IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ADAM M. MILAZZO, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12454 Trial Court No. 3AN-12-11795 CI MEMORANDUM OPINION No. 6798 — June 12, 2019

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael R. Spaan, Judge.

Appearances: Adam M. Milazzo, *in propria persona*, Palmer. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Coats, Senior Judge.[*]

Judge ALLARD.

Adam M. Milazzo was convicted, following a jury trial, of second-degree murder, third-degree assault, fourth-degree assault, first-degree failure to stop at the

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

direction of a peace officer, and driving under the influence.[1] These convictions arose from an incident in which a highly intoxicated Milazzo struck two police cars, drove at a high speed to elude pursuit, ran several red lights, and collided with another vehicle in an intersection, killing the driver. This Court affirmed Milazzo's convictions on direct appeal.[2]

Representing himself, Milazzo filed an application for post-conviction relief alleging, among other things, that his trial attorney was ineffective, and that the prosecutor at Milazzo's trial committed misconduct. After an evidentiary hearing, the superior court denied Milazzo's application. Milazzo — still self-represented — now appeals, arguing that (1) the evidence proved that his trial attorney was incompetent and that this incompetence caused Milazzo prejudice, and (2) the evidence proved that Milazzo was unfairly prejudiced by the prosecutor's improper arguments at Milazzo's trial.

For the reasons explained here, we find no merit to these claims. Accordingly, we affirm the superior court's dismissal of Milazzo's post-conviction relief application.

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[1] AS 11.41.110(a)(l), AS 11.41.220(a)(l)(A), AS 11.41.230(a)(3), AS 28.35.182(a), and AS 28.35.030(a), respectively. We note that Milazzo's judgment incorrectly states that he was convicted of fourth-degree assault under AS 11.41.230(a)(1) rather than AS 11.41.-230(a)(3).

[2] *Milazzo v. State*, 2011 WL 5248078, *1-2 (Alaska App. Nov. 2, 2011) (unpublished).

Background facts

The following facts come from this Court's decision affirming Milazzo's convictions.[3]

On July 13, 2006, at approximately 11:30 p.m., Anchorage Police Sergeant Roy LeBlanc saw Milazzo driving recklessly on Northern Lights Boulevard. Sergeant LeBlanc decided to stop the car Milazzo was driving and he activated his emergency lights and siren. Milazzo kept driving on Northern Lights, passing several places where he could have stopped.

Milazzo finally pulled into a dead end street. Sergeant LeBlanc followed him, as did Anchorage Police Officer Norman Robison, who had arrived to assist. However, Milazzo did not stop. Instead, Milazzo started to make a slow turn. According to Sergeant LeBlanc's testimony, Milazzo then "gunned" his engine, "rammed" the front corner of LeBlanc's patrol car, and then proceeded to drive toward Officer Robison.

Officer Robison saw Milazzo hit LeBlanc's patrol vehicle and continue driving, and Robison concluded that Milazzo had no intention of stopping. Robison tried to position his patrol car to block Milazzo from getting back on Northern Lights, but Milazzo accelerated toward him, struck the right front of his patrol car, got by it, and drove back onto Northern Lights.

Milazzo then accelerated on Northern Lights. Other drivers on the road estimated Milazzo's speed at between eighty and ninety miles per hour. Officer Robison pursued with overhead lights flashing and siren activated. Robison saw three cars stopping for a red light at the Northern Lights and Bragaw intersection, and he concluded that continuing to pursue Milazzo was not worth the risk to public safety. He

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[3] *See Milazzo v. State*, 2011 WL 5248078, *1-2 (Alaska App. Nov. 2, 2011) (unpublished).

therefore stopped his pursuit and turned off his lights and siren. He saw Milazzo go through the red light at Bragaw.

Soon after, a woman was driving east on Northern Lights, approaching the intersection at Boniface Parkway. She saw and heard Milazzo's car coming up rapidly behind her. To protect herself and her passengers, she got out of Milazzo's path by going into the left-hand turn lane. She saw that Milazzo was not going to stop at the red light and watched Milazzo go through the light and crash into a pickup truck that was crossing Northern Lights northbound on Boniface.

The driver of the truck died from the injuries he received in the collision. Milazzo was also seriously injured in the collision and was taken to the hospital. Testing established that Milazzo's blood alcohol content was 0.19 percent, more than twice the legal limit.

