IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DARRIN RAY DUNN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13085 Trial Court No. 4FA-16-02252 CR MEMORANDUM OPINION No. 6838 — November 20, 2019

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Douglas L. Blankenship, Judge.

Appearances: William R. Satterberg Jr., Attorney at Law, Fairbanks, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

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

The State charged Darrin Ray Dunn with second-degree sexual assault for orally penetrating C.S.'s genitals while she was incapacitated following a night of heavy drinking, and with first-degree sexual assault for forcibly continuing the assault after C.S. was no longer incapacitated.[1] After a jury found Dunn guilty of both counts, the superior court merged the two counts and entered a single conviction for first-degree sexual assault.

During Dunn's trial, his defense attorney sought permission to question C.S. about an unrelated sexual assault committed against her several years earlier. The attorney argued that the prior assault was relevant because it might have led C.S. to imagine that Dunn had sexually assaulted her. After hearing argument on Dunn's request and testimony from C.S. outside the presence of the jury, the judge excluded this line of questioning. He ruled that evidence of the previous sexual assault was only marginally relevant and was outweighed by C.S.'s privacy interests.

Following trial, Dunn moved to set aside the verdicts as inconsistent with one another, arguing that the culpable mental states of the two crimes were mutually exclusive. The judge denied this motion, reasoning that the evidence supported a jury finding that C.S. was initially incapacitated, but that as the assault continued, she regained capacity and communicated her lack of consent.

Dunn then made a motion to set aside his convictions based on insufficient evidence. The judge ruled against Dunn as to both counts.

Prior to sentencing, Dunn's attorney moved to continue the sentencing hearing so that he could obtain a psychiatric evaluation to determine whether Dunn suffered from combat-related post traumatic stress disorder or a traumatic brain injury.

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[1] AS 11.41.420(a)(3)(B) and AS 11.41.410(a)(1), respectively.

The judge denied the continuance motion and, during the sentencing hearing, rejected Dunn's proposed statutory mitigator AS 12.55.155(d)(9) — that the offense was among the least serious within the definition of first-degree sexual assault.

Dunn now challenges each of the judge's rulings, arguing that the judge abused his discretion in excluding the evidence of C.S.'s previous sexual assault; that the judge erred in refusing to set aside the verdicts as inconsistent; that the judge erred in concluding that the charge of first-degree sexual assault was supported by sufficient evidence; that the judge abused his discretion in denying a continuance; and that the judge erred in rejecting the least serious conduct mitigator.

For the reasons set forth in this opinion, we affirm the judge's rulings and, accordingly, we affirm Dunn's conviction and sentence.

Background facts

On the evening of June 10, 2016, C.S., a recruiter for the National Guard, drank heavily at a bar. Also present were Dunn, a sergeant in the National Guard, and Eric Smith, C.S.'s boyfriend. Around 3:00 a.m., the three walked back to the nearby apartment building where C.S. and Smith both lived (in separate units). The group continued to drink outside on the lawn before moving inside to C.S.'s apartment.

C.S. testified at trial that she was by then extremely intoxicated and acting "crazy." At some point, Dunn twisted C.S.'s arm behind her back, causing her to cry. While Dunn tried to soothe C.S., her boyfriend Smith departed to his own apartment.

C.S. testified that she was so intoxicated that she was only intermittently conscious. She recalled Dunn starting to kiss her, and then fumbling with the buttons on her shorts, but she did not recall Dunn actually removing them or his removal of her shirt. She next recalled finding herself on the floor of her living room, clad only in her

bra, with Dunn engaging in oral penetration of her genitals. C.S. testified that she both wept and hyperventilated, but that she was too intoxicated to verbally object to Dunn's conduct.

According to C.S., Dunn signaled his awareness of her lack of consent in two ways: when she intermittently wept and hyperventilated, he would tighten his grip on her arms to quiet her; and he told her that she was obligated to obey his orders to be quiet, because he was her superior officer in the National Guard.

C.S. testified that she eventually decided to go limp and silent. Dunn looked up, and C.S. was able to kick herself out from underneath him and escape behind her locked bedroom door. She then retrieved a loaded revolver from her bedside table and forced Dunn out of her apartment at gunpoint. While Dunn pounded on the apartment's door, C.S. hid under her bed and called the Alaska State Troopers, who responded and arrested Dunn.

