IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DESARAY ANCHETA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12126 Trial Court No. 1KE-13-895 CR MEMORANDUM OPINION No. 6622 — April 25, 2018

Appeal from the Superior Court, First Judicial District, Ketchikan, Trevor N. Stephens, Judge.

Appearances: Andrew Ott, Johnson Kamai & Trueb, LLC, Kodiak, for the Appellant. Diane L. Wendlandt, 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 WOLLENBERG.

Following a jury trial, Desaray Ancheta was convicted of second-degree misconduct involving a controlled substance (possession of heroin with intent to deliver),[1] third-degree misconduct involving a controlled substance (possession of

[1] Former AS 11.71.020(a)(1) (2013).

methamphetamine with intent to deliver),[2] and fourth-degree misconduct involving a controlled substance (possession of oxycodone).[3]

On appeal, Ancheta argues that the State presented insufficient evidence to support her convictions for possessing heroin and methamphetamine with intent to deliver. Ancheta also argues that the trial court erred in precluding her from relying on a text message written by her boyfriend, Jonathan Hart, to establish that she was not involved in drug dealing.

For the reasons explained here, we reject Ancheta's claims and affirm her convictions.

Underlying facts

In December 2013, Ancheta and her boyfriend, Hart, traveled from Oregon to Ketchikan. They checked in to a hotel and began searching for a short-term rental unit in the area. Ultimately, Ancheta and Hart rented a one-bedroom apartment for one week from a Ketchikan resident who lived upstairs from the rental unit. Hart gave conflicting stories to the apartment's owner about why he and Ancheta were in Ketchikan. Hart also paid the rent in cash.

After several days of observing cars coming and going from the rental unit, the owner became suspicious of possible drug activity and contacted the police. Based on that contact and other information, the police obtained a search warrant for the apartment. Upon executing the warrant, the police found a large quantity of drugs, several thousand dollars in cash, and drug distribution materials in the bedroom shared by Hart and Ancheta.

---

[2] Former AS 11.71.030(a)(1) (2013).

[3] Former AS 11.71.040(a)(3) (2013).

In particular, in the middle of the bed, in plain view, the police found a case containing approximately eighteen grams of methamphetamine. And underneath the mattress, the police found a glass pipe with white residue.

Inside a cabinet to the left of the bed — on the side of the room with Hart's belongings — the officers discovered a bag containing another seventeen and one-half grams of methamphetamine. The cabinet also contained a digital scale, a straw scoop, two packs of syringes, balloons, and small baggies, along with Hart's Oregon identification card.

Also on the left side of the room, the police discovered a small portable safe. Inside the safe, the police found more balloons, syringes, baggies, and a bag containing approximately nineteen grams of heroin. Near the safe, the officers found a purple Crown Royal bag that contained $2,400 in cash.

On the right side of the bedroom, the officers found Ancheta's purse and her driver's license. On a right-side shelf, the police located a metal canister containing one unmarked pill, later identified as oxycodone.

The police also found two cell phones that were later determined to belong to Ancheta and Hart. The police later extracted several text messages sent from each phone.

Proceedings

The State charged Ancheta and Hart with possessing heroin with intent to deliver and possessing methamphetamine with intent to deliver. The State also charged Ancheta with possessing oxycodone based on the pill found on the right side of the bedroom.

Ancheta and Hart were jointly tried by a jury. In addition to the physical evidence seized from the apartment and the testimony of the investigating officers and

the apartment owner, the State presented text messages sent from Ancheta's and Hart's cell phones.

Prior to trial, the superior court ruled without objection that the text messages would be admitted only with respect to the person who sent the messages. In other words, the court ruled that the jury could rely on Hart's text messages to evaluate the charges against Hart, but the jury could not rely on Hart's text messages to evaluate the charges against Ancheta, and vice versa. The court instructed the jury as to this limitation twice during trial, without objection from Ancheta's attorney. The court also included the limitation in a written jury instruction at the end of the trial, again without objection.