At Milazzo's trial, a traffic accident expert estimated that, just prior to the collision, Milazzo was traveling at eighty-four to ninety-six miles per hour. The truck Milazzo hit was traveling at about eighteen miles per hour, which was consistent with the driver proceeding into the intersection after the light turned green. From his investigation, the expert concluded that neither driver attempted to brake or take any other emergency action to avoid the collision.

The jury convicted Milazzo of one count of second-degree murder for killing the driver of the truck, one count of third-degree assault for recklessly placing Sergeant LeBlanc in fear of imminent serious physical injury, one count of fourth-degree assault for recklessly placing Officer Robison in fear of imminent physical injury, one count of first-degree failure to stop at the direction of a peace officer, and one count of driving under the influence.

Milazzo's direct appeal

Milazzo appealed his murder conviction and one of his assault convictions.[4] In that merit appeal, Milazzo argued, *inter alia*, that there was insufficient evidence for the jury to convict him of second-degree murder on the theory that he either intended to cause serious physical injury or that he knew that his conduct was substantially certain to cause death or serious physical injury.[5] This Court rejected this insufficiency claim.[6] We noted first that Milazzo's intoxication was not a defense to the "knowingly" mens rea requirement. As we explained, "[u]nder Alaska law, 'a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance.'"[7] We then summarized the evidence that supported the jury's verdict and held that "[a] reasonable juror evaluating this evidence could conclude that, when he raced his vehicle into the intersection against a red light while [the victim] was crossing the intersection, Milazzo knew his conduct was 'substantially certain to cause death or serious physical injury.'"[8]

Milazzo's application for post-conviction relief

Milazzo represented himself in the post-conviction relief proceedings. In his application, Milazzo alleged that both his trial attorney and his appellate attorney had been ineffective. He also alleged that the prosecutor had committed misconduct during

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[4] *Id.* at *3-4.

[5] *Id.* at *3.

[6] *Id.*

[7] *Id.* at *2 (quoting AS 11.81.900(a)(2)).

[8] *Id*.

his closing statements at Milazzo's criminal trial. Milazzo's application for post-conviction relief was denied. On appeal, Milazzo does not pursue his allegation that his appellate attorney was ineffective.

Milazzo's ineffective assistance of counsel claims against his trial attorney

In his application for post-conviction relief, Milazzo alleged that his trial attorney had been ineffective for failing to move for a new trial on the ground that the murder and assault convictions were contrary to the weight of the evidence.

At the evidentiary hearing, Milazzo's trial attorney testified that he did not move for a new trial (or a judgment of acquittal) with regard to the murder conviction because he believed that the evidence was sufficient to support the conviction. The trial attorney also testified that he *did* move for a judgment of acquittal with regard to the assault convictions because he believed that the evidence did not support those convictions. This motion was denied by the trial court. The trial attorney acknowledged that he did not separately move for a new trial on the ground that the assault verdicts were contrary to the weight of the evidence because, at the time, he was not aware that there was a significant difference between moving for a new trial and moving for a judgment of acquittal. He also testified that he thought there were advantages to moving for a judgment of acquittal because jeopardy attached if such a motion was granted. The trial attorney did not think a retrial would have been helpful to Milazzo.

Based on this testimony, the superior court found that the trial attorney acted competently. The superior court also found that Milazzo was not prejudiced because the court found that there was no reasonable probability that the trial court would have granted any motions for a new trial if they had been filed.

On appeal, Milazzo argues that his trial attorney performed incompetently because he was unaware of the difference between a motion for judgment of acquittal

and a motion for a new trial on the ground that the verdict is contrary to the weight of the evidence.

Milazzo is correct that there is a difference between a motion for judgment of acquittal under Alaska Criminal Rule 29 and a motion for a new trial on the ground that the verdict is contrary to the weight of the evidence under Alaska Criminal Rule 33. When a judge decides a motion for judgment of acquittal, the judge is required to view the evidence — and all reasonable inferences that can be drawn from that evidence — in the light most favorable to upholding the jury's verdict.[9] (The same standard applies on appeal.[10])

In contrast, when a trial judge rules on a motion for a new trial on the ground that the verdict is against the weight of the evidence, the judge is not required to make inferences in favor of either party.[11] Instead, the trial judge is authorized to independently weigh the evidence and determine the credibility of the witnesses.[12] If the judge concludes that the verdict is against the weight of the evidence, the judge may exercise their discretion to grant a new trial "in exceptional cases in which the evidence preponderates heavily against the verdict."[13] Milazzo is therefore correct that there may

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[9] *Pavlik v. State*, 869 P.2d 496, 497 (Alaska App. 1994).

