IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JONDEAN WILLOCK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13462 Trial Court No. 4FA-11-00366 CR MEMORANDUM OPINION No. 7047 — March 8, 2023

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Michael A. MacDonald, Judge.

Appearances: Claire F. DeWitte, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge TERRELL.

Jondean Willock was convicted, following a jury trial, of first-degree sexual assault after he lured a woman, R.F., into an apartment by promising to call her a taxi and then sexually assaulted her.[1] He now appeals his conviction, arguing: (1) that the

[1] AS 11.41.410(a)(1).

superior court erred by admitting the recording of R.F.'s conversation with the trooper who responded to her 911 call, and (2) that there was plain error in the prosecutor's rebuttal closing argument and in the court's handling of a situation where a juror had to leave the state for a few days due to an unexpected death in his family. We conclude that there was no reversible error.[2]

Facts and proceedings

At trial, the State presented the testimony of R.F., as well as the audio recording of R.F.'s conversation with the trooper who responded to her 911 call. (Willock challenges the admissibility of this recording on appeal.) The following description of events is taken from R.F.'s testimony and the recording.

In January 2011, R.F. was at a Fairbanks bar when she saw Willock, whom she recognized because he was dating a friend of hers. The two then went to other bars together. Willock told R.F. that a friend of his was coming to pick him up, and he agreed to have the friend drive her home as well. When the friend arrived, R.F. told him that she wanted to go to the Alaska Motor Inn, where she was staying, but the friend instead drove both her and Willock to the apartment complex where Willock was staying and told R.F. that she had to get out. Willock promised to call R.F. a taxi from inside the apartment, so she went with Willock into the apartment.

Once inside, Willock held R.F. down on a couch and then on the floor. He held her hands over her head as he digitally penetrated her underneath her pants. Willock also shook R.F. and pulled her hair. R.F. repeatedly told Willock to stop, but

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[2] This is Willock's second appeal in this case, following a second trial. We reversed Willock's conviction after his first trial because the trial court had admitted improper propensity evidence. *Willock v. State*, 400 P.3d 124 (Alaska App. 2017). This improper evidence was not admitted in the second trial.

he did not. R.F. was able to get a hand free and grab Willock's face, allowing her to get up and flee the apartment.

R.F. then ran to a house across the street and knocked on the door. The only people in the house were three boys, aged ten through twelve. They opened the door and allowed her to use a telephone to call 911. (R.F.'s cell phone was out of battery during this incident.) R.F. recounted that she did not tell the boys she had been sexually assaulted because she did not want to upset them any more than necessary. She told them only that Willock had pulled her hair.

The boys also testified at trial, stating that they were watching movies when R.F. began pounding on the front door and asking for help. The boys ultimately let her in. (Two of the boys said that they initially waited because they were alone but decided to let her in after about five minutes because it was clear she needed help. One boy said he thought they let her in immediately.) R.F. either told them or implied that the person who hurt her might be following her. The boys testified that one of them called 911. One of the boys estimated that a trooper arrived about five minutes after the call.

The recording of the 911 call was played for the jury, and, although the boys testified that they called 911, the recording reflects that R.F. called 911 and then passed the phone to the boys when the operator asked for the address. In the recording of the 911 call, R.F. appeared to be crying.

Alaska State Trooper Thomas Mealey testified that he responded to the 911 call, along with another officer. He estimated that he arrived at the scene a few minutes after he received the call. When he arrived in the neighborhood, he saw Willock about forty yards from the boys' house, walking away from it. Mealey stopped and detained Willock because he did not have a winter jacket on and had scratches on his face and fresh blood by his nose, leading Mealey to believe that Willock might be connected to the 911 call he was investigating.

Trooper Mealey then knocked on the door of the boys' house, and R.F. answered. R.F. was upset and crying and had a red welt under her eye. Mealey recorded his conversation with R.F., the content of which is described above. During the recording, R.F. sounded like she was crying and regularly stated that her head hurt.