The jury convicted Ancheta of all three counts. Ancheta now appeals.

Why we conclude that the evidence was sufficient to support Ancheta's two convictions for illegally possessing controlled substances with intent to deliver

Ancheta challenges the sufficiency of the evidence to support her convictions for second- and third-degree misconduct involving a controlled substance — possessing heroin and methamphetamine with intent to deliver. In particular, Ancheta argues that the State failed to establish that she knowingly possessed the controlled substances or that she was involved in distributing them.

The State prosecuted Ancheta primarily as Hart's accomplice. To establish accomplice liability, the State was not required to prove that Ancheta *personally* possessed the drugs (either actually or constructively) or that she intended to *personally* distribute the drugs.[4] Rather, a defendant's guilt may be established by the defendant's own conduct, by the conduct of other people for whom the defendant is vicariously

[4] *See Wagers v. State*, 810 P.2d 172, 174 (Alaska App. 1991).

liable, or both.[5] Thus, the State could prove its case by establishing that Hart (or some combination of Hart and Ancheta) committed each element of the offenses charged, and that Ancheta was vicariously liable for Hart's conduct under AS 11.16.110.

Ancheta does not contest that the State presented sufficient evidence to establish that *someone* in the apartment possessed heroin and methamphetamine with the intent to deliver. In the bedroom shared by Hart and Ancheta, the police found more than thirty-five grams of methamphetamine (including eighteen grams in plain view in the middle of the bed) and nineteen grams of heroin, along with items commonly used to measure and package illegal drugs for sale (a digital scale, baggies, and balloons).

Ancheta instead disputes her personal involvement in Hart's drug dealing. To establish Ancheta's legal accountability for Hart's conduct, the State was required to prove that (1) Ancheta intended to promote or facilitate Hart's distribution of controlled substances; and (2) Ancheta either solicited Hart to commit these offenses or aided or abetted Hart in the commission of the offenses.[6]

Viewing the evidence in the light most favorable to the jury's verdicts, we conclude that these elements were met. At trial, the State introduced a text message from Ancheta to a friend in which Ancheta stated that she did not know anyone in Ketchikan, and in which she described Hart as having "more of a rapport." Ancheta explained that Hart had asked her to "keep a low key and stay out of the hustle to an extent here." And, out of "respect" for Hart, Ancheta said that she had agreed to take "a backseat" and play the "at home role" in Ketchikan. In addition, Ancheta explained that she had her "own hustle back home" which she was maintaining while in Ketchikan.

---

[5] AS 11.16.100; *Andrew v. State*, 237 P.3d 1027, 1040-41 (Alaska App. 2010).

[6] *See* AS 11.16.110(2); *Riley v. State*, 60 P.3d 204, 221 (Alaska App. 2002).

Given Ancheta's statement that she agreed to stay out of Hart's "hustle" only "to an extent," and to take a "backseat" and assume the "at home" role, a juror could reasonably reject Ancheta's suggestion that she was not involved in the drug dealing at all, and could instead credit the State's argument that Ancheta was simply playing a supportive role — providing assistance to Hart as necessary, and staying at the apartment to watch over a stash of drugs that, according to the testimony, had a potential street value in Ketchikan of over $25,000 (apparently, significantly more than the drugs would sell for in the Lower 48).

Ancheta ascribes a different meaning to her text message. But when an appellate court evaluates the sufficiency of the evidence at a criminal trial, we are required to view the evidence and the reasonable inferences to be drawn from that evidence in the light most favorable to upholding the jury's verdict.[7] Viewing the text message, together with the other evidence, in this light, jurors could reasonably conclude that Ancheta knew that Hart was selling (or intending to sell) illegal drugs in Ketchikan, that she shared that goal, and that she purposely assisted Hart in achieving it.[8]

We therefore conclude that the evidence was sufficient to support Ancheta's convictions for second- and third-degree misconduct involving a controlled substance.

