IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ROBERT J. GOLDSTEIN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12264 Trial Court No. 3VA-13-168 CR MEMORANDUM OPINION No. 6574 — January 17, 2018

Appeal from the Superior Court, Third Judicial District, Valdez, Daniel Schally, Judge.

Appearances: Maureen E. Dey, Gazewood & Weiner, P.C., Fairbanks, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

Robert J. Goldstein appeals his convictions for first-degree assault and third-degree assault. Goldstein's convictions stem from his role in an altercation at the Gold Rush bar in Valdez. Goldstein also appeals his conviction for fourth-degree controlled substance misconduct, a conviction that was based on the discovery of a small

baggie of methamphetamine on Goldstein's person when he was searched during the jail booking process.

Goldstein's first claim on appeal is that the trial judge should have allowed Goldstein's attorney to elicit hearsay testimony regarding potentially exculpatory statements that Goldstein made to a police officer some 30 to 40 minutes after Goldstein was taken into custody. Goldstein argues that his statements were admissible either as present sense impressions or as excited utterances — the hearsay exceptions codified in Alaska Evidence Rule 803(1) and 803(2).

But the trial judge expressly found that, at the time Goldstein made these statements, Goldstein "was thinking ahead towards likely litigation of criminal charges" and was "reflecting on the situation that he [found] himself in at the time". In other words, the judge found that Goldstein's statements were the product of deliberation — and the record supports the judge's finding. Given this finding, the judge properly rejected the defense attorney's assertion that Goldstein's statements were admissible as present sense impressions or excited utterances.

Goldstein also argues that some of his statements to the police were admissible under Evidence Rule 803(3) because these statements were assertions about Goldstein's mental or emotional condition during the altercation at the bar. But this argument is based on a misunderstanding of Evidence Rule 803(3).

The hearsay exception codified in Evidence Rule 803(3) applies to a person's assertions about their *then-existing* mental or emotional condition — a person's description of their mental or emotional condition *at the time they are speaking*. As explained in the first paragraph of the Commentary to Alaska Evidence Rule 803(3), this rule "is essentially a specialized application" of Evidence Rule 803(1) — *i.e.*, a specialized application of the rule that covers statements of *present* sense impression.

Evidence Rule 803(3) does not apply to a person's assertions about a mental or emotional condition that they experienced at some earlier time. [1]

See also Saltzburg, Martin, and Capra, *Federal Rules of Evidence Manual* (11th ed. 2015), Rule 803, Vol. 4, p. 803-30 (explaining that the corresponding federal hearsay exception does not apply to "[s]tatements of a past state of mind or physical condition").

For these reasons, we uphold the trial judge's rulings with respect to this offered evidence.

In a separate claim on appeal, Goldstein argues that the trial judge should have moved his trial out of Valdez. But when Goldstein's attorney asked for a change of venue, he relied solely on the conclusory assertion that the primary victim of Goldstein's assaults was well-known in Valdez, with no evidentiary support. Moreover, the defense attorney made this request before jury selection, so it was impossible to know whether this was a real problem. Given the lack of support for the requested change of venue at the time, the trial judge denied the motion. Goldstein's attorney did not renew this motion either during or after jury selection. Thus, there is no substantive support in the record for a change of venue. We therefore affirm the trial judge's ruling.

Goldstein claims that the evidence presented at his trial was not legally sufficient to support his various convictions. He also claims that the evidence was not legally sufficient to disprove his asserted defense of self-defense.

But Goldstein's arguments hinge on viewing the evidence in the light most favorable to himself. When an appellate court evaluates the sufficiency of the evidence to support a guilty verdict in a criminal trial, we must view the evidence (and the

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[1] *Kelly v. State*, 116 P.3d 602, 604 (Alaska App. 2005), and at 610 (Judge Mannheimer, concurring).

inferences that could reasonably be drawn from that evidence) in the light most favorable to upholding the jury's verdict.[2] Viewing the evidence at Goldstein's trial in that light, we conclude that the evidence was sufficient to convince reasonable jurors that the State had proved the charges beyond a reasonable doubt, and that the State had disproved Goldstein's claim of self-defense beyond a reasonable doubt. The evidence was therefore legally sufficient to support Goldstein's convictions.[3]

Goldstein's final argument concerns his sentence. Goldstein's most serious offense, first-degree assault, was based on Goldstein's act of stabbing another man. Under the charging statute, AS 11.41.200(a)(1), the State was required to prove that Goldstein inflicted serious physical injury to another person "by means of a dangerous instrument".

First-degree assault is a class A felony,[4] and the sentencing for non-sexual class A felonies is governed by AS 12.55.125(c). Under the version of AS 12.55.125(c) that was in effect at the time Goldstein committed his crime (*i.e.*, the pre-2016 version of the statute), the presumptive sentencing range for a first felony offender was normally 5 to 8 years' imprisonment[5] — but, under AS 12.55.125(c)(2), the presumptive range was increased to 7 to 11 years' imprisonment if the defendant "used a dangerous instrument".[6]

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[2] *See*, *e.g.*, *Dorman v. State*, 622 P.2d 448, 453 (Alaska 1981); *Spencer v. State*, 164 P.3d 649, 653 (Alaska App. 2007).

[3] *Dorman*, 622 P.2d at 453; *Spencer*, 164 P.3d at 653.

[4] AS 11.41.200(b).

[5] Former AS 12.55.125(c)(1) (pre-2016).

[6] Former AS 12.55.125(c)(2) (pre-2016).

Because Goldstein's jury found that Goldstein used a dangerous instrument during the assault, the trial judge ruled that Goldstein's sentencing was governed by this higher presumptive sentencing range.

On appeal, Goldstein argues that the judge's ruling constitutes an unlawful double counting of the "dangerous instrument" factor. But in *Burks v. State*, 706 P.2d 1190, 1192 (Alaska App. 1985), and in *Abdulbaqui v. State*, 728 P.2d 1211, 1219-1220 (Alaska App. 1986), this Court rejected essentially the same argument: we ruled that it does not violate the double jeopardy clause for a defendant to be convicted of first-degree robbery based on the defendant's use of a firearm, and then for the defendant to be sentenced to the higher presumptive term prescribed in AS 12.55.125(c)(2), again based on the defendant's use of the firearm.

Based on *Burks* and *Abdulbaqui*, we uphold the trial court's ruling that the 7- to 11-year presumptive range specified in AS 12.55.125(c)(2) governed Goldstein's sentencing.

In sum, the judgement of the superior court is AFFIRMED.