IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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| MELANIE C. WHALEN,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-13606<br>Trial Court No. 1JU-19-01051 CR<br><br>MEMORANDUM OPINION<br><br>No. 7057 — May 31, 2023 |

Appeal from the District Court, First Judicial District, Juneau, Kirsten L. Swanson, Judge.

Appearances: Monique Eniero, Attorney at Law, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Heather Stenson, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge TERRELL.

Melanie C. Whalen was convicted, following a jury trial, of fourth-degree assault for an altercation in a correctional facility during which Whalen grabbed a

corrections officer's hair and pushed the officer's glasses into her face.[1] On appeal, Whalen raises two challenges to her conviction.

First, Whalen argues that the district court erred when it denied her request for a mistrial following a comment by one corrections officer who testified regarding Whalen's "prior bookings" at the facility. We conclude that the court did not abuse its discretion when it elected to strike the comment and provide the jury with a curative instruction rather than grant Whalen a mistrial.

Second, Whalen argues that the district court erroneously allowed the prosecutor to ask her questions during cross-examination regarding whether she tended to get "angry when . . . confronted . . . by authority figures" and regarding a prior incident where she became angry with her probation officer. We agree with Whalen that these questions were irrelevant and improper. However, under the circumstances of this case, we conclude that the court's error was harmless.

Whalen also argues that the cumulative effect of the district court's errors requires reversal of her conviction. For the reasons explained in this opinion, we reject this claim.

*Relevant prior facts and proceedings*

Whalen was arrested on August 2, 2019 for a probation violation in an unrelated case and taken into custody. After spending the night at the Lemon Creek Correctional Center, Whalen was removed from her cell so that she could participate telephonically in her arraignment hearing. Following her arraignment, multiple corrections officers escorted Whalen back to her cell.

Two of those officers, including Sarah Jones, testified that when they arrived at the cell, Whalen refused to enter and began to struggle with the officers. At one point, Whalen grabbed Officer Jones's hair and pushed her glasses into her face. In

[1] AS 11.41.230(a)(1).

response, the officers pushed Whalen against the wall, then to the floor, and restrained her — eventually returning her to her cell.

Whalen was charged with one count of fourth-degree assault for recklessly causing physical injury to the corrections officer. Prior to trial, in an effort to minimize the prejudicial impact of the fact that Whalen was in custody at the time of the altercation, the parties stipulated to an explanation of Whalen's presence at the correctional facility. That stipulation was set out in a jury instruction, which stated in pertinent part: "Melanie Whalen was arrested on August 2, 2019 on an unrelated matter and was in custody on August 3, 2019[.]" At the parties' request, the court also approved a protective order prohibiting any discussion of the reason why Whalen was in custody (*i.e.*, her violation of probation).

At trial, the State called a number of corrections officers as witnesses. The prosecutor asked one of these officers to describe Whalen's demeanor when she was booked into the facility on August 2, 2019. The officer responded that Whalen was "[a]ggressive, loud, argumentative, pretty consistent with previous bookings with Ms. Whalen." Whalen immediately moved for a mistrial. The court denied Whalen's request, and instead instructed the jury to disregard both the question and the officer's response. With agreement from the parties, the court also instructed the jury that "Ms. Whalen has never engaged in a physical altercation with corrections officers prior to the date in question."

Later in the trial, Whalen testified in her own defense. She claimed that her conduct was in reaction to the officers' use of force and explained that she grabbed Officer Jones's hair out of fear as she was roughly escorted to her cell. In support of this argument, Whalen admitted a number of photographs depicting bruising on her wrists that she attributed to her handcuffs being placed too tightly when she was arrested.

The prosecutor then sought permission from the court to ask Whalen about her tendency to "blam[e] pre-existing injuries on other people" and "her behavior when

she is confronted by authority because she regularly . . . engages this way, struggles." The prosecutor expressed her belief that the injuries to Whalen's wrists were not inflicted by improper use of the handcuffs but, rather, from her "struggling fairly significantly" with her probation officer when she was arrested.

The district court ruled that the State could ask Whalen about whether she "has struggled with authority before" and "whether she had violent incidences with authority, like the police, where she's gotten scared and has struggled." The prosecutor then proceeded with the following line of questioning:

> *Prosecutor*: Do you tend to get angry when you're confronted about your behaviors by authority figures?
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> *Whalen*: No. Not always.
>
> *Prosecutor*: But you sometimes do, don't you?
>
> *Whalen*: I mean, with authority figures or just people in general?
>
> *Prosecutor*: Specifically authority figures.
>
> *Whalen*: Oh, that, no.
>
> *Prosecutor*: Police, jail officers, probation officers?
>
> *Whalen*: No.