Why we decline to find plain error in the court's handling of Hart's text message

Ancheta's second claim on appeal is that the trial court erred in precluding Ancheta from relying on a text message sent by Hart. The text message in question was

---

[7] *See Bergman v. State*, 366 P.3d 542, 542-43 (Alaska App. 2016).

[8] *See State v. Nason*, 498 A.2d 252, 256 (Me. 1985) (concluding that a jury could rationally have found the defendant's participation as an accomplice in her husband's drug trafficking beyond a reasonable doubt based on the circumstantial evidence in the case).

sent by Hart to a potential drug buyer. In this message, Hart questioned why the other person was "hitting up" Ancheta for heroin when, according to Hart's message, Ancheta "doesn't sell it, I do." Ancheta argues that this text message should have been admitted as a statement against interest under Alaska Evidence Rule 804(b)(3) and that the trial court erred in precluding Ancheta from relying on this message in closing argument to support her claim of non-involvement in Hart's drug distribution.

This claim is not preserved for appeal. Ancheta never sought to admit the text message as exculpatory evidence in her own case. Instead, despite multiple opportunities to object throughout the trial, Ancheta's attorney repeatedly endorsed the trial court's ruling on the text messages: the decision that each defendant's text messages were admissible solely as evidence against the person who sent the message.

The question regarding the admission of Hart's and Ancheta's text messages first arose prior to trial. The State announced its intent to introduce several text messages from both Ancheta and Hart under Alaska Evidence Rule 801(d)(2)(E) as statements of co-conspirators made during the course of, and in furtherance of, the conspiracy. Hart's attorney objected, arguing that there was no evidence that he and Ancheta were co-conspirators or that the text messages were sent in furtherance of the alleged conspiracy.

Rather than resolve this dispute, the trial court suggested that the text messages of each defendant could be admitted against that defendant as statements of a party opponent under Alaska Evidence Rule 801(d)(2). The court indicated that if the text messages were admitted on that ground, the court would instruct the jury to only

consider each defendant's text messages for the limited purpose of evaluating the charges against that defendant.[9]

But before the court made its final ruling on this issue, the court pointed out that Ancheta might be disadvantaged by this limitation on the use of the evidence. The court suggested that Ancheta might want to rely on Hart's statements in her own case: "I would presume that Ms. Ancheta wants Mr. Hart's statements in the record because they're exculpatory as far as her to a degree." The court then asked the defense attorneys, including Ancheta's attorney, for their positions. Despite the court's express suggestion that Hart's text messages might be exculpatory as to Ancheta, Ancheta's attorney agreed with the court's approach that the text messages would only be admissible against the defendant who wrote them. Ancheta's attorney asked only that the State properly establish the identity of the sender as a prerequisite to admission of the text messages.

During the presentation of evidence at trial, the court gave the previously proposed limiting instruction twice — first, before admitting emails from Hart and Ancheta to the apartment owner regarding the rental unit, and second, before admitting Hart and Ancheta's text messages. Each time, the court instructed the jury that it could only consider each defendant's statements for the purpose of evaluating the charges

---

[9] We note that the trial judge's approach raised potential problems, particularly for Hart, under *Bruton v. United States,* 391 U.S. 123 (1968). Ancheta's text messages seemed to implicate Hart, but as a non-testifying co-defendant, Ancheta was unavailable for cross-examination. In *Bruton*, the Supreme Court held that a defendant's Sixth Amendment right of confrontation is violated if the confession of a non-testifying co-defendant is introduced at their joint trial, and if this confession directly implicates the defendant. *Id.* at 126. But Hart's attorney indicated that he did not view Ancheta's text messages as directly inculpating Hart, and thus he told the court that there was no *Bruton* issue. Ancheta similarly did not raise an objection under *Bruton*.

against that defendant — not in evaluating the charges against the co-defendant. Ancheta's attorney did not object on either occasion.

