IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ARLANDRA ROBERT MILTON UPTON JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13529 Trial Court No. 3AN-17-06028 CR MEMORANDUM OPINION No. 7044 — February 22, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Andrew Peterson, Judge.

Appearances: Tristan Bordon (briefing) and Emily Jura (oral argument), Assistant Public Defenders, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, 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.

Arlandra Robert Milton Upton Jr. was tried by a jury for first-degree vehicle theft and second-degree theft (theft by receiving), based on his possession and

use of a motorhome that had been stolen from a storage lot.[1] The jury acquitted Upton of first-degree vehicle theft but found him guilty of second-degree theft.

Upton appeals his conviction, raising two claims. First, Upton claims that the trial court erred in sustaining the State's objection to certain testimony by Upton's neighbor, Jorge Bailey. For the reasons explained in this opinion, we agree with Upton that the court erred in excluding the testimony, but we find that the error was harmless. Second, Upton claims that the jury's verdicts were inconsistent. We reject this claim, concluding that the jury's verdicts may be logically reconciled.

Background facts and proceedings

In 2015, Anchorage resident Glen Hanson bought a 1995 Gulf Stream Ultra motorhome with 80,000 miles on it for $8,000. Hanson replaced the water heater and internal electronics, and testified at trial that he valued the motorhome at around $20,000, and that a friend had offered him $10,000 for the motorhome after he recovered it from the theft at issue in this case. Hanson stored the motorhome in a secure, fenced storage lot maintained by his homeowners' association.

On Saturday, July 29, 2017, Hanson went golfing. In the parking lot of the golf course, he saw a motorhome which he thought looked like his, but he could not be sure because he did not remember the license plate number for his motorhome. But on his way home, he went by the storage lot where his motorhome was stored, and discovered that it was missing. Hanson then called the police around 4:00 p.m. to report his missing motorhome.

On Monday, July 31, 2017, around 4:00 a.m., an Anchorage Police Department patrol officer was driving through the parking lot of a closed grocery store

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[1] AS 11.46.360(a)(1) and AS 11.46.130(a)(1), respectively.

in Eagle River and, while running the license plate numbers of vehicles through a police database, discovered that a motorhome in the lot (Hanson's) was flagged as stolen. The officer called for back-up and after other officers arrived, they boxed in the motorhome and directed the occupants to come out.

Arlandra Upton Jr. and Kenneth Tate came out of the motorhome and spoke to the officers. Upton denied stealing the motorhome and said that he and his partner, Steven Phillips, had purchased the motorhome a few days earlier from a man whose first name was David and whose last name was something along the lines of Clerk or Clark. The officers called Phillips on his cell phone and Phillips said that the seller's name was David LeClerc. Upton and Phillips also gave statements to the officers that appeared to be inconsistent about how much they paid for the motorhome; Upton first claimed it was $3,000, then that it was only $200 plus his bicycle, while Phillips claimed it was $1,000. The officers subsequently arrested Upton.

Upton was indicted for first-degree vehicle theft and second-degree theft (under a theory of theft by receiving) and the case proceeded to a jury trial. At trial, the State called Hanson, Phillips, and two of the officers who were present at the recovery of the motorhome to testify to the above information.

Upton presented the testimony of his neighbor, Jorge Bailey, and testified on his own behalf. His defense to the charges was based on his lack of awareness that the motorhome was stolen — he argued that he had been fooled by LeClerc, who had professed to be selling the motorhome for his aunt. He explained that, during the sales transaction, he gave LeClerc his bicycle to go and retrieve the title to the motorhome, but LeClerc never returned with the title or the bicycle.[2]

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[2] At trial, Upton and Phillips stated that the sale price of the motorhome was $1,000, $200 of which represented a cash down payment by Phillips, with the balance due by (continued...)

In its closing arguments, the State argued that the jury did not need to find that Upton took the motorhome from the storage lot in order to find him guilty of first-degree vehicle theft, and that even if the jurors accepted Upton's claim that he bought the motorhome from LeClerc, they could still conclude that the information known to Upton made the transaction so questionable that Upton did not have a reason to believe that he had the right to take possession of the motorhome. (The first-degree vehicle theft statute, AS 11.46.360, makes it a crime to drive, tow away, or take the vehicle of another "having no right to do so or any reasonable ground to believe the person has such a right.") As to the second-degree theft charge, the State argued that Upton recklessly disregarded the obvious risk that the motorhome was stolen when he retained the motorhome after LeClerc failed to return with the title days after the purchase.

