IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAVID WILLIAM FUTREL,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13385
Trial Court No. 3AN-18-02213 CR

MEMORANDUM OPINION

No. 7049 — March 8, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Yvonne Lamoureux, Judge.

Appearances: David T. McGee, Attorney at Law, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage (opening brief), and Jay A. Hochberg, Attorney at Law, Ewa Beach, Hawai'i, under contract with the Office of Public Advocacy, Anchorage (reply brief), for the Appellant. RuthAnne Beach, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Judge ALLARD, writing for the Court.
Judge WOLLENBERG, concurring.

David William Futrel was convicted, following a jury trial, of two counts of third-degree weapons misconduct (felon in possession of a concealable firearm), three counts of fourth-degree controlled substance misconduct, and one count of driving while license cancelled, suspended, or revoked (an infraction).[1] On appeal, Futrel challenges only his weapons misconduct convictions.

Futrel raises two arguments on appeal. First, Futrel argues that the trial court erred in allowing the State to introduce testimony describing photographs that appeared to depict Futrel posing with firearms. We agree that it was error for the trial court to allow this testimony, but we also conclude that the error was harmless given other evidence that was admitted at trial (but not challenged on appeal).

Second, Futrel argues that the jury instruction on the definition of "possession" constituted plain error requiring reversal of the weapons misconduct convictions. For the reasons explained here, we do not find plain error.

Relevant facts

In early 2018, Futrel had outstanding arrest warrants. A newly created unit of the Anchorage Police Department — the Investigative Support Unit — was tasked with finding and arresting violent offenders with felony warrants which included Futrel.

On March 7, 2018, an officer with the unit, Officer Mitchel Veenstra, saw a man resembling Futrel driving a Dodge Neon; a second officer, Officer Nicholas Saldana, confirmed that Futrel was the driver. The officers, who were driving unmarked vehicles, surreptitiously followed Futrel to a local park, where Futrel backed his vehicle into a parking space.

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[1] AS 11.61.200(a)(1), former AS 11.71.050(a)(4) (2018), and AS 28.15.291(a)(2), respectively.

Saldana pulled into the parking lot and used his truck to try to block Futrel's car in the parking space. Other officers, some of them in marked police cars with sirens, drove into the parking lot. Futrel tried to maneuver around the police vehicles before Saldana used his truck to push Futrel's car into a snowbank, immobilizing it. Futrel then got out of the car and attempted to flee on foot before being apprehended and arrested.

Through the windows of Futrel's vehicle, the police saw a small bag containing what appeared to be methamphetamine on the front dashboard, a bag containing what appeared to be marijuana next to the driver's seat, several drug pipes, a piece of aluminum foil with burn residue, and a package of aluminum foil. When Futrel fled the car, he left the driver's door open, and the police saw a box of ammunition and the packaging for either a pistol grip or a pistol grip sleeve in a compartment in the door.

When interviewed by one of the officers, Futrel acknowledged that he had "a little bit of meth," but he told the officer that he did not have any other drugs. He also stated that there were no guns in the car. Futrel told the officer that the car was not his, and that he had borrowed it from his friend for a few days because he needed a place to stay. Futrel also told the officer that he was thinking about buying the car.

The police impounded the Neon and applied for a search warrant. Upon executing the search warrant, the police discovered drug paraphernalia, along with substances that were later identified as methamphetamine, heroin, and buprenorphine. In the center console, the police found two loaded handguns — a Ruger .45-caliber pistol and a Browning .380-caliber pistol. In the backseat, the police found a jacket, backpack, and groceries. Inside the backpack, the police discovered ammunition for the Ruger handgun.

The crime laboratory was unable to retrieve any usable fingerprints from the handguns and did not test them for DNA evidence.

Futrel was charged with two counts of third-degree weapons misconduct (felon in possession of a concealable firearm) and three counts of fourth-degree controlled substance misconduct.[2] Futrel was also charged with first-degree failure to stop at the direction of a peace officer, reckless driving, and the infraction of driving while license cancelled, suspended, or revoked.

At trial, Futrel defended against the weapons misconduct charges on the grounds that he did not know the firearms were in the center console. The State did not present any evidence that Futrel owned the guns. Rather, the State argued that circumstantial evidence showed that Futrel knowingly possessed the guns: Futrel had borrowed the car for several days, the guns were located in the center console, ammunition for one of the guns was found in a backpack in the backseat, and other items found in the car — *e.g.*, the groceries, backpack, and jacket — supported the conclusion that Futrel was living in the car.