After the State rested, Ancheta's attorney asked the court how it planned to "deal with the limiting instruction" that it had already given twice orally. The court responded that it would give the same instruction in writing, to which Ancheta's attorney responded, "Okay. . . . I wanted to make sure."

The next day, the court proposed a written instruction that tracked the court's prior limiting instructions regarding the use of the defendants' out-of-court statements. The proposed instruction — which ultimately became Instruction No. 26 — read in relevant part:

> You may consider evidence of a defendant's out-of-court statement only in determining that defendant's own guilt or innocence. You may not consider a defendant's out-of-court statement as any evidence against the other defendant. Nothing that one defendant may have said should influence you to any extent, however slight, in deciding the other defendant's case.

During the discussions that followed, Ancheta's attorney did not object to this instruction.

In closing argument, Ancheta's attorney specifically brought the instruction to the jury's attention. Reading from the instruction, Ancheta's attorney reminded the jury that it could not use the statements of one defendant in evaluating the case against the other defendant:

> I have Instruction Number 26. . . . "Nothing that one defendant may have said should influence you to any extent, however slight, in deciding that [*sic*] defendant's case."
>
> So we have this exchange going on between Mr. Hart and some guy in Oregon. Court instruction says, you can't [use]

> that against Ms. Ancheta. You should not attribute anything that's going on between them.

However, moments later, Ancheta's attorney attempted to rely on Hart's text message — "she doesn't sell it, I do" — as evidence that potentially undermined the State's case against Ancheta. The attorney argued:

> There's no indication of an effort to distribute by Ms. Ancheta. The police know of no distribution by Ms. Ancheta. On her side of the bed we have this one pill and, yeah, there's this little container sitting in the middle of the bed and we don't know how it got there. We're not even going to try to address it except that [by] Mr. Hart's own admissions, "she doesn't sell it, I do."

Hart's attorney immediately objected to Ancheta's attorney's remarks, pointing out that, under the judge's ruling, Hart's statement was not admissible in Ancheta's case. Despite the fact that Ancheta's attorney had moments before read Instruction No. 26 to the jury, Ancheta's attorney surprisingly said that he was unaware of such a limitation on the evidence. The court then reminded counsel that the court had previously instructed the jury that each defendant's out-of-court statements could only be used to evaluate that defendant's guilt or innocence. The court noted that Ancheta's attorney had not objected to this instruction and that he had, in fact, read the instruction to the jury just moments before. In response, Ancheta's attorney did not challenge the judge's characterization, but instead conceded that he had "walked over the line."

The judge then sustained Hart's objection and referred the jury to Instruction No. 26, explaining again that the jury could only use each defendant's out-of-court statements "in considering that particular defendant's guilt or innocence." Ancheta's attorney concluded his closing statement shortly thereafter.

On appeal, Ancheta argues for the first time that Hart's text message was admissible as exculpatory evidence in her case because it was a statement against interest

under Evidence Rule 804(b)(3). Based on this argument, Ancheta contends that the trial court erred in precluding her from relying on the text message as evidence of her non-involvement in the drug dealing.

In a joint criminal trial of co-defendants, a statement by one defendant, introduced by the State under Alaska Evidence Rule 801(d)(2) as a statement of a party opponent, is generally admissible only as to that defendant. As to any co-defendant, the statement is hearsay and inadmissible — unless there is another basis for concluding that the statement is non-hearsay or that an exception to the hearsay rule applies.[10]

Here, Ancheta is essentially arguing that the limiting instruction given by the court was inappropriate as to Hart's statement — "she doesn't sell it, I do" — since that statement was not only a statement of a party opponent as to Hart, but also independently admissible as a statement against interest.