Upton's closing argument returned to the theme that Upton had been duped by LeClerc. Upton's counsel relied on Upton's testimony that he had a learning disability, had been held back in school, and had not graduated from high school in support of his argument that Upton had a harder time than most people understanding the intentions of others and was easily fooled. Upton's counsel emphasized that Upton did not steal the motorhome from the storage lot and asserted that LeClerc was the person who did so. Upton's counsel argued that there was a sufficient legitimacy to the transaction such that Upton did not know he had no right to possess or drive the motorhome, thus negating the first-degree vehicle-theft charge. Counsel further argued

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[2] (...continued)
December 1st. But Upton testified that when it became apparent that LeClerc did not have the title, and LeClerc claimed that he needed a way to go and get it from his fictitious aunt, he threw in his own Specialized brand mountain bike as part of the deal so that LeClerc would have a means of conveyance to go retrieve the title. And Upton stated his view that if LeClerc kept his end of the bargain and returned with the title, he (LeClerc) could keep the bike.

that Upton was not subjectively aware of a substantial and unjustifiable risk that the motorhome was stolen, and thus did not recklessly disregard that risk, as required for the second-degree theft charge.

The jury acquitted Upton of first-degree vehicle theft and found him guilty of second-degree theft.

This appeal followed.

Why we reject Upton's claim that he is entitled to reversal of his second-degree theft conviction based on the trial court's erroneous preclusion of testimony

In his defense case, Upton's first witness was his neighbor, Jorge Bailey. Bailey testified that on Saturday, July 29, 2017, he was working in his garage with the garage door open when he saw an unfamiliar motorhome pull up in the parking area between his residence and Upton's residence. After some time had passed, he saw his neighbors, Steven Phillips and Arlandra Upton Jr., come outside in the parking lot, and Bailey came out of his garage and joined them. Phillips and Upton were talking to a young man next to the motorhome. Upton's counsel then had the following exchange with Bailey:

> *Defense Counsel*: You had a conversation with this young man. What was the young man there telling you about?
>
> *Bailey*: The young man that I talked to — I listened to his story of what the — where the RV came from, and that his aunt wanted to, you know —
>
> *Prosecutor*: Your honor, I'm going to object based on hearsay.

Upton's counsel then argued that any underlying declaration from the seller's (LeClerc's) purported aunt was fictitious, because the aunt did not exist, and

therefore was not hearsay because it was not offered for its truth, and that LeClerc's statement was also not hearsay because it was being offered to show the effect that LeClerc's statement had on its listeners, especially Upton. The trial court nonetheless sustained the State's hearsay objection.

On appeal, Upton argues that the trial court erred in precluding Bailey from testifying about LeClerc's statement, and that this error violated his constitutional right to present a defense. But the State argues that this Court should decline to reach this issue, asserting that Upton failed to preserve the claim because he did not make a proffer as to what the remainder of Bailey's interrupted sentence would have been — *i.e.*, as to what LeClerc stated that his fictitious aunt had said. We disagree.

Alaska Evidence Rule 103(a)(2) provides that an appellant cannot assert that the exclusion of evidence was in error unless "the substance of the evidence was made known to the court by offer *or was apparent from the context within which the questions were asked*." (Emphasis added.) Here, the substance of LeClerc's purported statement about his aunt — that the aunt wanted to sell the motorhome, because it was too much trouble to take care of — is known because LeClerc's statement came in through Phillips's and Upton's testimony.[3] Indeed the trial court had this same understanding, stating, during its discussion of Bailey's partial statement and the State's hearsay objection, that "it's clearly hearsay that is being admitted to show that this guy was selling his aunt's vehic — his aunt's motorhome." Under these circumstances, we

[3] In addition, the prosecutor said in her opening statement, "You're going to hear he — the details of the story . . . . He's got to get rid of this for his aunt. She's elderly. She wants it to go to somebody who could use it." Anchorage Police Officer Peter Frederick also relayed this statement during his testimony, but the court sustained the State's objection to questioning for more detail.

are not required to speculate as to the substance of the excluded evidence, and therefore we conclude that Upton preserved the issue for appeal.

