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 On Rehearing No. 6544 — November 15, 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.

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

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.

Downard raises two claims on appeal. First, he contends that the trial judge committed error by removing one of the jurors from the panel after it came to light that the juror had given false answers during jury selection. 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 established 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 took their oath. (The panel consisted of fourteen jurors, two of whom were to be designated alternates at the end of the trial.) 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 jurors, A.C.

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. from her work in the Division of Juvenile Justice. 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.

This employee also alerted the prosecutor that A.C.'s brother, with whom A.C. had been living, had been convicted of sexual abuse of a minor and was required to register as a sex offender. Based on the employee's information about A.C.'s brother, the prosecutor obtained a copy of the documentation confirming that he was a registered sex offender because of a 2004 conviction for sexual abuse of a minor.

When the prosecutor first alerted the judge and the defense attorney about all of this, the defense attorney told the court that he wanted more information about these matters — and, in particular, he asked the judge to bring A.C. back to court for individual questioning:

> *Defense Attorney*: I'm not conceding that [Juror A.C.] can [be discharged] for cause. I'm not conceding [that] this is a good cause challenge. Yes, that one question [about any family member having had to come to court] was there. But I think this Court needs to make further inquiry ... about what [A.C.] understood that question to be, and why [his prior prosecution for sexual abuse of a minor] wasn't disclosed. I think that's a factual issue that has to be dealt with first. I don't think the Court can just assume that he committed perjury or that he [knowingly] failed to disclose something.

Rather than immediately calling A.C. back to court for further questioning, the trial judge decided to take formal testimony from the Division of Juvenile Justice employee, and also to examine A.C.'s juvenile records.

When the Juvenile Justice employee took the stand, she reiterated that A.C. had been adjudicated a delinquent minor for sexual abuse of a minor, and that A.C.'s

brother, with whom A.C. had been living, had also been convicted of sexual abuse of a minor (as an adult) and was required to register as a sex offender.

The clerk of court then took the stand. She verified that there was a delinquency file involving A.C., and that the documents in this file showed that A.C. had been adjudicated a delinquent minor, as described by the Juvenile Justice employee. In particular, the delinquency file contained A.C.'s November 2003 delinquency adjudication for sexual abuse of a minor.

All of this information about A.C. and his brother contradicted A.C.'s responses during jury selection. As we are about to explain, during the jury selection process, A.C. indicated — both by his affirmative answers, and by his failure to respond to certain questions that were posed to the entire group of prospective jurors — that he would have no problem sitting on a sexual assault case, and that neither he nor any member of his family had ever "[been] involved in a lawsuit" or had ever "had to come to court."

At the very beginning of the jury selection process, the prosecutor addressed general questions to the entire panel of prospective jurors. One of these questions was:

> *Prosecutor*: Judge Cole read the charges [to all of you] a little while ago. And you may have [inferred] from that what this case is about. This is a sex assault case, okay? This is a sex assault and a physical assault case. All right, based on any of your personal experiences in life, either yourselves, family members, friends, anything like that, is there anybody on the panel that would have an issue with sitting on a sex assault trial? Okay. All right, [I see] no hands.

A few moments later, the prosecutor began his individual *voir dire* questioning of prospective juror P.Z. During this *voir dire* of P.Z., the prosecutor described a hypothetical situation where a woman was coerced to have sex with a man, not because the man resorted to physical violence, but rather because the man *threatened* physical violence — so that the woman had no physical injuries, and the case presented a "he said, she said" controversy. The prosecutor then asked P.Z. if he would "feel comfortable making a decision in a case like that". P.Z. answered, "It would be a difficult decision, but I think I could do it."

The prosecutor then addressed the entire group of prospective jurors:

> *Prosecutor*: Is there anybody on the [jury] panel that would not feel comfortable making a decision in a case like that? [No response from any panel member.] Okay.

The later individual *voir dire* examination of Juror A.C. took place against this backdrop.

Juror A.C. gave a short opening statement, answering a list of written questions that all jurors were supposed to answer:

> *Juror A.C.*: I — my name's [A.C.] ... I have no children. I was born on the island [*i.e.*, Kodiak Island], raised here. Hobbies are just hanging out with friends, brothers, biking. I have no family member in — involved in a lawsuit or had to come to court. I have served on a jury before.[1] I have no reasons why I shouldn't serve now. And I don't know anyone that's involved.

[1] This response was false or mistaken. A.C. later admitted, during his continued individual *voir dire*, that he had not served on a jury before; he had only been summoned for jury service.

Several minutes later, the prosecutor asked A.C.:

> *Prosecutor*: Based on the day and a half of questions we've been asking, [do] any red flags go off in your head, that —
>
> *Juror A.C.*: No.