Dunn denied that he engaged in sexual conduct with C.S. He testified that he sat down on C.S.'s couch and "passed out," with no further memory until he awakened in the early morning and went outside to relieve himself. He then returned to the apartment, only to find that he was locked out. He pounded on the apartment's door so that he could retrieve his wallet, cell phone, and glasses. He denied that C.S. forced him from her apartment at gunpoint.

The jury rejected this defense and found Dunn guilty of both counts.

The court's exclusion of evidence of a prior sexual assault committed against C.S. was not an abuse of discretion

During the second day of C.S.'s testimony, the defense attorney told the judge that he wished to raise an evidentiary issue. The attorney stated that C.S. had

previously been sexually assaulted while she was a member of the New York National Guard, and that he intended to question her about that event. He added that he did not consider Alaska's rape shield statute to bar this line of questioning, but that he wanted to alert the court to that potential issue.

The rape shield statute, AS 12.45.045, provides limits on introducing at trial evidence of the victim's previous sexual conduct. In prosecutions for sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, or attempts to commit these crimes, "evidence of the [victim's previous] sexual conduct . . . may not be admitted[,] nor may reference be made to it in the presence of the jury," unless the defendant applies for leave of court at least five days before trial (or at a later time, for good cause shown), and the evidence is approved by the trial judge following an *in camera* hearing. If, at this hearing, the judge finds that the proffered evidence of the victim's sexual conduct is relevant, and its probative value is "not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness," the judge must then issue an order defining the permissible scope of cross-examination regarding the prior sexual conduct.[2] Only then will the evidence be admitted.

Additionally, the rape shield statute provides that "[i]n the absence of a persuasive showing to the contrary, evidence of the [victim's] sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible[.]"[3] (The prior sexual assault against C.S. occurred in 2013, more than one year prior to the date of the charged offense.)

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[2] AS 12.45.045(a).

[3] AS 12.45.045(b).

After learning that the defense attorney intended to question C.S. about a prior sexual assault, the judge held a hearing outside the presence of the jury. The defense attorney elaborated that, during C.S.'s grand jury testimony, she testified that she had been sexually assaulted some years earlier while she was a member of the New York National Guard, and that she had not reported this assault to the authorities. Then, the attorney noted, C.S. testified at Dunn's trial the previous day that her experience during Dunn's sexual assault was like a "bad dream."

Because of this description, the defense attorney argued that on the night of the charged sexual assault, C.S. could have experienced a nightmare about the earlier sexual assault in New York after she had gone to bed. The defense attorney hypothesized that upon awakening from such a nightmare, C.S. could have imagined that Dunn had sexually assaulted her. The attorney argued that this potential conflation of events entitled him to question C.S. about the previous assault. The attorney further argued that this defense theory did not implicate the rape shield statute, because C.S.'s status as a victim of a prior sexual assault was not "evidence of the [victim's] prior sexual conduct" within the meaning of the rape shield statute.

The judge required the defense attorney to voir dire C.S. The attorney asked C.S. whether she had testified that Dunn's sexual assault was like a bad dream, and whether she sometimes recalled prior adverse life experiences, including her sexual assault in New York, when she was intoxicated. C.S. answered these questions in the affirmative. But C.S. denied having a nightmare about the New York incident. And when the attorney asked her whether she had gone to sleep and dreamed that Dunn had assaulted her, she denied this as well: "Sir, I know the difference between a dream and reality, and I know what happened and I know what I remember."

Notably, Dunn's attorney did not ask C.S. to describe the circumstances of the earlier sexual assault. That is, the attorney afforded no basis for the judge to conclude that the earlier assault and C.S.'s account of an assault by Dunn were in any way similar to one another.

The judge ruled that Dunn's theory that the prior sexual assault had induced a false perception of a recent sexual assault by Dunn was "marginal" and "speculative," and that Dunn had not overcome the presumption of inadmissibility set forth in the rape shield statute. The judge noted that Dunn offered no expert testimony regarding the plausibility of his defense — *i.e.*, that an intoxicated subject could draw upon a memory of a past sexual assault to unconsciously create a false memory of a recent sexual assault.[4] Lastly, the judge found that Dunn had failed to raise the issue at least five days before trial as required by the rape shield statute, and that this failure was not excused by good cause.