Turning to the merits of Upton's claim, we agree that the trial court erred in sustaining the State's hearsay objection. The statement at issue contained two levels of hearsay — the fictitious aunt's statement that she wanted to sell the motorhome, and LeClerc's statement that this is what she said. Alaska Evidence Rule 805 provides, "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules." This rule is essentially identical to Federal Evidence Rule 805, and as one leading treatise has explained:

> Rule 805 will be satisfied if one of the statements is admissible under an exemption or exception and the other is offered for a proper non-hearsay purpose. The goal is to satisfy the hearsay rule for each transmission, whether that be by exception, exemption, or the statement not being hearsay at all.[4]

Beginning with the purported aunt's fictitious statement that she wished to sell the motorhome, this statement was not hearsay. Alaska Evidence Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Courts have recognized that when a statement is not offered for its truth, but rather for its *falsity*, that the statement is, by definition, not hearsay.[5] And Upton was offering this statement

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[4] 4 Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, *Federal Rules of Evidence Manual*, § 805.02(2), at 805-3 (12th ed. 2019). Federal Evidence Rule 805 provides: "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."

[5] *See, e.g.*, *United States v. Bowles*, 751 F.3d 35, 39-40 (1st Cir. 2014) (forged (continued...)

for its falsity. Upton's defense was that LeClerc was a real person who duped him, but that LeClerc's claim that he had an aunt who wanted him to sell the motorhome was fictitious. And Upton's counsel explained this in his discussion with the trial court following the State's hearsay objection, stating that "if [the statement is attributed to] a fictitious character . . . it's not being offered for the truth."

As to LeClerc's statement purporting to recount the statement of his aunt regarding her intention to sell the motorhome, Upton's counsel explained that it was being offered to show the effect on its listeners, in particular Upton and his partner, Phillips, to whom LeClerc was trying to sell the motorhome. The statement was offered to show that LeClerc was a smooth-talking con artist who presented a deal that seemed legitimate to Upton. Alaska's courts have long recognized that an out-of-court statement will not be barred as hearsay when it is being offered not for its truth but rather to show the effect the statement had on the listener.[6]

Because the separate out-of-court statements embedded in Bailey's thwarted retelling of LeClerc's statement were not hearsay, the trial court erred in

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[5] (...continued)
signatures on checks were not hearsay, because they were false); *United States v. Neadeau*, 639 F.3d 453, 455 (8th Cir. 2011) (out-of-court statements not hearsay because government was offering them as a prelude to showing they were false); *United States v. Wellington*, 754 F.2d 1457, 1464 (9th Cir. 1985) (testimony regarding statements made to dupe potential investors was not hearsay because offered to show the statements' falsity); *see also State v. Robinson*, 715 N.W.2d 531, 559-60 (Neb. 2006) (citing numerous federal court of appeals decisions for this proposition).

[6] *See, e.g.*, *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 457 n.99 (Alaska 2002) (noting that trial court erroneously excluded statements as hearsay because the statements were not being offered for their truth but rather "to show that the statements were made to exert pressure in the course of an antitrust conspiracy"); *McCracken v. State*, 914 P.2d 893, 899 (Alaska App. 1996).

precluding Bailey from testifying as to this statement. But we reject Upton's claim that this erroneous evidentiary ruling violated his constitutional right to present a defense.

The Alaska Supreme Court has recognized that, "[w]hen a trial court's evidentiary rulings substantially infringe upon the right to present a defense, the court necessarily violates the defendant's due process rights."[7] But the trial court's ruling did not substantially infringe on Upton's ability to present his defense that he was duped by LeClerc. As we mentioned, the substance of what Bailey was about to testify to came in through the testimony of Phillips and Upton. Phillips testified that LeClerc's "claim was it was his aunt and that she wanted . . . the motorhome gone — and that she was going to get rid of it herself." Upton also testified that LeClerc said that "my aunt said that she's trying to get rid of this and it's — it's just hard for them to take care of, or something like that." And as noted previously, in her opening statement the prosecutor told the jury they would hear LeClerc's story that he was trying to sell the motorhome for his aunt.