The jury acquitted Futrel of failure to stop at the direction of a peace officer and reckless driving, but convicted Futrel of all the other charges.

This appeal followed.

Futrel's challenge to testimony regarding photographs from social media that appeared to show him with firearms

On appeal, Futrel challenges the admission of testimony given by one of the responding officers, Officer Ian Lewis, who was part of the Investigative Support Unit team that arrived at the park to help apprehend Futrel.

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[2] This offense has since been re-titled "fifth-degree" misconduct involving a controlled substance. FSSLA 2019, ch. 4, § 53.

The challenged testimony arose in the context of other testimony that is not challenged on appeal. As the concurrence explains in more detail, the prosecutor elicited testimony early in the trial establishing that one of the primary tasks of the Investigative Support Unit was to search for and apprehend "violent offenders, people with violent felony warrants." Officer Veenstra described these suspects as "the worst of the worst" and identified Futrel as a person who met the unit's criteria.

When Officer Lewis testified, he reiterated that "[t]he primary function [of the Investigative Support Unit] is locating and apprehending violent offenders with felony warrants." He also testified that, prior to apprehending Futrel, the unit had been cautioned "that Mr. Futrel always carries a gun and would respond to APD by shooting at officers."

For the most part, Futrel's defense attorney did not object to this testimony. However, apparently in an attempt to neutralize the officer's unfairly prejudicial testimony, Futrel's attorney questioned one of the police officers about the source of the information that Futrel might shoot at the officers. The officer indicated that officers looked for "corroborating factors," but he acknowledged that Futrel had not pulled a gun on the officers when they stopped him.

In response, the prosecutor approached the bench and argued that Futrel's attorney had "opened the door" to *additional* evidence that would corroborate the officer's testimony that Futrel was generally considered armed and dangerous. Specifically, the prosecutor wanted to introduce photographs that the police had found on Futrel's social media showing Futrel with what appeared to be firearms. The defense attorney objected, arguing that the photographs were ambiguous and that they also constituted improper propensity evidence.

The trial court partially sustained the defense objection, acknowledging the potentially prejudicial nature of this evidence. But the court nevertheless allowed the

prosecutor to introduce the evidence in a limited form. The court ruled specifically that the prosecutor could elicit testimony about the *existence* of the photographs rather than showing the photographs themselves. The court also limited the prosecutor to the following three questions:

> *Prosecutor*: Officer Lewis, in January or February 2018, did you obtain two photographs that may have depicted Mr. Futrel with a firearm on his person?
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> *Officer Lewis*: Yes.
>
> *Prosecutor*: Do you know when those photographs were taken?
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> *Officer Lewis*: No.
>
> *Prosecutor*: Do you know if the items depicted in the photographs were actually firearms?
>
> *Officer Lewis*: No.

Immediately after this testimony, the trial court gave the following limiting instruction:

> *The Court*: Ladies and gentlemen, at this time I want to instruct you that this information, this testimony is being offered solely for the purpose of demonstrating or showing why — the reasons why and how the steps that the officers took in their interactions with Mr. Futrel and should be considered by you only for that purpose and for no other purpose. I see you nodding your heads that you understand.

On appeal, Futrel argues that it was error for the court to permit the prosecutor to introduce testimony about the photographs because the reasons why the officers interacted with Futrel in the way they did were not relevant to the charges that Futrel faced.

We agree that this was error. We have previously cautioned trial courts against admitting such "course of the investigation" evidence and have advised courts that such evidence should only be admitted if "it is truly important for the jurors to

understand the *reasons* why the police made their investigative choices or decisions."[3] Here, it is not clear why the jury needed to know why the police apprehended Futrel the way they did, and the unfairly prejudicial nature of the testimony about the photographs was obvious, particularly in the context of the felon-in-possession charges. We therefore agree with Futrel that the trial court should have fully sustained the defense objection and should not have permitted any testimony about the photographs.

The problem facing Futrel on appeal, however, is that the officer's testimony about the photographs was only a small part of a much larger line of prosecutorial questioning directed at informing the jury that the officers considered Futrel a violent felon — the "worst of the worst" — who was known to carry firearms and who might shoot at the officers. But Futrel's trial attorney did not object to the majority of this evidence at trial, and his appellate attorney fails to challenge it in his opening brief.[4]

Because Futrel has limited his challenge on appeal to the testimony regarding the photographs, our prejudice analysis is likewise limited to evaluating the effect the challenged testimony about the photographs would have had on the jury.[5]

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[3] *See Lino v. State*, 2018 WL 798545, at *4-5 (Alaska App. Feb. 7, 2018) (unpublished) (internal citation and quotations omitted); *see also Avery v. State*, 514 P.2d 637, 644-45 (Alaska 1973) (holding that while evidence of the out-of-court statement that prompted the police to investigate the defendant may have been relevant, any probative value was outweighed by its potential for prejudice).