On appeal, Dunn argues that the judge improperly treated the rape shield law as "inviolable and sacrosanct" — as a near absolute bar to the admission of a victim's prior sexual conduct, and that the judge unconstitutionally deprived Dunn of the ability to confront C.S. and to present a defense. The State disagrees, arguing that the judge properly found that Dunn's confabulation defense was too speculative to warrant an invasion of C.S.'s privacy regarding the earlier assault.

We agree with the State that the defense attorney failed to establish the relevance of the prior sexual assault. The defense attorney's cursory voir dire of C.S.

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[4] *See Pierren v. State*, 2016 WL 5462034, at *4 (Alaska App. Sept. 28, 2016) (unpublished) (noting that a defendant failed to offer an expert to substantiate his claim that a child victim's allegation of sexual abuse could be a "manifestation" of alleged earlier child abuse).

revealed no evidence that the two assaults were similar, as normally would be required to establish that a witness had confused two events. And C.S.'s descriptive characterization of her experience during Dunn's sexual assault as a dreamlike sense of helplessness offered no support for Dunn's hypothesis that C.S. might have imagined both the assault and her subsequent ejection of Dunn from her apartment at gunpoint. Given this record, we find that the judge did not abuse his discretion when he excluded this evidence as "marginal" and "speculative."

Because we affirm the judge's ruling on this ground, we need not decide whether the rape shield statute applies to this matter. That is, we need not decide whether the prior sexual assault committed against C.S. amounted to "evidence of the [victim's] prior sexual conduct" within the meaning of the statute. We also note that, contrary to Dunn's characterizations of the rape shield statute on appeal, the rape shield statute is procedural rather than substantive in nature.[5] As we explained in *Jager v. State*, the rape shield statute does not substantively alter the evidence rules regarding the admission of relevant evidence, and it does not preclude the introduction of "truly relevant" evidence regarding a victim's prior sexual conduct. Instead, the statute sets forth a procedure that courts must follow when a party seeks to introduce such evidence.[6]

Our holding today disposes of Dunn's argument that the judge's application of the rape shield law unconstitutionally deprived Dunn of his right to confront witnesses or to present a defense. We have previously held that "[w]hen properly applied, the rape shield statute will not encroach on the confrontation clause, because there is no right to

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[5] *Jager v. State*, 748 P.2d 1172, 1175 (Alaska App. 1988).

[6] *Id.* (recognizing that the rape shield statute establishes a screening procedure and "guards against hasty and ill-conceived admission of evidence that is only marginally relevant or truly irrelevant").

confront and cross-examine on irrelevant issues."[7] The same principle defeats Dunn's contention that he was denied his due process right to mount a defense.[8]

The verdicts were not inconsistent with one another and the charge of first-degree assault was supported by sufficient evidence

The State alleged that Dunn sexually penetrated C.S. while knowing that she was incapacitated and unable to communicate her lack of consent (second-degree assault), and also sexually penetrated C.S. without her consent (first-degree sexual assault). The jury found Dunn guilty of these two charges.

Eight days after the jury was discharged, Dunn filed a motion arguing that these verdicts were inconsistent. The judge denied this motion, ruling that the jury could have found that C.S. was incapacitated at the outset of the assault, but that she regained self-control and was then coerced by the use of force; accordingly, the two verdicts were not necessarily inconsistent.

Dunn then filed a motion challenging the sufficiency of the evidence to prove either charge. The judge denied this motion.

Dunn appeals the judge's ruling upholding the verdicts as logically consistent with each other, and the judge's conclusion that the evidence was sufficient to prove the charge of first-degree assault. (Dunn does not appeal the judge's ruling that the evidence was sufficient to establish the charge of second-degree assault.)

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[7] *Id.* at 1177 (citation omitted); *see also Larson v. State*, 656 P.2d 571, 575 (Alaska App. 1982) (holding that Alaska Evidence Rule 403, properly applied, does not violate the right to confront witnesses or to present a defense).

[8] *See Larson*, 656 P.2d at 575.

