IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BRANDON H.W. KUSEGTA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12730 Trial Court No. 3DI-14-00519 CR MEMORANDUM OPINION No. 6822 — September 18, 2019

Appeal from the Superior Court, Third Judicial District, Dillingham, Patricia P. Douglass, Judge.

Appearances: Margi A. Mock, Attorney at Law, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, 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 Mannheimer, Senior Judge.[*]

Judge ALLARD.

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

Brandon H.W. Kusegta was convicted of third-degree assault and first-degree witness tampering after he beat his wife, M.A., and then, in two recorded phone conversations, asked her not to testify at his trial.[1] Kusegta raises two issues on appeal.

First, Kusegta argues that the superior court improperly admitted the audio recordings of his phone conversations with his wife because the State failed to properly authenticate these phone conversations as required by Alaska Evidence Rule 901(a). Specifically, Kusegta argues that the State failed to prove that these conversations occurred after M.A. was served with a subpoena to testify at Kusegta's trial. (Whether the phone calls occurred after M.A. was subpoenaed was important because, under the witness tampering statute, the State was required to prove that Kusegta knowingly induced or attempted to induce M.A. to "be absent from a judicial proceeding *to which [she had] been summoned*."[2])

Although Kusegta frames his argument as a challenge to the "authenticity" of the recordings, Kusegta's argument primarily goes to the relevance of the recordings. As we recognized in *Thompson v. State*, the modern test for authentication of audio recordings is "whether the proponent of the recording can satisfactorily establish that the recording is an accurate reproduction of the conversation or other audio event portrayed in the recording."[3] On appeal, Kusegta does not dispute that the conversations occurred, nor does he dispute that the conversations were between him and M.A.

What Kusegta does dispute is whether the State presented sufficient evidence of the *timing* of the conversations (*i.e.*, sufficient evidence that the two

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[1] AS 11.41.220(a)(5) and AS 11.56.540(a)(2), respectively.

[2] AS 11.56.540(a)(2) (emphasis added).

[3] *Thompson v. State*, 210 P.3d 1233, 1239 (Alaska App. 2009); *see also Bichiok v. State*, 2014 WL 1017183, at *2-3 (Alaska App. Mar. 12, 2014) (unpublished) (applying *Thompson*).

conversations occurred after M.A. was served with her trial subpoena). Alaska Evidence Rule 104(b) governs this issue of conditional relevancy. Under this rule, "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact" — here, the fact that M.A. had already been served with her trial subpoena when the conversations occurred — "the court shall admit [the evidence] upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

In Kusegta's case, the record was sufficient to establish this foundation. In the first of the recordings, M.A. can be heard telling Kusegta, "I got subpoenaed." M.A. made this statement before Kusegta advised or asked her not to testify. This evidence was sufficient to satisfy the foundational requirement of Evidence Rule 104(b), and the trial judge properly admitted the recorded conversations.

Second, Kusegta argues that the superior court committed constitutional error when it refused to allow Kusegta's trial attorney to cross-examine M.A. about her immunity agreement with the State. Some background facts are necessary to explain this issue.

M.A. testified under oath at Kusegta's first grand jury proceeding that Kusegta had not hit her. Kusegta's indictment was then dismissed (for reasons not relevant to our disposition) and Kusegta was re-indicted. At the second grand jury proceeding, M.A. testified that Kusegta had, in fact, hit her. M.A.'s testimony thus posed a potential self-incrimination issue because if she testified at trial, she would almost certainly be forced to admit that she had committed perjury at either the first or the second grand jury.

In response to this concern, the State granted M.A. transactional immunity from any criminal charges relating to her appearances before the grand jury.[4] In other words, the State granted M.A. immunity from potential prosecution for perjury in either of the two grand jury proceedings. But the State did not grant M.A. immunity from future acts of perjury — *i.e.*, from providing knowingly false testimony at Kusegta's trial.

At trial, Kusegta's attorney sought to cross-examine M.A. about the State's grant of immunity. The trial judge refused to allow this cross-examination because the judge erroneously concluded that this would constitute an improper comment on M.A.'s claim of privilege.

On appeal, the State concedes that the superior court's ruling was error, but the State argues that this error was harmless beyond a reasonable doubt.

The State's concession of error is well founded.[5] Alaska Evidence Rule 512 prohibits adverse comment upon, or drawing inferences from, a witness's claim of privilege.[6] But it does not prohibit comment on, or drawing inferences from, the existence of an immunity agreement between a witness and the State.[7]

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[4] *See State v. Gonzalez*, 825 P.2d 920, 933-36 (Alaska App. 1992), *aff'd.* 853 P.2d 526 (Alaska 1993).

[5] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972).

[6] Alaska Evid. R. 512 ("The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel.").

[7] *See* Alaska Evid. R. 613 ("[E]vidence of bias or interest on the part of a witness [is] admissible for the purpose of impeaching the credibility of a witness."); *Evans v. State*, 550 P.2d 830, 838 (Alaska 1976) ("Cross-examination to show bias because of expectation of immunity from prosecution is one of the safeguards essential to a fair trial . . . .").

Nevertheless, we agree with the State that this error was harmless beyond a reasonable doubt. When M.A. testified at Kusegta's trial, she repeatedly denied that Kusegta had assaulted her, and she repeatedly declared that she had sustained her injury when she accidentally ran into a door. M.A. also repeatedly declared that Kusegta had not asked or pressured her to refrain from testifying.

As Kusegta acknowledges on appeal, his trial attorney's purpose for cross-examining M.A. about the immunity agreement was to undermine the credibility of any incriminating testimony that M.A. might give. But M.A.'s testimony was favorable to Kusegta, and Kusegta's attorney specifically argued in favor of M.A.'s credibility during closing arguments, urging the jury to believe M.A. when she testified that Kusegta did not hit her. Given these circumstances, we conclude that the trial judge's error in disallowing this line of cross-examination was harmless beyond a reasonable doubt.

The judgment of the superior court is AFFIRMED.