[4] We note that a different attorney wrote Futrel's reply brief. That attorney emphasized — as part of his argument regarding the challenged testimony about the photographs — the inappropriate nature of the prosecutorial line of questioning characterizing Futrel as a violent felon. To the extent this represented a new claim, we note that an appellant may not raise a new claim in their reply brief. *See Berezyuk v. State*, 282 P.3d 386, 398 (Alaska App. 2012).

[5] *See Love v. State*, 457 P.2d 622, 632 (Alaska 1969).

Overall, the evidence linking Futrel to the firearms was strong. The firearms were found in the center console of a car that Futrel was living in and considering buying. Ammunition to one of the guns was found in a backpack in the car that also contained sandwich bags similar to the bags containing drugs that were found in the front seat of the car. Further, there was additional ammunition and the packaging for either a pistol grip or a pistol grip sleeve in plain view in the side compartment of the driver's door. A wire transfer receipt with Futrel's name was also found in the same compartment.

Having reviewed the trial as a whole, we conclude that the fact that Futrel had, at some unknown period of time, taken a picture of himself with what may have been firearms was unlikely to have had any appreciable effect on the jury's verdict. Accordingly, given the limited nature of the challenged evidence on appeal, the strength of the State's case for Futrel's knowing possession of the guns, and the existence of a limiting instruction, we conclude that the trial court's error in allowing the testimony about the photographs was harmless.[6]

Futrel's challenge to the jury instruction on the definition of "possession"

Futrel's second claim on appeal is a challenge to the jury instruction used to define possession. Because Futrel did not object to this instruction, he is required to show plain error on appeal. "Plain error is an error that (1) was not the result of

[6] *See Coffin v. State*, 425 P.3d 172, 175 (Alaska App. 2018) ("As a general matter, jurors are presumed to follow the instructions that they are given." (citing *Whiteaker v. State*, 808 P.2d 270, 277 (Alaska App. 1991))).

intelligent waiver or tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial."[7]

Futrel argues that the instruction defining "possession" was similar to the instruction that we found misleading in *Dirks v. State*.[8] Specifically, he argues that, as in *Dirks*, the jury instruction reflected a confusing "hodgepodge of legal theories" and failed to inform the jury what was required to find "possession." But Futrel's case is factually distinguishable from *Dirks*, and the instruction here was accompanied by additional clarifying instructions that were not given in *Dirks*.

In *Dirks*, the State's theory of prosecution was that Dirks "possessed" a holstered gun in the backseat that belonged to a passenger in the car. (Dirks was driving the car.) We concluded that the jury instruction on "possession" — which included explanations of "actual," "constructive," "sole," and "joint" possession — was misleading in this context because the instruction allowed the prosecutor to argue improperly that Dirks possessed the handgun, even though the gun belonged to the passenger, "simply because Dirks knew that the gun was in his car and within his reach."[9]

Futrel's case is distinguishable because Futrel was alone in the car with the guns. Unlike in *Dirks*, Futrel's defense was that he did not "knowingly" possess the guns because, according to Futrel, the guns belonged to the owner of the car and he was unaware of their existence in the center console.

In this factual context, it was appropriate for the State to argue multiple theories of possession. The State primarily argued that Futrel had sole actual possession

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

[8] *Dirks v. State*, 386 P.3d 1269, 1271-72 (Alaska App. 2017).

[9] *Id.* at 1270-71.

of the guns, but in the alternative — in response to Futrel's defense — also argued that Futrel could have had joint possession, *i.e.*, the owner of the car owned the guns but Futrel exercised control over them.

The jury was additionally instructed that "[e]vidence of proximity to contraband alone cannot establish knowing possession." Given this additional instruction, and the factual differences between the two cases, we conclude that any potentially misleading language in the instruction defining "possession" was harmless.

Conclusion

The judgment of the superior court is AFFIRMED.

Judge WOLLENBERG, concurring.