Sergeant Lee Bruce of the Alaska Bureau of Investigation testified that he interviewed Willock at the trooper post. Willock had scratch marks on his face. In the interview, Willock stated that he ran into R.F. at a bar and then went to other bars with her, that a friend drove them to the apartment where he was staying, and that R.F. went into the apartment with him. Willock said that he then left the apartment to walk to a friend's house. He stated that he did not remember how he got the scratch marks on his face. Bruce collected DNA from Willock's hands.

A forensic nurse testified that she examined R.F. at the hospital that night. R.F. had bruises on both legs and on her wrist, although her vagina showed no signs of injuries. R.F. also said she had pain in her head, shoulder joints, and legs. The nurse took vaginal, cervical, and buccal swabs and fingernail clippings from R.F.

A crime lab technician testified that R.F. was, to a reasonable degree of certainty, the source of DNA collected from Willock's hands. Willock's DNA was not detected in R.F.'s vaginal samples. The rest of the DNA evidence was inconclusive.

Based on the foregoing testimony and evidence, the jury found Willock guilty of first-degree sexual assault.

Why we affirm the admission of the recording of the conversation between Trooper Mealey and R.F.

As discussed above, Trooper Mealey talked to R.F. upon responding to the scene. The audio recording of this conversation was played to the jury over Willock's

objection. On appeal, Willock argues that the superior court erred in admitting the audio recording.

In the recording, R.F. recounted the evening's sequence of events: she ran into Willock at a bar, went to other bars with him, was driven to the apartment by Willock's friend and then invited inside under the pretense that Willock would call her a taxi, was sexually assaulted, ran to the boys' house, called 911, and waited for the police to arrive. She also said repeatedly that her head hurt. At times in the recording, she sounded like she was crying.

The superior court admitted the recording as a first report of sexual assault, a present sense impression, an excited utterance, and a statement of existing mental, emotional, or physical condition.[3]

We conclude that the superior court properly admitted the recording as an excited utterance under Alaska Evidence Rule 803(2). We have held that:

> [w]hen hearsay is offered under the excited utterance exception, "the ultimate question is whether the proponent of the evidence has shown that the circumstances surrounding the utterance produced a condition of excitement which temporarily stilled the speaker's capacity of reflection and produced utterances free of conscious fabrication." This is a question of fact, and we will uphold the trial judge's conclusion on this issue unless that conclusion is shown to be clearly erroneous.[4]

Here, Trooper Mealey testified that, when he was speaking with R.F. at the scene, she was crying and upset. This is corroborated by the sound of R.F. crying and

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[3] *See Greenway v. State*, 626 P.2d 1060, 1061 (Alaska 1980); Alaska R. Evid. 803(1)-(3).

[4] *Arredondo v. State*, 411 P.3d 640, 643 (Alaska App. 2018) (quoting *Sipary v. State*, 91 P.3d 296, 305-06 (Alaska App. 2004)).

her urgent manner of speech in the recording. She also stated that she was in pain. And the entire conversation occurred within approximately twenty minutes of the sexual assault and ten minutes of knowing that she was safe from Willock because Trooper Mealey was with her. The superior court could reasonably find that the circumstances surrounding R.F.'s statements to Trooper Mealey "produced a condition of excitement which temporarily stilled [her] capacity of reflection and produced utterances free of conscious fabrication."[5] It therefore was not error to admit the recording on this basis.[6]

Why we find no plain error in the prosecutor's rebuttal closing argument

Willock's attorney, in his closing argument, argued that the DNA evidence presented by the State was inadequate and was not consistent with R.F.'s account. In response, the prosecutor began her rebuttal closing argument by saying,

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[5] *Id.*

[6] We question the other bases advanced for admitting the recording. Admissible evidence of a first report of sexual assault is limited to evidence that the report was made, supplemented by enough details to allow the trier of fact to understand that the episode the victim described is the episode being litigated. *Borchgrevink v. State*, 239 P.3d 410, 415 (Alaska App. 2010). The recording here was over eight minutes long and R.F. described the events of the entire night. Similarly, a statement constitutes a present sense impression only when there is hardly any interval between the observation of an event and the statement describing the observation and therefore no time for reflection. *Davis v. State*, 133 P.3d 719, 727 (Alaska App. 2006). Here, an interval of time had lapsed between the sexual assault and the interview. The boys' testimony suggested that ten minutes had passed between the time R.F. began knocking on their door and the time the interview with Trooper Mealey occurred. Finally, a statement describing the declarant's existing mental, emotional, or physical condition is admissible to prove the declarant's present condition. *Sanders v. State*, 364 P.3d 412, 420 (Alaska 2015). While some of R.F.'s statements during the interview would appear to show her existing mental, emotional, and physical state — such as her statements that her head hurt — admitting the entire recording, rather than portions of it, for this purpose could unfairly prejudice Willock, given the substance of the rest of the recording.