[10] *See Hinson v. State*, 199 P.3d 1166, 1170 (Alaska App. 2008).

[11] *See Dorman v. State*, 622 P.2d 448, 454 (Alaska 1981); *Howell v. State*, 917 P.2d 1202, 1212 (Alaska App. 1996).

[12] *Dorman*, 622 P.2d at 454; *see also Hunter v. Philip Morris USA Inc.*, 364 P.3d 439, 450 n.51 (Alaska 2015) (holding that a trial court tasked with ruling on a motion for new trial need not view the evidence in the light most favorable to the non-moving party, but instead must "use its discretion and independently weigh the evidence" (quoting *Kava v. American Honda Motor Co., Inc.*, 48 P.3d 1170, 1176 (Alaska 2002)).

[13] *Dorman*, 622 P.2d at 454 (quoting with approval from 2 C. Wright, Federal Practice
(continued...)

be some situations in which a judge would deny a motion for judgment of acquittal but nevertheless grant a motion for a new trial under Criminal Rule 33.

But, as the superior court noted, to make his case for post-conviction relief, "Milazzo [was] required to prove not that his trial counsel could have done things better, but that no competent attorney would have done things as badly as his trial counsel did."[14] Here, Milazzo's attorney testified that he believed there was sufficient evidence to support Milazzo's murder conviction, and the State presented ample witness testimony and physical evidence at trial to support his assault convictions. If a new trial had been granted on the murder conviction, it would have given the State the opportunity to indict Milazzo under an extreme indifference theory of second-degree murder that both parties concede was more appropriate to the facts of the case than the theory Milazzo was prosecuted under at trial. It cannot be said that no reasonably competent defense attorney would have failed to move for a new trial in these circumstances. Moreover, the trial court ruled that there was no reasonable probability it would have granted a motion for a new trial based on the weight of the evidence as to either the murder or assault convictions.

Given these circumstances, we affirm the superior court's denial of Milazzo's ineffective assistance of counsel claims.

Milazzo's prosecutorial misconduct claim

In his application for post-conviction relief, Milazzo argued that the prosecutor misstated the proper culpable mental state for second-degree murder and

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[13] (...continued)
and Procedure § 553, at 487 (1969), now found at § 582 (4th ed.) with the word "weighs" substituted for "preponderates").

[14] *See Tucker v. State*, 892 P.2d 832, 835 (Alaska App. 1995).

repeatedly referred to an objective reasonable person standard rather than the subjective knowing standard required to convict Milazzo in this case. According to Milazzo, the prosecutor's misstatements of law constituted prosecutorial misconduct that prejudiced Milazzo and led the jury to convict him under an erroneous legal standard. Milazzo also separately argued that his appellate attorney was ineffective for failing to raise this claim of prosecutorial misconduct on appeal.

In response to this ineffective assistance of counsel claim, the appellate attorney testified that she did not raise this prosecutorial misconduct claim because she did not believe that the prosecutor's argument amounted to misconduct. She also noted that any misstatement of the law was corrected by the trial court's jury instructions, which she believed accurately stated the proper culpable mental state for the second-degree murder charge in this case.

The superior court agreed with the appellate attorney's assessment. The court noted that the trial judge had properly instructed the jury on the relevant law. The court also noted that Milazzo's trial attorney had objected when the prosecutor argued that Milazzo should be held to a reasonable sober person standard, and this objection was sustained by the trial judge, who then reminded the jury that the court (not the parties) would instruct them on the law. Having found that any misstatement of the law by the prosecutor did not prejudice Milazzo, the court denied Milazzo's ineffective assistance of appellate counsel claim as well as his free-standing prosecutorial misconduct claim.

On appeal, Milazzo renews his stand-alone prosecutorial misconduct claim, but he does not renew his ineffective assistance of appellate counsel claim.