This case arose when officers who recognized David William Futrel sought to arrest him on outstanding warrants. The officers surreptitiously followed Futrel as he drove to a parking lot, at which point the officers attempted to box him in. After Futrel tried unsuccessfully to maneuver around the police vehicles, he exited the car and attempted to flee on foot before being apprehended and arrested. Ultimately, the police discovered drugs and guns in the vehicle.

Based on this incident, Futrel was charged and convicted of two counts of third-degree weapons misconduct (felon in possession of a concealable firearm), three counts of fourth-degree controlled substance misconduct, and one count of driving while license cancelled, suspended, or revoked (an infraction).

On appeal, Futrel raises two issues, including a narrow evidentiary issue. In particular, with respect to the evidentiary issue, Futrel argues that the trial court erred in allowing the State to introduce testimony regarding photographs taken prior to the events in this case — photographs that appeared to depict Futrel posing with firearms — and that his weapons misconduct convictions should be reversed on this basis.

But this testimony likely had little effect on the jury's verdict. The court only allowed three questions, and these questions did not clearly establish when the photographs were taken or whether the items depicted on Futrel's person were even firearms.

That said, there is a more significant issue lurking in the background — namely, the problematic nature of the evidence that *led up to* the testimony about the photographs. Specifically, throughout Futrel's trial, the State repeatedly introduced evidence about the nature of the responding unit, the "violent" individuals that this particular unit was tasked with apprehending, and the fact that Futrel fit their profile,

when none of those issues were contested, and the evidence had a significant potential for prejudice and misuse.

The introduction of this evidence began during the testimony of Officer Mitchel Veenstra, the first officer to testify at trial. During the prosecutor's direct examination, Veenstra explained that the Investigative Support Unit (a newly created unit within the Anchorage Police Department) was assigned to track down Futrel. Without objection, Veenstra testified that the Investigative Support Unit was responsible for searching for "violent offenders, people with violent felony warrants." Veenstra described these suspects as "the worst of the worst, the people that have been causing major problem[s] for patrol, suspects that are likely to run, [those who are a] higher risk than what patrol officers generally would deal with on a daily basis." Veenstra then declared that Futrel was "someone [who] met our criteria as I was explaining earlier." (At this point, Futrel objected. The judge did not directly rule on the objection, but told the prosecutor to focus on how the officer became involved, rather than on Futrel's history.)

A second officer, Officer Ian Lewis, reinforced Veenstra's testimony, explaining that "[t]he primary function [of the Investigative Support Unit] is locating and apprehending violent offenders with felony warrants." In direct response to this testimony, Futrel's attorney confirmed on cross-examination that Futrel did not have any prior assault convictions.

This sparked the first of two occasions in which the State claimed that Futrel had "opened the door" to additional evidence validating the nature of the police response. The court agreed and allowed the prosecutor to inquire into the nature of Futrel's arrest warrants. When Futrel's attorney questioned the relevance of establishing that Futrel had an assaultive nature, particularly in a case charging nonviolent offenses, the prosecutor indicated — and the trial court agreed — that it was relevant as "to why

there were five or six officers who approached Mr. Futrel and why they've been watching him."

But it is not immediately apparent why it was necessary to introduce testimony about the reasons for the heavy police response, or the fact that Futrel was perceived to be dangerous. Futrel was not contesting that he was validly stopped or arguing that the police response was excessive.

What proceeded to unfold was far afield from what was necessary to establish Futrel's guilt of the charged offenses. On redirect examination, the prosecutor established through Lewis's testimony that, at the time of his arrest, Futrel had outstanding arrest warrants for both a probation violation as well as second- and fourth-degree domestic violence assaults. The prosecutor then went further, establishing through Lewis that, prior to apprehending Futrel, the unit had been cautioned "that Mr. Futrel always carries a gun and would respond to APD by shooting at officers."

Futrel's attorney did not object but instead addressed this statement with Lewis on cross-examination. The attorney confirmed with Lewis that not all reports to the police are true and asked Lewis if he had verified the report that Futrel "always carries a gun and would respond to APD by shooting." Lewis responded that, during the course of their investigation, officers look for "corroborating factors."

This is the questioning that the State claims "opened the door" to evidence regarding the photographs of Futrel potentially posing with firearms.