Upton claims that precluding Bailey from testifying about LeClerc's statement substantially infringed his ability to present his defense because Bailey was the only person testifying to that point who did not have a vested interest in the outcome of the case. But it was undisputed at trial that the aunt was fictitious and that so was any statement attributed to her. Bailey's testimony was not necessary to nail that point down. Thus, the issue to which LeClerc's statement was most pertinent was the basic underlying question in this case — *i.e.*, was there an actual person who identified himself as David LeClerc and who tried to sell Upton the motorhome, or was Upton just making that up to cover for having a more direct link to the theft of the motorhome from the storage lot? As explained below, the omission of what Bailey heard LeClerc say was not

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[7] *Smithart v. State*, 988 P.2d 583, 586 (Alaska 1999).

critical to Upton's ability to establish the existence of a person who identified himself as David LeClerc and sold the motorhome to Upton.

To begin, although Bailey was not permitted to state *what* LeClerc said to the group (Upton, Phillips, and Bailey), he was permitted to testify that when the motorhome arrived he saw a young man get out of it and make contact with Upton. Bailey testified that he was present for the discussion between LeClerc and Upton, which resulted in Upton buying the motorhome. And Bailey also was allowed to testify that his overall impression of LeClerc was that he seemed "legitimate" and that he (Bailey) was interested in the motorhome (even if he would have wanted to "verify" the details). Accordingly, there was testimony from a disinterested party that someone sold the motorhome to Upton.

Additionally, the jury heard the recording from when the police first contacted Upton in which he told them that he and Phillips had purchased the motorhome from someone whose first name was David and whose last name was either Clerk or Clark. The jury also heard that when the police called Phillips he recounted the same basic story and identified the seller as "David LeClerc." Upton also told police that there had been a written sales contract between him, Phillips, and LeClerc, and said that he had a picture of this contract on his cell phone which he could show them. This sales contract was introduced as an exhibit at trial.

Finally, although the State had initially left itself room to argue that Upton was guilty of first-degree vehicle theft because he supposedly stole the motorhome from the storage lot, by the close of trial, the State abandoned that theory. In a discussion of jury instructions outside the jury's presence, the court asked the prosecutor if the State's theory of first-degree vehicle theft was based on a claim that Upton stole the motorhome from the storage lot, or on his actions after purportedly buying it. The prosecutor responded:

> I think it could be both, but I think it's more along the lines of here, if this sale truly did happen, then it's kind of the theory that he had enough knowledge at that time to know that this was stolen. And so that taking at that time was the vehicle theft of knowing that it was stolen.

Then, in her closing argument, the prosecutor made no argument at all in support of a claim that Upton stole the motorhome from the storage lot. Rather, the prosecutor began her discussion of this aspect of first-degree vehicle theft by stating that even "[i]f you believe the defendant's story that this person, David, came over to his house and sold him this motorhome," Upton was still guilty of first-degree vehicle theft because there were so many red flags that he undoubtedly knew he had no reasonable basis to believe that he had the right to take possession of the motorhome at the outset. Given all of the above, the absence of Bailey's testimony about what LeClerc said regarding selling the motorhome for his fictitious aunt did not substantially infringe on Upton's constitutional right to present a defense.

In these circumstances, Upton is required to show that the trial court's evidentiary ruling appreciably affected the verdict.[8] He fails to do so. In order to convict Upton of first-degree vehicle theft, the State had to prove that when Upton drove, towed away, or took the motorhome, he had "no right or reasonable belief in a right to do so."[9] It was undisputed that the true owner of the motorhome, Hanson, had not sold the motorhome to Upton or given him permission to take it. Upton's defense to this charge thus turned on establishing that there was reasonable doubt as to whether he knew that

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[8] *Compton v. State*, 485 P.3d 56, 63 (Alaska App. 2021) ("In the absence of constitutional error, the trial court's evidentiary errors require reversal only if the errors appreciably affected the jury's verdict." (citing *Love v. State*, 457 P.2d 622, 631-32 (Alaska 1969))).

