IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BUKURIM MIFTARI, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12290 Trial Court No. 3AN-12-9690 CR MEMORANDUM OPINION No. 6556 — December 20, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, Kevin M. Saxby, Judge.

Appearances: Susan Orlansky, Reeves Amodio LLC, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and James E. Cantor, Acting 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).

Bukurim Miftari appeals his convictions for first-degree murder, kidnapping, and tampering with physical evidence.[1] Miftari raises two claims. First, he argues that Superior Court Judge Kevin M. Saxby erred in initially ruling that a communications engineer, slated to testify about cell phone calls that Miftari placed from varying locations, was not an expert witness. Miftari argues that if the judge had timely recognized the expert nature of this testimony, the judge would have ruled that the prosecutor's late disclosure of the engineer's name entitled Miftari to a continuance. Miftari contends that this continuance might have enabled his attorney to conduct a more effective cross-examination of the engineer.

As the judge later recognized, he erred when he initially concluded that the engineer would not offer expert testimony. But the State had timely disclosed the substance of the expert's testimony. Miftari made no showing that he was misled about the significance of this testimony — that cell phone records placed Miftari in the vicinity of the locale where the victim was shot, at the time that she was shot. Therefore, we conclude that the judge's error was harmless.

Miftari also challenges the sufficiency of the evidence that he kidnapped the victim before shooting her. The evidence was sufficient to support the jury's verdict.

Background facts

On September 16, 2012, Kristen Reid and her friend Belen Walker drove to a strip club in Anchorage to celebrate Walker's birthday. Shortly after Walker and Reid sat down, Miftari arrived. Reid had recently broken off her dating relationship with Miftari.

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[1] AS 11.41.100(a)(1)(A); AS 11.41.110(a)(1); AS 11.41.300(a)(1)(C); and AS 11.56.-610(a)(1), respectively.

Another of Reid's friends, Caren Bennett, was at the strip club that night. She spoke with Miftari, who seemed jealous that Reid was speaking to other men and sharing her telephone number. Miftari asked Bennett, "[h]ave you ever thought about shooting somebody that you love?"

Later, Bennett followed Reid to the women's restroom and related this conversation to her. Reid told her, "I can handle it, it's okay." Reid showed Bennett scratches on her neck and said they had been inflicted during a fight with Miftari.

After Walker and Reid left the club around 2:00 a.m., they stopped at a grocery store. By then Reid had ignored ten to fifteen phone calls from Miftari. Once back at Walker's home, Reid parked her vehicle around the corner so that Miftari would not know she was there.

Miftari texted Reid that he was looking for her. Soon thereafter, he arrived at Walker's house. He called out Walker's name and asked if Reid was inside. When Reid opened the door, Miftari racked the slide of a handgun, apparently to chamber a bullet, and held the gun at his side. Reid accused Miftari of harassing her, and Miftari responded that he only wanted to speak with her. Leaving her shoes and her cell phone behind, Reid followed Miftari to his vehicle, a blue Chevy Tahoe.

At 5:54 a.m., police responded to a call about a blue Chevy Tahoe that was stopped on Fairbanks Avenue in Anchorage. The vehicle was registered to Miftari Auto Sales, a business owned by Miftari's family. Police found bullet holes and blood inside the vehicle. Reid was lying in a nearby ditch with a gunshot wound to her face. She was transported to a hospital, where she died a few days later.

Miftari's motion for a continuance

Two years before trial, the State subpoenaed records from AT&T, Miftari's cell phone provider, and disclosed these records to Miftari. Five months before trial, the

State filed a notice that it would call an expert identified only as an AT&T cell phone tower witness, whose name would be supplied later. (AT&T had a policy of only designating an expert to respond to a State subpoena once the trial date was definitively established.)

The State timely disclosed that the expert would explain the interaction of Miftari's cell phone with various cell phone towers around Anchorage: "He will review the cell phone records that were provided [to Miftari] ... and explain to the jury how to interpret the data as to [a] cell phone number, incoming calls, outgoing calls, duration of calls and cell phone tower locations that picked up the call signals."

Fifteen days before trial, the State notified the defense that AT&T had named the engineer that it would produce, Vincent Maduakor. Then, on the day before trial, Miftari's defense attorney moved for a forty-five-day continuance. The defense attorney argued that the untimely disclosure of the engineer's name, the State's failure to produce his curriculum vitae, and the generality of the summary of the engineer's proposed testimony violated Alaska Criminal Rule 16(b)(1)(B). Miftari contended that the continuance would afford him time to prepare a "vigorous cross-examination."

The judge held a hearing regarding Miftari's motion. The prosecutor argued that, contrary to its earlier categorization of the engineer as an expert witness, the engineer was actually not an expert, because he would merely interpret business records (the cell phone tower data) without exercising professional judgment.

The judge accepted this argument, analogizing the engineer's testimony to that of a foreign language interpreter. The judge accordingly denied Miftari's motion for a continuance based on the State's tardy disclosure of the expert's name.

