IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ARNOLD DARREN DAVID, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12461 Trial Court No. 3AN-14-08309 CR MEMORANDUM OPINION No. 6789 — April 17, 2019

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

Appearances: Michael Barber, Barber Legal Services, Boston, Massachusetts, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge ALLARD.

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

Arnold Darren David was convicted of one count of driving under the influence[1] and one count of third-degree assault[2] after he offered to drive two women to a women's shelter and instead drove erratically and dangerously through downtown Anchorage until they escaped his vehicle.

David raises two issues on appeal. First, David argues that the superior court erred in denying his request for a mistrial after the State's witnesses referred to one of the complaining witnesses as a "victim" during the trial, in violation of a protective order. Second, David argues that the prosecutor's comments during closing statements shifted the burden of proof and inaccurately described the beyond a reasonable doubt standard.

For the reasons explained here, we reject both arguments.

Background facts

Denese Chamblin and Leah Karmun were outside an Anchorage grocery store when David offered them a ride back to a women's shelter, where they were staying. Chamblin and Karmun accepted David's offer. After getting into the truck, however, Chamblin noticed that David smelled heavily of alcohol. According to both women's later testimony, David was speeding and swerving, and running stop signs and red lights. Chamblin and Karmun testified that they told David to stop and let them out, but he refused.

Karmun eventually jumped out of the truck while David was stopped. Chamblin testified that she escaped after David stopped again a few minutes later. According to Chamblin's testimony, David yelled at Chamblin to stop running and told

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[1] AS 28.35.030(n).

[2] AS 11.41.220(a)(1)(A).

her he was going to shoot her. Chamblin testified that David was holding his hands up like he had a gun.

Based on these events, David was charged with one count of driving under the influence and two counts of third-degree assault. The jury convicted David of driving under the influence and the third-degree assault charge against Chamblin. The jury acquitted David of the third-degree assault charge against Karmun.

The superior court properly denied David's request for a mistrial

Prior to trial, the superior court granted David's request for a protective order prohibiting the State and its witnesses from referring to Chamblin and Karmun as "victims." During the trial, Officer Kenneth Anglin used the term twice during his testimony, both times in reference to Chamblin. A second witness, Officer Amanda Covington, referred to Chamblin as "the possible victim"; and then later used the phrase "the victim or a witness" in describing generic police procedures.

Based on these references, David's attorney asked for a mistrial. The attorney argued that "[t]here is a dispute about whether or not a crime actually was committed here, and by referring to [Chamblin and Karmun] as victims, that invades the jury's province of whether or not a crime actually was committed."

The superior court denied the request for a mistrial. The court agreed that Officer Anglin violated the protective order, but the court found the violation to be inadvertent and it ruled that any resulting prejudice could be addressed through an appropriate jury instruction. The court found that Officer Covington's generic comments did not violate the protective order and that, in any event, any prejudice could also be cured by an instruction to the jury. At the end of trial, the court instructed the jury to disregard any references to Chamblin or Karmun as victims, and the court reminded the

jury that it was required to independently determine whether Chamblin and Karmun had been victims of a crime.

David now appeals the superior court's denial of his request for a mistrial. Whether to grant a mistrial is a decision entrusted to the sound discretion of the trial judge.[3] We will not reverse a trial judge's decision to deny a motion for a mistrial unless "after reviewing the whole record, we are left with a definite and firm conviction that the trial court erred in its ruling."[4]

We have reviewed the record in this case, and we do not find an abuse of discretion. Officer Anglin's two references to Chamblin as a victim were brief and limited. Officer Covington's references to Chamblin as a "possible victim" and her use of the phrase "the victim or a witness" in describing generic police procedures were not obvious violations of the protective order, if they were violations at all. Moreover, any prejudice was cured by the trial judge's additional instruction. Accordingly, we find no abuse of discretion in the superior court's denial of the motion for mistrial.

The prosecutor's comments during rebuttal were not plain error

David also challenges two of the prosecutor's comments during closing argument. Because David did not object to these comments at trial, we review under the plain error standard.[5] We conclude that the prosecutor's comments did not amount to plain error.

David argues first that the prosecutor impermissibly shifted the burden of proof when he "informed the jury that it should base its verdict on whether it considered

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[3] *Hewitt v. State*, 188 P.3d 697, 699 (Alaska App. 2008).

[4] *Roussel v. State*, 115 P.3d 581, 585 (Alaska App. 2005).

[5] *See Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

David's version of events reasonable." But this is a partial mischaracterization of the prosecutor's statements. During his closing argument, the prosecutor repeatedly told the jury that the State was required to prove every element beyond a reasonable doubt, and that the jury should only convict David if it found that the State met that burden. Then, during rebuttal, the prosecutor argued that David's defense was not reasonable and that, if the jury agreed that David's defense was not reasonable, it should find David guilty.

On appeal, David takes this final comment out of context and argues that the prosecutor told the jury that it could convict David simply because his defense was not reasonable. Understood in the context of the prosecutor's overall argument, however, it is clear that the prosecutor was telling the jury that it should only convict David if it found that David's defense was not reasonable *and* that the State had otherwise proven every element beyond a reasonable doubt. We therefore conclude that David has not demonstrated plain error.

Second, David argues that the prosecutor inaccurately described the reasonable doubt standard when he told the jury that it "is actually not the highest burden of proof." Again, David takes the prosecutor's statements out of context. Here is what the prosecutor told the jury:

> [W]e don't have to prove [the defendant's guilt] to an absolute certainty. We don't have to prove it to 100 percent. So if this is actually not the highest burden of proof, it's actually, to be 100 percent certainty — that's not what we're at. It's beyond a reasonable doubt which is a reason based on common sense.

We acknowledge the prosecutor's statements were potentially ambiguous. The reasonable doubt standard is the highest burden of proof in the American legal system, and it is inappropriate for a prosecutor to suggest otherwise.

Understood in context, however, the prosecutor was distinguishing between the reasonable doubt standard and a theoretical standard of proof to absolute certainty.[6] We therefore conclude that the prosecutor's comments did not amount to plain error.

Conclusion

The judgment of the superior court is AFFIRMED.

[6] *See* Alaska Criminal Pattern Jury Instruction 1.06 ("The prosecution is not required to prove guilt beyond all possible doubt, for it is rarely possible to prove anything to an absolute certainty.").