[9] *Dobberke v. State*, 40 P.3d 1244, 1247 (Alaska App. 2002) (citing AS 11.46.360(a)).

he lacked reasonable grounds to believe that he had a right to possess the motorhome. There were numerous aspects of the transaction that seriously undermined this defense, not the least of which were the deeply discounted sale price and the fact that LeClerc did not have the motorhome's title. Despite this, the jury found Upton's defense persuasive and acquitted him of first-degree vehicle theft. The absence of Bailey's testimony about *what* LeClerc said did not appreciably affect the verdict.

The fact that Upton was convicted of second-degree theft under a theft-by-receiving theory does not alter our analysis. The theft-by-receiving statute, AS 11.46.190, provides that "[a] person commits theft by receiving if the person buys, receives, retains, conceals, or disposes of stolen property with reckless disregard that the property was stolen." In this case, Upton retained the motorhome even after he became suspicious of LeClerc. Upton admitted that he thought LeClerc had effectively stolen his bicycle when he never returned with the bicycle or the motorhome's title during the sales transaction. When discussing whether the bicycle was part of the sale, Upton said that LeClerc "needed a way to go and get the title, so I just, you know, I gave him my bike." Later, his attorney asked, "And then so when he [LeClerc] did not bring [your bike] back, you consider it stolen. Is that what you're trying to say?" And Upton responded, "[Y]eah."

In other words, Upton admitted that on Saturday afternoon, he gave LeClerc his bike to go get the motorhome's title and come back, but he continued to possess and operate the motorhome a day and a half later, even after he believed that LeClerc had stolen his bike. The jury could reasonably conclude that, at that point, Upton was aware of a substantial enough risk that the motorhome was also stolen and that disregarding that risk "constitute[d] a gross deviation from the standard of conduct that a reasonable

person would observe in the situation" to convict him of theft by receiving.[10] Upton fails to show that the absence of Bailey's testimony about what LeClerc said appreciably affected the jury's verdict on the second-degree theft count.

Why we reject Upton's inconsistent verdicts claim

Upton asserts that the jury's verdicts — acquitting him of first-degree vehicle theft, but convicting him of second-degree theft — were inconsistent because "the jury could not logically conclude that Upton's act of buying the vehicle was theft by receiving without also concluding that he committed vehicle theft." Upton did not raise this claim below so he must show plain error.

As we noted in another plain error case involving an inconsistent verdicts claim, *Miller v. State*, "a litigant who advances a claim of plain error must show that they had no tactical reason for failing to make a contemporaneous objection to the asserted error."[11] And generally there is a powerful tactical reason for not making a contemporaneous objection, in that if the attorney alerts the judge to the problem, the judge might return the jurors to deliberate further and they might render a verdict in the State's favor. Whereas if the defendant does nothing, but is later able to make a successful inconsistent verdicts claim, the defendant would get a new trial on the charges

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[10] AS 11.81.900(a)(3); *see Saathoff v. State*, 991 P.2d 1280, 1284-86 (Alaska App. 1999), *aff'd*, 29 P.3d 236 (Alaska 2001) (the word "retains" in AS 11.46.190 refers to the person's decision to retain the property at the moment they become aware of a substantial and unjustifiable risk that the property is stolen).

[11] *Miller v. State*, 312 P.3d 1112, 1115 (Alaska App. 2013) (collecting cases).

for which he was convicted but would not face retrial on the charges for which he was acquitted.[12]

Upton advances various arguments as to why we should not presume that his trial attorney failed to object for tactical reasons, but we need not resolve them. His inconsistent verdicts claim is wrongly premised on the theory that the jury had to have convicted him of second-degree theft based on his possession of the motorhome right after the transaction with Upton. But the jury could have convicted him based on his retention of the motorhome after LeClerc failed to return with the title.

The jury could have found that there was reasonable doubt as to whether Upton lacked reasonable grounds for believing that he had the right to possess the motorhome immediately after the sales transaction, and therefore conclude he was not guilty of first-degree vehicle theft. However, the jury could still have found that LeClerc's failure to return with the title made Upton aware of a substantial and unjustifiable risk that the motorhome was stolen, and therefore conclude he was guilty of second-degree theft (under a theft-by-receiving theory). Thus, the verdicts can be logically reconciled.

Conclusion

The judgment of the superior court is AFFIRMED.

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[12] *Id.*