As we indicated earlier, Downard's defense attorney had initially asked the trial judge to summon A.C. back to court for questioning about these matters. But after Downard's attorney heard the testimony of the Juvenile Justice employee and the clerk of court, he altered his approach. The defense attorney told the judge that even if Juror A.C. deliberately withheld information that he and his brother had been prosecuted for sexual offenses, the judge still had no authority to remove A.C. from the jury — that the only remedy was a mistrial:

> *Defense Attorney*: [Criminal] Rule 24[(b)(2)] ... allows the court to ... excuse jurors prior to the time of [deliberations] who "become unable or disqualified to perform [their duties]". [Juror A.C.] hasn't "become" anything. He's the same guy he was before.
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> And then, if we go down to the — under [Rule] 24(c), it says challenges for cause, and it says after the examination of perspective jurors is completed and *before any juror is sworn*, you can challenge for cause. And I think that's the operative [language]. Once they're sworn, jeopardy has attached. And the only way to undo this is through a mistrial.
>
> And I think again, under [subsection] (b), the plain reading of it is somebody "becomes" something — which means something happens in between the time they are sworn and the time that verdict comes, [and] not that we discover [new] information ... .

> So we're back into that situation where we have a juror who may have committed potential obstruction of justice from failing to answer, and I'm not even sure that that's happened, because I think an inquiry has to be made. But I think it's very clear that, once they're sworn, the only — by the plain reading of the language, the only solution is mistrial, because he hasn't "become" anything different.

A few minutes later, the defense attorney returned to this theme — that even if A.C. lied during jury selection, the only action the trial judge could lawfully take at that point was to declare a mistrial:

> *Defense Attorney*: If [the prosecutor] is trying to get rid of [Juror A.C.] for [concealing material information during jury selection], then yeah, I think you need to bring him in and ask him these questions, because ... he's alleging some juror misconduct. And there has to be a hearing, and those facts have to be established. [But] I still think that ultimately, whether we bring him in or not, that the remedy in that case is mistrial.
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> *The Court*: Okay. But [another possible] remedy can also be designat[ing] him as an alternate.
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> *Defense Attorney*: Not under the procedures of [Criminal Rule] 24(b), Judge. ... [Designation of alternates] has to be done at random. ... He — whatever [Juror A.C.] did, and if — let's say [that Juror A.C.] lied, and — let's just accept for argument's sake that he lied, and he knew about [his own delinquency adjudication and his brother's conviction for a sex offense], and he hid this. [But] he did that before he took that oath [as a trial juror]. And once he's taken that oath, he's done nothing since that time. [So you can't remove him.]

. . .

> *The Court*: What prejudice would it [create] if [Juror A.C.] remain[ed] listening in on the trial, and we have to decide later if I should designate him as an alternate or dismiss him?
>
> *Defense Attorney*: Because the Court can't do that.

A few minutes later, based on A.C.'s responses during jury selection, and based on the evidence revealed by the Juvenile Justice employee's testimony and by A.C.'s own delinquency file, the trial judge found that A.C. had committed a "serious violation" of his duty to provide truthful answers during jury selection, by failing to disclose that both he and his brother had been prosecuted for sex offenses.

The trial judge rejected the defense attorney's position that the only thing to do was declare a mistrial. Instead, the judge summoned A.C. to the courtroom and discharged him from the jury:

> *The Court*: Mr. [C.], for reasons that I'm not asking you to explain or comment on, some information has been provided to us, just in the last hour or two, about prior legal issues, legal difficulties that you had, and ... that are similar in nature to the offense of which the defendant is charged ... . And that you have a brother ... who has also had legal difficulties and encounters with the law for similar offenses. And that this wasn't brought up at jury selection on Thursday. [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.

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), the position taken by Downard's trial attorney was that any such inquiry was essentially moot. Downard's trial attorney repeatedly told the judge that even if A.C. deliberately withheld information about his own delinquency adjudication and his brother's conviction of a sex offense, the judge had no authority to remove A.C. from the jury.

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 "having to come to court" — and A.C. denied under oath that any member of his family ever "had to come to court".

Moreover, as we explained, A.C. remained silent when the prosecutor asked the group of prospective jurors whether any of them would have difficulty "sitting on a sex assault trial", or whether they would have difficulty "making a decision in a case"

where a charge of rape hinged on evaluating the credibility of the man's and the woman's competing testimony.

And later, when the prosecutor asked A.C. individually whether any of these prior questions raised "any red flags", A.C. answered "No."

Thus, the record provides ample support for the trial judge's conclusion that A.C. was untruthful during *voir dire*.

On a different issue, 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 own delinquency prosecution and his brother's prosecution for sex offenses. Downard argues that if A.C. was merely negligent when he failed to disclose these matters — that is, if A.C. somehow subjectively failed to understand that he was being asked about these matters — 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 even if the trial judge was unwilling 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 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 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 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 of which [Mr. Downard] is charged ... . [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.
>
> *Juror A.C.*: Okay.

Even though the judge may have verbally 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. 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.