The problem with this entire line of questioning — regarding the purpose of the Investigative Support Unit, whether Futrel met their profile of a violent offender ("the worst of the worst"), and whether Futrel would shoot at police officers if confronted — is that it was not relevant to the central questions at issue in the case:

whether Futrel possessed the drugs and firearms on the occasion of his arrest.[1] And because testimony about Futrel's allegedly violent nature and past possession of guns so closely resembled the charges on which the jury was being asked to deliberate, there was a real risk that testimony about photographs of Futrel with guns would be used for improper propensity purposes.[2]

The State argues that evidence of Futrel's social media posts depicting him posing with guns was relevant to explain why the police initiated the stop in riot gear and why this was not an undue show of force. But as I have noted, there was no apparent need to introduce evidence as to why the police were in riot gear or why Futrel was stopped by a particular law enforcement unit, especially since Futrel never challenged the police use of force as excessive or unreasonable.[3]

As both this Court and the Alaska Supreme Court have repeatedly recognized, detailed explanations as to why officers were investigating the defendant, or

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[1] *See Pavlik v. State*, 869 P.2d 496, 498 (Alaska App. 1994) (holding that the trial court erred in admitting testimony that the officers' presence at a fishing site was prompted by a report that the defendants had fished there illegally in prior years, as the evidence had no bearing on any elements of the charged fishing violations, was not relevant to any issue in dispute since the defendants alleged no impropriety on the part of the officers, and served only to establish the defendants' propensity for misconduct).

[2] Indeed, in closing argument, the State appeared to rely on the evidence for precisely this purpose — *i.e.*, to argue that Futrel had simply acted in conformity with the past reports of his weapons possession. The prosecutor argued that the police "took reasonable precautions because they had a reasonable belief that Mr. Futrel was armed. And then lo and behold, he was armed. That's pretty good." There was no objection to this argument, and it is not challenged on appeal.

[3] I note that testimony about the *appearance* of the police — *i.e.*, whether the officers were in standard uniforms and whether their vehicles were obviously marked as police vehicles — was relevant to the charge of failure to stop at the direction of a police officer. But the testimony went well beyond what was necessary for that purpose.

hearsay reports used to explain the course of the police investigation, are generally more prejudicial than probative, given their capacity for misuse.[4] I therefore agree with the majority opinion of this Court that admission of the testimony regarding the photographs was error. But it also seems to me from a review of the record that the evidence should never have gotten to the point where the trial court was even deciding this question.[5]

All of that said, much of this evidence was introduced in the trial court without any objection. While Futrel occasionally objected, he did not object to some of the most damaging evidence, and he did not lodge a global objection to this line of questioning. And Futrel does not challenge the evidence as a matter of plain error on appeal. Rather, he argues only that the trial court erred in admitting the testimony about the photographs — testimony that did not clearly establish that the items on Futrel's

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[4] *See Avery v. State*, 514 P.2d 637, 644-45 (Alaska 1973) (holding that, while evidence of the out-of-court statement that prompted the police to investigate the defendant may have been relevant, any probative value was outweighed by its potential for prejudice); *Lino v. State*, 2018 WL 798545, at *4-5 (Alaska App. Feb. 7, 2018) (unpublished) (holding that evidence of informant's tip that prompted the police investigation was more prejudicial than probative, where there was no apparent need for the troopers to detail the tip and there was a significant risk that jurors would view the tip as substantive evidence of the defendant's intent to deliver drugs); *Randall v. State*, 2016 WL 3369194, at *3 (Alaska App. June 15, 2016) (unpublished) ("Out-of-court statements made to a police officer will sometimes tend to show the officer's state of mind, or will sometimes tend to show why the officer did or did not undertake particular investigative actions. But before a trial judge allows [this evidence] to prove 'the course of the investigation', the judge must be convinced that the course of the investigation is itself truly relevant.").

[5] *See* 2 Robert P. Mosteller et al., *McCormick on Evidence* § 249, at 198-200 (8th ed. 2020) (stating that officers should not be permitted to "relate historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay" under the theory that these reports explain why the police acted; "[i]nstead, a statement that an officer acted 'upon information received,' or words to that effect, should be sufficient"), *cited favorably in Lino*, 2018 WL 798545, at *4; *see also Avery*, 514 P.2d at 644-45 (discussing the same principles in an older version of the *McCormick on Evidence* treatise).

person were even firearms or when he possessed these items. Given the context of the larger, unopposed evidence, the facts of this case, and the trial court's limiting instruction, this particular testimony was harmless.

And obviously, since Futrel does not challenge this larger evidence on appeal and instead focuses narrowly on the testimony regarding the photographs, the State has not had an opportunity to address these concerns. It would therefore be improper to definitively decide them, or reverse Futrel's weapons misconduct convictions on this basis.

For these reasons, I join the majority, although I do so with significant reservations.