IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN EINHELLIG, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13998 Trial Court No. 3DI-20-00009 CR MEMORANDUM OPINION No. 7100 — April 10, 2024

Appeal from the Superior Court, Third Judicial District, Dillingham, Christina L. Reigh, Judge.

Appearances: Emily L. Jura, Assistant Public Defender, 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: Allard, Chief Judge, and Harbison and Terrell, Judges.

Judge ALLARD.

John Einhellig was convicted, following a jury trial, of third-degree escape.[1] On appeal, he argues that the superior court violated his constitutional right to

[1] AS 11.56.320(a)(4)(A).

testify when it failed to conduct the required inquiry into whether he wished to testify and then refused to allow him to testify after he indicated he wanted to testify shortly before the jury was excused for deliberations. The State concedes error, and further concedes that the error was not harmless beyond a reasonable doubt. We find the State's concessions well-founded.[2] Accordingly, we reverse Einhellig's conviction.

Relevant facts and prior proceedings

John Einhellig was originally indicted on charges of felony driving under the influence and felony refusal to submit to a chemical test.[3] He was released on bail conditions that included electronic monitoring. Einhellig was later charged with third-degree escape for allegedly removing his electronic monitoring device while on pretrial release.[4]

Trial was bifurcated so that the jury would hear evidence and deliberate on the driving under the influence and refusal charges before hearing evidence regarding the escape charge. On the first day of jury selection, Einhellig was disruptive, and he was removed from the courtroom for a portion of the voir dire proceedings. Einhellig was allowed to return later that day and remained in the courtroom for the remainder of the proceedings.

At the first phase of the trial, the jury heard testimony regarding the driving under the influence and refusal charges. The trial court conducted a *LaVigne*

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[2] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess any concession of error by the State in a criminal case).

[3] AS 28.35.030(n) and AS 28.35.032(p), respectively.

[4] AS 11.56.320(a)(4)(A).

inquiry[5] and Einhellig testified on his own behalf and against the advice of his counsel. The jury subsequently acquitted Einhellig of both charges.

At the second phase of the trial, the State presented evidence of various jail calls between Einhellig and his father in which Einhellig's father chastised Einhellig for cutting off the ankle monitor and Einhellig acknowledged that he had done so.

After the State rested, the court asked the defense attorney — in the presence of the jury — if he would be presenting any evidence. The attorney stated, "defense rests." The court did not inquire of Einhellig whether he wished to testify or otherwise determine whether his decision not to testify was voluntary. Neither party drew the court's attention to the fact that it had failed to conduct the required *LaVigne* inquiry in the second phase of the trial.

After the defense rested, the parties made closing arguments. The defense attorney argued that Einhellig had not cut off the electronic monitoring device, but instead, that the device had accidentally broken. The prosecutor argued that Einhellig had cut the device off and was therefore guilty of third-degree escape.

After closing arguments, the court read the jury instructions and then asked counsel if there was any reason why the jury should not be excused to deliberate. Einhellig personally answered, "I'd like to testify." Neither the court nor the attorneys responded to this statement. Instead, the court excused the jury, stating that the defense had already rested and there would be no more testimony.

The jury subsequently convicted Einhellig of third-degree escape. At sentencing, the court imposed a sentence of 30 months to serve.

This appeal followed.

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[5] *See LaVigne v. State*, 812 P.2d 217, 222 (Alaska 1991) (requiring the trial court to personally advise the defendant outside of the presence of the jury of their constitutional right to testify); Alaska R. Crim. P. 27.1.

Why we reverse Einhellig's conviction

A criminal defendant has a constitutional right to testify on their own behalf under the Alaska and United States Constitutions.[6] This right is "personal to the criminal defendant and fundamental to the dignity and fairness of the judicial process."[7] In *LaVigne v. State*, the Alaska Supreme Court developed a procedure for ensuring that the defendant's personal right to testify is not violated.[8] This procedure was codified in Alaska Criminal Rule 27.1, which requires the court to advise the defendant of their right to testify.[9] If the defendant elects not to testify, the court must "confirm that the decision not to testify is voluntary."[10] The court must conduct this inquiry personally with the defendant and outside the presence of the jury.[11]

As both parties acknowledge, the *LaVigne* inquiry did not occur in the second part of the trial. During the first phase of the trial, the trial court advised Einhellig that it was his right and choice to testify. But during the second phase of the

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6 *Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *LaVigne*, 812 P.2d at 219.

7 *LaVigne*, 812 P.2d at 219.

8 *Id.* at 222.

9 Alaska R. Crim. P. 27.1 provides:

> (a) **Advice of Right.** Prior to the prosecutor's opening statement, the court shall advise the defendant on the record outside the presence of the jury that it is the defendant's right to choose whether to testify or remain silent.
>
> (b) **Inquiry of Nontestifying Defendant.** Before the defense rests, the defense shall notify the court outside the presence of the jury that the defense intends to rest. If the defendant has not testified, the court shall ask the defendant to confirm that the decision not to testify is voluntary. This inquiry must be directed to the defendant personally and must be made on the record outside the presence of the jury.

10 Alaska R. Crim. P. 27.1(b).

11 *Id.*

trial, the court failed to inquire outside the presence of the jury whether it was Einhellig's voluntary decision not to testify after the defense attorney indicated that the defense was resting without putting on any evidence.

A trial judge's failure to conduct a *LaVigne* inquiry does not automatically require reversal of a defendant's conviction.[12] Instead, the error is analyzed for harmlessness.[13] To meet the threshold burden of demonstrating prejudice, a defendant must show that they would have testified and that they would have offered "relevant testimony."[14] The burden then shifts to the State to prove that the error was harmless beyond a reasonable doubt.[15]

In the current case, the State concedes that Einhellig has met this threshold burden of demonstrating prejudice, and the State further concedes that it is unable to meet its burden of showing that the error was harmless beyond a reasonable doubt. As the State points out, it is clear from the record that Einhellig wanted to testify and that Einhellig made that intention clear to the trial court. As the State also points out, Einhellig testified in the first phase of the trial and his testimony was obviously credible to the jury because they acquitted him of the other charges. The State also concedes that Einhellig had "relevant testimony" to offer, noting "[t]he theory of prosecution — that Einhellig had removed his ankle monitor — and the theory of the defense — that it had broken off accidentally — put Einhellig's actions and mental state directly at issue," and "Einhellig clearly possessed personal knowledge on these points that was legally relevant to his defense."

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[12] *Weist v. Anchorage*, 929 P.2d 668, 669 (Alaska App. 1996).

[13] *Id.*

[14] *Id.*

[15] *LaVigne v. State*, 812 P.2d 217, 221 (Alaska 1991).

Because we agree that the State's concessions are well-founded,[16] we reverse Einhellig's conviction for third-degree escape and we remand this case to the superior court for further proceedings consistent with this decision.[17]

Conclusion

The judgment of the superior court is REVERSED.

[16] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972).

[17] Because we are reversing Einhellig's conviction, we need not address Einhellig's other argument on appeal.