The prosecutor then requested another bench conference and asked the court for permission to question Whalen about a specific incident involving her probation officer. The court granted the State's request, and limited the State's questioning to a prior incident involving Whalen and a probation officer.

Returning to her cross-examination, the prosecutor asked Whalen, "Had you become angry and verbally aggressive with Probation Officer Dumont on the 2nd when she confronted you about your behavior?" Whalen responded, "I became angry because she was already angry." At this point, the court interrupted and prevented the prosecutor from asking any further questions on the subject.

The jury ultimately found Whalen guilty of fourth-degree assault against Officer Jones. This appeal followed.

*Why we conclude that the district court did not abuse its discretion in denying Whalen's request for a mistrial*

On appeal, Whalen argues that the district court erred when it denied her request for a mistrial following the corrections officer's testimony that Whalen's behavior was "pretty consistent with previous bookings[.]" The State acknowledges that the officer's reference to Whalen's prior bookings at the jail was "indeed inadmissible."

The question of whether to grant a mistrial is entrusted to the sound discretion of the trial court.[2] In this case, the district court found that the officer's statement was improper, and that the decision as to whether to grant a mistrial was a "close call." The court found, however, that the statement was not made in bad faith, and the court noted that the jury was already aware that Whalen was in custody at the time of the incident in this case. The court reasoned that the officer's improper statement was not significantly more prejudicial than the information the jury already knew about Whalen's custodial status since the statement referred to prior bookings, rather than prior arrests, and it did not specify the number of prior bookings or provide details regarding Whalen's history of aggression.

For these reasons, the court denied Whalen's motion for a mistrial and instead instructed the jury to ignore both the prosecutor's question and the officer's response. The court also invited Whalen's attorney to propose additional language for a curative instruction. Based on a stipulation by the parties, the court further instructed the jury that "Ms. Whalen has never engaged in a physical altercation with corrections officers prior to the date in question."

We have previously stated that "[a] timely curative instruction is presumed to remedy the unfair prejudice that might otherwise arise from inadmissible

[2] *Hewitt v. State*, 188 P.3d 697, 699 (Alaska App. 2008).

testimony."[3] Given the facts of this case and the strong curative instruction, we conclude that the district court did not abuse its discretion when it issued a curative instruction rather than granting Whalen's request for a mistrial.[4] We therefore reject Whalen's first claim of error.

*Why we conclude that the district court erred when it allowed the State to question Whalen about her anger toward officers, but that this error was harmless*

Whalen's second argument on appeal is that the district court erred when it allowed the State to ask Whalen questions about whether she tended to get "angry when . . . confronted . . . by authority figures" and regarding a specific prior incident where she became angry with her probation officer.[5] We agree with Whalen that these questions were not relevant, and therefore should not have been permitted.[6]

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[3] *Hamilton v. State*, 59 P.3d 760, 769 (Alaska App. 2002); *see also Knix v. State*, 922 P.2d 913, 923 (Alaska App. 1996) (explaining that the jury is presumed to follow the trial court's instructions).

[4] *See, e.g.*, *Hines v. State*, 703 P.2d 1175, 1178-79 (Alaska App. 1985) (upholding the trial court's decision to issue a curative instruction rather than grant a mistrial after a witness testified that the defendant "had prior offenses"); *Preston v. State*, 615 P.2d 594, 603-04 (Alaska 1980) (holding that "mention of [the defendant's] probationary status neither informed the jury of the substance of the underlying conviction nor so prejudiced the defense as to demand a mistrial or a finding that the trial court abused its discretion in ruling on the motion").

[5] On appeal, the State argues that Whalen failed to adequately preserve objections to both of these questions in the district court. But, in context, it was apparent the district court understood Whalen's attorney to have objected to the prosecutor's line of questioning about Whalen's general demeanor with authority figures and the follow-up question regarding the specific incident with her probation officer. By allowing the prosecutor to ask these questions, the court overruled the objection. Given this, we analyze the court's ruling on its merits.

[6] Alaska R. Evid. 402 ("Evidence which is not relevant is not admissible.").

The district court first ruled that it would be "fair" to question Whalen about whether she had "struggled with authority before" and "had violent incidences with authority" after she testified during her direct examination that she sustained injuries from corrections officers during her arrest. But the prosecutor's question regarding whether Whalen tended to get "angry" when confronted by authority figures was not relevant to proving the underlying charge (that Whalen assaulted a corrections officer) or to impeach Whalen regarding the source of her injuries. Instead, the question inappropriately called for Whalen to discuss her general emotional state when interacting with "authority figures." Given that the court had previously instructed the jury that "Ms. Whalen has never engaged in a physical altercation with corrections officers prior to the date in question," whether she had become "angry" with officers in the past was irrelevant.