The State argues that Milazzo is procedurally barred from raising a claim of prosecutorial misconduct outside of an allegation that his appellate counsel was ineffective because Milazzo could have brought the misconduct claim on direct appeal

but did not do so.[15] Milazzo argues that the State waived this procedural bar in the proceedings below.

We have reviewed the transcript and it appears that the State did waive any reliance on the procedural bar. It also appears that Milazzo detrimentally relied on that waiver when he chose to renew his stand-alone prosecutorial misconduct claim and chose not to renew his ineffective assistance of appellate counsel claim which was based on the same underlying conduct. Accordingly, we will address Milazzo's claim on appeal on the merits, notwithstanding the procedural bar that would otherwise apply.

Milazzo points to two different issues in the prosecutor's closing argument. First, Milazzo contends that the prosecutor misrepresented the law as it relates to voluntary intoxication. Under Alaska law, voluntary intoxication is a defense to intentional conduct but not to knowing conduct. Alaska Statute 11.81.900(a)(2) states, in relevant part, that "a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance." In other words, if a defendant engages in the type of conduct proscribed by a criminal statute, and if the defendant is unaware of the nature of their conduct because of intoxication, and if a sober person in the defendant's position would have been aware that their conduct was of that nature, then the defendant will be deemed to have acted knowingly.[16]

As Milazzo points out, the prosecutor was not always as careful as he should have been in articulating this standard. At times, the prosecutor's argument suggested that, because Milazzo was intoxicated, his conduct should be evaluated under

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[15] *See* AS 12.72.020(a)(2) (stating that an applicant for post-conviction relief may not bring a claim "if the claim was, or could have been but was not, raised in a direct appeal from the proceeding that resulted in the conviction").

[16] *Hutchison v. State*, 27 P.3d 774, 780 (Alaska App. 2001).

a reasonable person standard, rather than under the standard of a sober person in Milazzo's position. Milazzo argues that this subtle distinction between the two standards prejudiced him because it allowed the jury to convict him under a criminal negligence standard rather than a knowingly standard.

We disagree. As the superior court pointed out, the jury was properly instructed on the relevant law, including the mental states that applied to the second-degree murder charge and the extent to which voluntary intoxication was a defense to those mental states. Moreover, during the prosecutor's closing argument, Milazzo's attorney objected to the prosecutor's use of the term "reasonable person." That objection was sustained by the trial court, which proceeded to give a curative instruction. In accordance with this curative instruction, the jury was also instructed that if the arguments of counsel departed from the facts or from the law, the jury should disregard them.

As a general matter, we presume that a jury follows the trial court's instructions.[17] The record in this case provides no reason to suppose that Milazzo's jury failed to follow the instructions it was given. Accordingly we find no merit to Milazzo's claim that the prosecutor's misstatements prejudiced him or caused the jury to convict Milazzo under a lower standard than permitted by Alaska law.

Milazzo also separately argues that he was prejudiced by the prosecutor's description of the law as it related to the assault charges. To convict Milazzo of the third-degree assault charge against Sergeant LeBlanc, the State had to prove that Milazzo was aware of and consciously disregarded a substantial and unjustifiable risk that his conduct in gunning the engine and ramming his car into the front corner of LeBlanc's patrol car placed LeBlanc in fear of imminent serious physical injury by means of a

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[17] *Knix v. State*, 922 P.2d 913, 923 (Alaska App. 1996).

dangerous instrument.[18] To convict Milazzo of the fourth-degree assault, the State had to prove that Milazzo was aware of and consciously disregarded a substantial and unjustifiable risk that his conduct in ramming Sergeant LeBlanc's patrol car and then driving toward Officer Robison placed Robison in fear of imminent physical injury.[19] The jury was properly instructed on these elements, and we again presume that the jury followed those instructions.[20] To the extent that the prosecutor may not have been as clear as he could have been in explaining these elements, we find no plain error.

Conclusion

The judgment of the superior court is AFFIRMED.

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[18] *See* AS 11.41.220(a)(1)(A); AS 11.81.900(a)(3).

[19] *See* AS 11.41.230(a)(3); AS 11.81.900(a)(3).

[20] *Knix*, 922 P.2d at 923.