The State argues that Dunn did not object to the purportedly inconsistent verdicts before the jury was discharged, and so is limited to review for plain error.[9] Normally, plain error review occurs when the judge makes no ruling for us to review,[10] but in this case the judge ruled on the merits on Dunn's tardy objection that the verdicts were inconsistent. Since we are upholding the judge's ruling, we need not address the State's plain error argument further.

Dunn's inconsistent verdict claim rests on his argument that Dunn could not have simultaneously known that C.S. was "incapacitated" (*i.e.*, "temporarily incapable of appraising the nature of one's own conduct or physically unable to express unwillingness to act"[11]) as required for a second-degree sexual assault, while at the same time acting recklessly as to the possibility that he was coercing C.S. by the use of force as required for first-degree sexual assault.[12]

But the judge determined that the jury could reasonably have found that Dunn's culpable mental state evolved as the sexual assault progressed. The judge explained that the evidence supported the conclusion "that the victim was incapacitated, regained capacity, realized the situation, thought about what to do to extricate herself while the defendant held her down, and then did so." Implicitly, the judge found that the

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[9] *See Miller v. State*, 312 P.3d 1112, 1114 (Alaska App. 2013).

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

[11] AS 11.41.470(2).

[12] *See Reynolds v. State*, 664 P.2d 621, 625 (Alaska App. 1983) ("In order to prove a violation of AS 11.41.410(a)(1), the state must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent."); *see also State v. Mayfield*, 442 P.3d 794, 799 (Alaska App. 2019) (noting that the "State must prove that the defendant recklessly disregarded the circumstance that the sexual activity was 'without consent'" (quoting *Reynolds*, 664 P.2d at 625)).

evidence at trial could support a reasonable conclusion by the jury that, as the assault progressed, Dunn realized that C.S. was non-verbally signaling her lack of consent, but he nonetheless forcibly continued the assault.

In *Davenport v. State*, the Alaska Supreme Court held that a claim of inconsistent verdicts fails if the record "reveals a basis upon which the jury's verdict[s] can rationally be explained."[13] We agree with the trial court that the evidence in Dunn's case provided such a basis.

Dunn also argues that there was insufficient evidence to convict him of first-degree sexual assault. Specifically, Dunn argues that "[o]nce C.S. regained the capacity to convey her lack of consent, . . . the sexual penetration stopped as a result of [Dunn's] subjective awareness of C.S.'s lack of consent."

We note, as an initial matter, that this is not the argument that Dunn made at trial. Rather, at trial, Dunn argued that no sexual contact occurred. Thus, the evidence at trial was not as well developed as it might otherwise have been if Dunn had been asserting consensual sexual contact.

In any event, when we review a sufficiency claim, we are required to view the evidence at trial — and all reasonable inferences derived from that evidence — in the light most favorable to upholding the jury's verdict.[14] Here, C.S.'s testimony at trial contradicts Dunn's contention on appeal that he immediately desisted once C.S. communicated her unwillingness to proceed. C.S. testified that, as the sexual assault progressed, she became aware that Dunn was holding her arms down and that when she

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[13] *Davenport v. State*, 543 P.2d 1204, 1208 (Alaska 1975).

[14] *See, e.g.*, *O'Connor v. State*, 444 P.3d 226, 232 (Alaska App. 2019).

"started to cry harder or hyperventilate . . . he would tighten his grip on [her] arms until [she] would stop."

Reasonable jurors could conclude that this pinning of C.S.'s arms, and the intermittent tightening of Dunn's grip on her arms, supplied both the coercive force required to establish a first-degree assault, and sufficient evidence that Dunn was at least reckless as to the possibility that this force was coercing C.S. into non-consensual sex. Indeed, Dunn signaled his actual awareness of C.S.'s lack of consent when, according to C.S., he told her that she had to obey his order to be silent, because he was her superior officer.

Thus, viewing the evidence in the light most favorable to upholding the jury's verdict as we are required to do, we conclude that there was sufficient evidence to support the jury's verdict finding Dunn guilty of first-degree sexual assault. And, as we explained earlier, this verdict was not logically inconsistent with the jury's verdict that Dunn initially committed second-degree sexual assault.