> So after listening to the defense question our DNA expert, I was thinking last night what is — what are they going to say, what are they going to tell you. And here's their defense. They're using a strawman. So I looked that up. I typed it into Google to come up with what is the definition of a strawman. So here's what I found.
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> A strawman is an intentionally misrepresented proposition that is set up because it is easier to defeat than the opponent's real argument. That's what they're doing. They're giving you a strawman because if you focus on that, you ignore all the other evidence.

The prosecutor then returned to this "strawman" theme twice more during the rebuttal closing argument. In one of these instances, the prosecutor stated,

> But, you know, if you want to buy their strawman, that the DNA wasn't good enough, throw it out. Just ignore it. All it does is just one more piece to this puzzle because you have enough already, because what you're looking for is beyond a reasonable doubt. We don't have to prove beyond all possible doubt.

On appeal, Willock argues that the prosecutor's discussion of "strawman" tactics and the statements that the jury could "throw . . . out" and "ignore" DNA evidence were improper. Because Willock did not object to these remarks in the superior court, he must now show plain error.[7] "Plain error is an error that (1) was not the result of intelligent waiver or a tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial."[8]

"This Court has previously drawn a distinction between (1) permissible prosecutorial argument that a defendant's version of events is not credible, given the

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

[8] *Id.*

evidence in the case, and (2) impermissible argument that 'disparages the legitimacy' of the legal theory or defense asserted by the defendant."[9] It is true that the prosecutor defined a strawman as an "*intentionally* misrepresented proposition" and said that this was what "they" (presumably, Willock's attorneys) were doing. This was improper: prosecutors may not suggest that defense attorneys are acting in bad faith or using typical defense tactics.[10] But even though the prosecutor "went a step too far," the prosecutor largely made a permissible closing argument.[11] The prosecutor permissibly argued that the defense's characterization of the DNA evidence as incomplete and inconsistent with the State's position in the case was not supported by the evidence. The prosecutor primarily used the term "strawman" as part of arguing that any gaps in the DNA evidence did not discredit the DNA evidence. In context, the prosecutor's statement that the jury could "throw . . . out" and "ignore" the DNA evidence was an argument that, even if there were no DNA evidence, the State still would have met its burden of showing guilt beyond a reasonable doubt. These arguments were not improper.[12] We thus conclude that the impropriety in the rebuttal closing argument did not prejudice Willock and therefore, there was no plain error.[13]

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[9] *Rossiter v. State*, 404 P.3d 223, 226 (Alaska App. 2017) (quoting *Williams v. State*, 789 P.2d 365, 369 (Alaska App. 1990)).

[10] *See Hess v. State*, 435 P.3d 876, 881 (Alaska 2018).

[11] *Hauge v. State*, 2019 WL 4464683, at *5 (Alaska App. Sept. 18, 2019) (unpublished).

[12] *See Williams*, 789 P.2d at 369 (concluding that the prosecutor's use of the phrase "red herrings" was not improper when "the challenged remark did not purport to disparage the legitimacy of any legal theory or defense asserted by [the defendant]" and instead "was directed at the substance of [the defendant's] testimony and amounted simply to an argument that [the defendant's] version of events was not credible").