Moreover, the parties had already stipulated that evidence regarding why Whalen was in the correctional facility (*i.e.*, her violation of probation) would not be admitted at trial. The prosecutor's question about whether Whalen tended to get angry when interacting with authority figures — specifically "[p]olice, jail officers, probation officers" — called for prejudicial information, bordering on improper propensity evidence.[7]

After Whalen responded that she did not tend to get angry with authority figures, the prosecutor sought permission from the court to ask Whalen about a specific incident involving her probation officer on the day of her arrest. The court allowed the prosecutor to proceed with this questioning. However, the prosecutor's question that followed, regarding whether Whalen had "become angry and verbally aggressive" with

[7] *See* Alaska R. Evid. 403 ("[E]vidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . . ."); Alaska R. Evid. 404(b) (prohibiting evidence of prior bad acts if it is used "to prove the character of a person in order to show that the person acted in conformity therewith").

her probation officer on the day she was arrested, was similarly not relevant and prejudicial.

As we mentioned, Whalen presented evidence that she had sustained injuries and implied that they were caused by the officers using an unnecessary level of force when detaining her. In response, the prosecutor could have asked Whalen questions about the source of her injuries — specifically, whether she had struggled during her arrest and whether this struggle could have resulted in the injuries she described. But instead, the prosecutor asked Whalen about an incident with her probation officer, prior to her arrest, where she became "angry" and "verbally aggressive." This information was irrelevant, as it related to Whalen's emotional state and not any physical actions that were directly at issue, and prejudicial, as it introduced the fact that Whalen was on probation when she was arrested. The district court thus erred in allowing the prosecutor to question Whalen in this way.

But despite the court's error, we conclude that the admission of these questions did not appreciably affect the jury's verdict in this case.[8] First, the State's evidence against Whalen was strong. The altercation involving Whalen and the corrections officers was recorded on video, and the video was played for the jury at trial. Multiple eyewitnesses testified regarding the assault, and Whalen admitted to reaching out and grabbing Officer Jones as officers tried returning Whalen to her cell. (Whalen argued that her actions were in self-defense.)

Second, the prosecutor's improper questions were limited and brief. Whalen responded to the first question in the negative — that she did not tend to get angry when confronted by authority figures — and she told the jury that she only had become angry with her probation officer because the officer "was already angry." Given that the jury was instructed, both orally and in writing, that "Ms. Whalen has never engaged in a physical altercation with corrections officers prior to the date in question,"

[8] *See Love v. State*, 457 P.2d 622, 629-32 (Alaska 1969).

it is unlikely that the jury would have used this testimony for an improper purpose. Accordingly, we conclude that allowing this questioning, while error, was harmless.

*Why we reject Whalen's claim of cumulative error*

Lastly, Whalen argues that the doctrine of cumulative error requires reversal in this case. Specifically, she asserts that the inadmissible testimony from the corrections officer — that Whalen was "[a]ggressive, loud, argumentative, pretty consistent with previous bookings" — combined with the prosecutor's improper questioning regarding her prior interaction with her probation officer in which she got "angry and verbally aggressive," collectively deprived her of a fair trial.

Cumulative error requires reversal "when the impact of errors at trial is so prejudicial that the defendant was deprived of a fair trial, even if each individual error was harmless."[9] As we have previously explained:

> [T]he doctrine of cumulative error is really a doctrine of cumulative prejudice. It applies only when real errors have been identified and the remaining question is whether these errors, in combination, were so prejudicial as to undermine the trustworthiness of the underlying judgement (even though each error, taken individually, might not require reversal).[10]

In this case, the jury was aware that Whalen was already in custody at a correctional facility at the time of the charged assault and that the alleged victim in the case was a corrections officer. The jury was also explicitly told that Whalen had never previously engaged in a physical altercation with corrections staff prior to this incident. The fact that the jury heard brief evidence that Whalen had "prior bookings" (and then was instructed to ignore this statement) and that she had gotten "angry" and "verbally

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9 *Roussel v. State*, 115 P.3d 581, 585 (Alaska App. 2005).

10 *State v. Savo*, 108 P.3d 903, 916 (Alaska App. 2005).

aggressive" with her probation officer thus did not substantially prejudice the trial or Whalen's defense. We therefore conclude that the combined effect of the erroneous information presented to the jury did not undermine the trustworthiness of the judgment.

*Conclusion*

The judgment of the district court is AFFIRMED.