Events at trial

At trial, the defense lawyer voir dired the engineer, who agreed that his testimony was based on his engineering expertise and was not just rote decryption of business data. Hearing this, the judge acknowledged that the engineer actually was an expert witness. Miftari's attorney then renewed his request for a continuance based on the prosecutor's earlier failure to timely disclose the engineer's identity. When the judge asked how Miftari was prejudiced by lack of notice, the defense attorney answered:

> All we're saying is that ... under the expert rules we should have had more time with this technical information to work with it and be prepared.

The prosecutor rejoined that the defense attorney had been provided with the cell phone data two years previously. After further discussion regarding the limited nature of the engineer's ultimate conclusion — that Miftari's phone was present at some indeterminate location within the area of coverage of each cell phone tower that responded to the cell phone's signal — the defense attorney did not continue to argue that he needed a continuance in order to effectively cross-examine the witness.

The judge ruled that he would limit any further testimony by the engineer to fact-based testimony. Miftari later gave notice that he would call a witness to rebut the cell phone engineer's testimony. The State opposed this, arguing that the defense attorney's proposed witness was a late-noticed expert. The court ruled that it would allow a defense witness to testify about how cell phone towers work and how cell phones send signals to towers. But following that ruling, Miftari's counsel elected not to call an expert witness.

Why we conclude that the judge's initial characterization of the engineer as a lay witness was harmless error

On appeal, Miftari argues that the judge erred when he initially concluded that the engineer would not give expert testimony. He further argues that, pursuant to Criminal Rule 16(b)(1)(B), the judge should have concluded that the disclosure of the engineer's name two weeks before trial entitled Miftari to a continuance.

Alaska Evidence Rule 702(a) defines expert testimony as testimony that relies on "scientific, technical, or other specialized knowledge." Criminal Rule 16(b)(1)(B) provides that "no later than 45 days prior to trial, the prosecutor shall inform the defendant of the names and addresses of any expert witnesses ... whom the prosecutor is likely to call at trial" along with their curriculum vitae and a written description of the proposed testimony. The rule further states that "[f]ailure to provide timely disclosure under this rule shall entitle the defendant to a continuance."

The engineer's testimony was clearly expert in nature because it was technical and specialized. But the judge accepted the prosecutor's unrealistic characterization of the testimony as merely a ministerial translation of an encrypted document and accordingly ruled that the expert discovery rule did not apply.

Miftari argues that, under the plain language of Criminal Rule 16(b)(1)(B), the late disclosure of the engineer's name entitled him to an automatic continuance without any showing that he was prejudiced by the late disclosure. But as Miftari acknowledges, we have upheld trial court decisions refusing to grant a continuance for a violation of Rule 16 where the defendant was aware of the substance of the expert witness's testimony and the failure to provide advance notice resulted in no unfair surprise.[2]

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[2] *Andrews v. State*, 286 P.3d 780, 782 (Alaska App. 2012) (citing *Worden v. State*, 213 (continued...)

Miftari does not argue that the State failed to adequately and timely disclose the substance of the engineer's testimony. Rather, Miftari contends that he was prejudiced because, without the engineer's name, he had no opportunity to "vet" the credentials of the engineer in advance. But the engineer's testimony was typical of testimony routinely offered in cases involving cell phone tower data and the location of a cell phone in a particular zone at a particular time. Miftari, who had a cell phone expert of his own at his disposal, did not contest the validity of this testimony, which was so generic that the identity of the presenter scarcely mattered.

Even if the judge had correctly ruled at the outset of trial that the engineer was an expert, the judge would only have granted a continuance upon a showing of prejudice from the late disclosure of the engineer's name — and Miftari showed no cognizable prejudice, either at the trial's outset or later when the judge acknowledged the expert nature of the testimony. Accordingly, the judge's error when he initially ruled that the engineer was a lay witness was harmless.[3]

The State presented sufficient evidence to convict Miftari of kidnapping

Miftari contends that the evidence at trial was insufficient to establish that Reid's decision to leave Walker's home in Miftari's Tahoe was not her voluntary choice, and accordingly the kidnapping conviction should be reversed.

When we review a sufficiency of the evidence claim on appeal, we "view the evidence presented, and reasonable inferences from the evidence, in the light most

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[2] (...continued)
P.3d 144, 146 (Alaska App. 2009) and *Russell v. Anchorage*, 706 P.2d 687, 690 (Alaska App. 1985)).

[3] *See Love v. State*, 457 P.2d 622, 633 (Alaska 1969).

favorable to upholding the jury's verdict."[4] We then "decide whether a fair-minded juror exercising reasonable judgment could conclude that the State met its burden of proving guilt beyond a reasonable doubt."[5]

Miftari's argument hinges upon viewing the evidence in his own favor. Reid was aware that Miftari had earlier mused about killing a loved one when Miftari appeared uninvited at Walker's door around 3:00 a.m., displaying and racking a handgun. She left the house without her shoes or cell phone. Based on this evidence, the jury could reasonably have concluded that Reid would not have departed but for coercion.

Conclusion

We AFFIRM the judgment of the superior court.

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[4] *Collins v. State*, 977 P.2d 741, 747 (Alaska App. 1999) (citing *Simpson v. State*, 877 P.2d 1319, 1320 (Alaska App. 1994)).

[5] *Id.* (citing *Dorman v. State*, 622 P.2d 448, 453 (Alaska 1981)).