[13] We need not decide whether the prosecutor's improper argument was a constitutional violation, which "will be prejudicial unless the State proves that it was harmless beyond a

Willock briefly makes a second challenge to the prosecutor's rebuttal closing argument, claiming that by explaining to the jury the reason for her earlier objection to part of the defense's closing argument, the prosecutor amplified her denigration of the defense's closing argument. During the defense's closing argument, Willock's attorney argued that a more sophisticated and discriminating form of DNA testing was available and could have been used by the State, but was not, and told the jury "that's a problem that the law requires you to resolve in the defendant's favor[.]" The prosecutor objected that the statement "the law *requires*" the jury to resolve the issue in Willock's favor was incorrect, but the court overruled the objection (without pointing out that Willock's counsel's statement was in error), stating that the instructions given to the jury would control.[14] In her rebuttal closing argument, the prosecutor returned to this issue, stating: "Your [jury] instruction doesn't say you have to look at it *in favor of* the defendant. That's not actually what it says at all, which is why I objected. It said it

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reasonable doubt," or an error that was not constitutional in nature, which "will be prejudicial if the defendant proves that there is a reasonable probability that it affected the outcome of the proceeding." *Adams*, 261 P.3d at 773. We conclude that the improper argument was not prejudicial under either standard.

[14] The pertinent jury instruction stated:

> The evidence should be evaluated not only by its own intrinsic weight but also according to the evidence which is in the power of a party to produce. If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the state's power to produce, the evidence offered should be viewed with caution. You are reminded that the State has the burden of proof. The defendant has no burden to produce any evidence.

should be viewed *with caution*." Willock did not object and therefore must show plain error.[15]

We agree that lawyers should not re-argue evidentiary or legal matters to a jury that the trial court has already ruled on. But we again conclude that Willock was not prejudiced because the brief reference to the objection was part of an otherwise permissible argument about the meaning of the instructions the jury received from the court. Willock has not shown plain error.

Why we find no plain error in the handling of a juror's brief absence from the state to attend a family funeral

At Willock's trial, the evidence concluded and the jury received the case on a Friday. The jury did not return a verdict then and was scheduled to resume deliberations the following Monday. On Monday, however, a juror called the bailiff to say that he could not come in because his father had died. Later, with the parties present, the court called the juror on the telephone. The juror said that he had flown to California the night before. He did not yet know when he was returning, but he expected to be back by the end of the week. He said that he would be able to continue his deliberations at that point. The court then asked if the parties had questions for the juror, and this exchange occurred:

> *Defense attorney*: I'm really sorry for your loss. Would it be too much of the court to ask for you emotionally to continue deliberating if you were going to come back and do that on Thursday or Friday?
>
> *Juror*: No, I think that I've already kind of made up my mind. So yes, if the court wants to wait, then I can come back and do that when I get back in town.

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[15] *Adams*, 261 P.3d at 764.

Deliberation was halted until the juror returned, with no objection from either party.

On appeal, Willock argues that it was plain error for the judge not to *sua sponte* declare a mistrial when the juror said that he had "already kind of made up [his] mind." Willock does not argue that it was improper for the juror to have formed an opinion — presumably because jurors are allowed to form opinions about a case after the case has been given to the jury.[16] Instead, Willock argues that the juror's statement of his opinion was a violation of the secrecy of jury deliberations and that, "[b]ecause the tenet of deliberations — secrecy — was lost, free debate was lost and Willock was deprived of a fair trial."[17]

Willock supports his argument by citing to generic language about the secrecy of jury deliberations in a federal appellate case.[18] But that case concerned when

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[16] *Cf. Larson v. State*, 79 P.3d 650, 656 (Alaska App. 2003) (noting that jurors must "keep an open mind — to make sure that their opinions remain tentative — until the entire case has been presented and the jurors have heard the trial judge's instructions").

[17] If Willock means to suggest that the juror's comment indicated that he was unwilling to approach deliberations with an open mind, we note that such an assertion hinges on a factual issue for which Willock did not ask the trial court to make a finding. As a federal court has noted in discussing plain error and issues of fact, "if an error pressed by the appellant turns on 'a factual finding [he] neglected to ask the district court to make, the error cannot be clear or obvious unless' he shows that 'the desired factual finding is the only one rationally supported by the record below.'" *United States v. Takesian*, 945 F.3d 553, 563 (1st Cir. 2019) (citation omitted). Here, the natural reading of the juror's comment does not support the view that the juror was unwilling to examine the case with an open mind during deliberations. Defense counsel's question asked whether it would be too much of an emotional burden for the juror to deliberate on this case in the wake of his father's death, and the juror's response can be viewed as stating that he had already thought through the case in sufficient detail that he had the mental bandwidth to deliberate despite any emotional difficulties he might be experiencing. The trial court did not commit plain error by failing to discharge the juror.

