quist testified that, because of the location of the proposed lease and the location of the fishing boundary line at Graveyard Point, he had substantial doubts as to whether anyone could conduct legal fishing at the proposed lease site.

In response to the defense attorney's follow-up questions, Sgt. Quist described how the representative of the Department of Natural Resources asked Quist if he "could definitively say that the site couldn't be fished", and Quist told the representative that he couldn't say for sure, because it "was in the wintertime, and we couldn't go out and make any measurements".

This brings us back to the defense attorney's proposed cross examination of Trooper Wittkop later in the trial. The defense attorney asked Wittkop if he was aware of the discussions between Sgt. Quist and Ryan Hickel of the Department of Natural Resources regarding whether a fishing lease should be granted for that site. Trooper Wittkop answered that he was "aware [of] discussions about whether the site could be legally fished or not." The defense attorney then asked Wittkop:

> *Defense Attorney*: And Sgt. Quist certainly thought it shouldn't be leased, right?
>
> *Prosecutor*: Objection as to this witness's view on what ...
>
> *The Court*: Sustained.

The defense attorney immediately asked the judge to reconsider this ruling. The attorney argued that he should be allowed to question Trooper Wittkop about Sgt. Quist's attitude toward the granting of the lease because Wittkop's answer would support "[the] constitutional argument in terms of the constitutional demand that the executive branch investigation was unfair and unjust". [*Sic*]

When the trial judge noted that the defense attorney had seemingly already obtained the answer he wanted from Sgt. Quist himself, the defense attorney argued that he needed to ask Trooper Wittkop about Sgt. Quist's attitude toward the lease because Sgt. Quist "pretty much downplayed it". The court again ruled that the defense attorney

could not ask Trooper Wittkop about Sgt. Quist's attitude toward the granting of the lease.

On appeal, Tennyson argues that the judge's ruling prevented her defense attorney from eliciting evidence of Sgt. Quist's bias "as revealed by trooper efforts ... to stop the lease". We disagree. Sgt. Quist readily acknowledged on cross examination that he questioned whether a fishing lease should be granted for that site — and that he expressed his reservations to a representative of the Department of Natural Resources. Quist further explained that his opposition to the lease was based on his assessment that, given the location of the site and the location of the fishing boundary, it appeared unlikely that anyone could legally fish from that site. To the extent that Sgt. Quist's attitude toward the lease exhibited a "bias", that bias was revealed.

Other claims potentially raised in Tennyson's briefs

To the extent that Tennyson may be attempting to raise other claims in her opening brief, those claims are waived due to inadequate briefing.[7] And to the extent that Tennyson may be attempting to raise other claims in her reply brief, those claims are also waived because a party is not allowed to raise new claims in their reply brief.[8]

Conclusion

The judgement of the district court is AFFIRMED.

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[7] *See*, *e.g.*, *Petersen v. Mutual Life Ins. Co. of New York*, 803 P.2d 406, 410 (Alaska 1990); *Wren v. State*, 577 P.2d 235, 237 n. 2 (Alaska 1978); *Kristich v. State*, 550 P.2d 796, 804 (Alaska 1976).

[8] *See*, *e.g.*, *Petersen v. Mutual Life Ins. Co. of New York*, 803 P.2d 406, 411 (Alaska 1990); *Hitt v. J.B. Coghill, Inc.*, 641 P.2d 211, 213 n. 4 (Alaska 1982).