The court did not abuse its discretion in denying a second continuance of Dunn's sentencing hearing

Dunn's trial ended on May 23, 2017, and the judge set sentencing for October 4, 2017. Shortly before the scheduled sentencing hearing, Dunn requested a continuance. The judge granted this continuance over the State's objection, rescheduling the sentencing for January 22, 2018.

Several days before the rescheduled sentencing hearing, Dunn moved for a second continuance. The parties argued Dunn's continuance motion orally at the sentencing hearing. The defense attorney informed the court that he had just received Dunn's medical records from the Veterans Administration, and that these records stated

in a conclusory fashion that Dunn suffered from combat-related post traumatic stress disorder (PTSD) and traumatic brain injury (TBI). But the records did not include the sort of comprehensive psychological examination that might support these diagnoses. The attorney stated that obtaining such an examination would take six to eight additional weeks, or perhaps more. He argued that if the examination supported a diagnosis of combat-related PTSD or TBI, this might qualify as a non-statutory mitigating factor.

The judge denied Dunn's continuance motion. The judge explained that AS 12.55.155(d)(20)(B), the statutory mitigator for combat-related PTSD or TBI, specifically excludes Title 11.41 crimes against the person and concluded that this also precluded consideration of combat-related PTSD or TBI as a non-statutory mitigator.[15] And, without making a specific finding of a lack of diligence, the judge noted that Dunn seemingly could have done more during the seven-month interval between the trial and the scheduled sentencing to document Dunn's alleged mental condition.

On appeal, Dunn argues that the court abused its discretion in denying the continuance. He contends that the judge erred when he ruled that a continuance to pursue issues of PTSD or TBI would be futile. He reasons that PTSD can bear on a defendant's blameworthiness, and that it was therefore "manifestly unjust" for the legislature to exclude crimes of violence against the person from the statutory mitigator for combat-related PTSD and TBI.

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[15] *See* AS 12.55.155(d)(20)(B); *see also Totemoff v. State*, 739 P.2d 769, 776 (Alaska App. 1987) ("[A] trial court should not propose a nonstatutory mitigating factor to the three-judge panel where the legislature specifically rejected that factor for inclusion in AS 12.55.155(d).").

Dunn did not make this argument in the trial court. And Dunn's briefing on the point is so cursory that we conclude he has waived it.[16]

We note that, even though evidence of a combat-related PTSD or TBI could not serve to establish a statutory or non-statutory mitigator under these circumstances, proof of such a condition might still be relevant evidence in determining an appropriate sentence within the presumptive sentencing range. But Dunn was allowed to present this argument to the trial court. And given the fact that the judge sentenced Dunn to the minimum active sentence allowed by statute — 20 years to serve — it does not appear that Dunn was prejudiced by denial of the continuance.[17]

The court did not err in rejecting the least serious conduct mitigator

Dunn argues that the court erred by rejecting mitigator AS 12.55.155(d)(9), that his conduct "was among the least serious conduct included in the definition of the offense." He reiterates his argument that he should not have been convicted of first-degree sexual assault, because the evidence at trial showed that he terminated the assault immediately once C.S. regained her capacity to convey her non-consent. Dunn contends that this alleged circumstance requires a finding that his first-degree sexual assault was among the least serious within the definition of the offense.

The judge rejected Dunn's argument, finding that Dunn did not immediately terminate the sexual assault once C.S. non-verbally conveyed her lack of consent, but rather held her down so that she had to forcibly extricate herself, and then only left the apartment when C.S. resorted to the use of a firearm to force him out of her

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[16] *See, e.g.*, *Berezyuk v. State*, 282 P.3d 386, 392 (Alaska App. 2012).

[17] AS 12.55.125(i)(l)(A)(ii).

apartment. These factual findings are not clearly erroneous. And we affirm the judge's legal ruling that these facts place Dunn's crime within the broad middle ground of conduct constituting sexual assault in the first degree, rather than in the far more narrow category of a least serious offense.[18]

Conclusion

We AFFIRM the judgment of the superior court.

[18] *See Michael v. State*, 115 P.3d 517, 519 (Alaska 2005) (holding that when a defendant asserts a mitigator, a trial court's findings of fact regarding the defendant's conduct are reviewed for clear error, and the trial court's legal ruling as to whether those found facts establish the mitigator is reviewed *de novo*).