[18] *See United States v. Thomas*, 116 F.3d 606, 618-20 (2nd Cir. 1997).

a trial judge may dismiss a juror based on a belief that the juror has decided not to follow the judge's instructions. It did not concern the proper response to an offhand statement by a juror. And, in that case, the court acknowledged that jury secrecy is not inviolate and that there are even times when a judge is required to inquire into jury deliberations.[19] It therefore is not clear that the juror in this case breached any duty when he gave a natural response to the question that Willock's attorney asked him and did so on the record and outside the presence of the other jurors. And, even assuming that the juror minimally breached his duty, "trial judges must be extremely cautious about granting a mistrial when the defendant has not sought one. Under the double jeopardy clause, if a judge declares a mistrial *sua sponte* when there is no necessity for it, the charges against the defendant must be dismissed."[20] The superior court therefore did not obviously err by failing to declare a mistrial, and Willock has not shown plain error.

Willock also notes that the court did not admonish the juror at the end of the telephone call and argues that this failure violated Alaska Criminal Rule 27(c)(2), which states,

> If any juror is permitted to separate from the jury after the case is submitted to the jury, the court shall admonish the juror that it is the juror's duty
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> (i) to discuss the case only with other jurors in the jury room, and

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[19] *Id.* at 621; *cf. Larson*, 79 P.3d at 653 (noting that Alaska Evidence Rule 606(b) does not prohibit inquiry into issues of potential juror misconduct prior to the jury returning a verdict); *Antoghame v. State*, 2023 WL 29317, at *1-6 (Alaska App. Jan. 4, 2023) (unpublished) (reversing trial court's decision not to inquire into potentially prejudicial remarks of a juror).

[20] *Riney v. State*, 935 P.2d 838, 838-39 (Alaska App. 1997); *accord Douglas v. State*, 214 P.3d 312, 326-27 (Alaska 2009).

(ii) not to converse with any other person on any subject connected with the trial.

But it is not clear that Rule 27(c)(2) was violated. At the time of the Monday telephonic hearing with the juror, the juror had not reunited with the other jurors after they last separated on Friday. Thus, even though best practices would have been to admonish the juror again, doing so may not have been technically required by the rule.[21]

Even if it was error not to give another admonishment, Willock has not shown that he was prejudiced by any error. There is no indication in the record that the juror in question engaged in any improper conversations about the case after the phone call.[22] Willock argues that we should find prejudice because the juror had already commented on the status of deliberations. But, as discussed above, it is not clear that the juror's statement — which was made in response to a question by defense counsel, in court, and outside the presence of the rest of the jury — was improper. We cannot

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[21] The juror had already been admonished multiple times not to discuss the case with other persons, to report any improper attempts by others to talk to him about the case, and to not prematurely form an opinion. At the outset of the trial, on February 20, 2019, the court read a long instruction to that effect. The next day, the court reiterated this instruction to the jury before sending them home at the close of the day, and noted that it had already given this admonition twice. The release of the jurors for the weekend on Friday, February 22, 2019 is not transcribed. But Willock does not argue that the jurors were released improperly, and, in the absence of evidence to the contrary, we presume that the proper procedures were followed. *See Smith v. State*, 484 P.3d 610, 617 (Alaska App. 2021) ("Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties." (quoting *Wright v. State*, 501 P.2d 1360, 1372 (Alaska 1972))).

[22] *See Tressler v. State*, 1988 WL 1513121, at *4-5 (Alaska App. Nov. 2, 1988) (unpublished) (finding no prejudice when the jury had been admonished earlier that day and the record did not show that any juror was exposed to publicity surrounding the trial).

conclude that the failure to admonish the juror after this statement prejudiced Willock. Willock therefore has not shown plain error.

Conclusion

The judgment of the superior court is AFFIRMED.