Whatever the merits of Ancheta's argument may be, she never presented this argument to the trial court. As we have explained, Ancheta's attorney never asked for admission of Hart's statement as a statement against interest; indeed, prior to closing arguments, Ancheta's attorney never singled out this particular statement from Hart's multiple text messages for separate consideration by the court. As a result, the trial court never made any factual findings as to whether this particular statement qualified as a statement against interest, nor did the court rule on the admissibility of Hart's statement on this ground. Indeed, during the discussion of jury instructions, Ancheta's attorney appeared to affirmatively request that the court repeat its oral limiting instruction in writing.

Ancheta argues that her claim is preserved, specifically pointing to a bench conference called by the judge immediately after her attorney finished closing argument.

---

[10] *State v. McDonald*, 872 P.2d 627, 644 n.5 (Alaska App. 1994).

At that bench conference, the judge asked the attorneys whether there was "a difference between not using [Hart's text] to convict Mr. Hart but using it to try to acquit Ms. Ancheta?" Ancheta's attorney responded, "Well, I think there is, Your Honor, which is why I crossed that line." Hart's attorney and the prosecutor argued that the statement was hearsay as to Ancheta, and the judge agreed to let his prior ruling stand.

Ancheta's attorney then made a comment that is marked as "indiscernible" in the appellate transcript, and it is this comment (together with the trial court's *sua sponte* decision to re-visit the issue) that Ancheta relies on to establish that her claim is preserved. The transcript shows that after the court decided to let its prior ruling stand, Ancheta's attorney said: "(Indiscernible) but I can't."

We disagree with Ancheta that this statement sufficiently preserved the issue for appeal. There is no indication from this exchange whether Ancheta's attorney argued that Hart's statement fell within *any* hearsay exception, let alone the hearsay exception for statements against interest. And Ancheta has not sought to reconstruct the record.[11] We have listened to the audio, and Ancheta's attorney appears to have said, "I'd like to argue it, but I can't." Ancheta has therefore not pointed to anything in the record demonstrating that Ancheta's attorney identified for the court an independent basis for admissibility, or sought a ruling on any theory of admissibility.

Accordingly, we conclude that this issue is not preserved for appeal.

In her reply brief, Ancheta argues conclusorily that we should review this claim for plain error, but she does not explain why the trial judge had an obvious duty to intervene in light of the repeated actions by Ancheta's attorney approving the limiting instruction. The doctrine of plain error requires a trial judge to take corrective action when a defense attorney fails to object to manifestly improper testimony or evidence, or

[11] *See* Alaska R. App. P. 210(i).

to an obviously incorrect or incomplete jury instruction.[12] But here, the trial judge *did* take corrective action.

After proposing a possible solution to the admissibility of the text messages — a solution that would preclude Ancheta from relying on Hart's text messages in her own case (and vice versa) — the judge specifically alerted Ancheta's attorney to the possibility that Ancheta might want to admit Hart's statements as exculpatory evidence in her own case. Despite this invitation, Ancheta's attorney concurred with the trial court's approach: Ancheta's attorney did not ask the court to decide whether the text messages were admissible as statements of co-conspirators, as the State had originally requested, nor did Ancheta's attorney suggest that any of Hart's messages were admissible as statements against interest. Rather, Ancheta's attorney agreed to the court's limiting instruction, and later, he took steps to ensure that the court repeated its limiting instruction in writing. And when the scope of the limiting instruction was pointed out to him during his closing, Ancheta's attorney did not ask the court to reevaluate its ruling.

Given the trial attorney's actions, and Ancheta's failure on appeal to substantively brief the applicability of the plain error doctrine under these circumstances, we cannot say that the judge committed plain error by failing to *sua sponte* recognize the potential applicability of the statement against interest hearsay exception and to *sua sponte* modify his previous limiting instruction.[13] As a general matter, it is the attorney's job to introduce evidence, and the court's job to evaluate the admissibility of evidence. Finding plain error under these circumstances would mean that the judge was *required* to convince Ancheta's attorney of the need to admit this evidence, and to propose the

---

[12] *See Burton v. State*, 180 P.3d 964, 968 (Alaska App. 2008).

[13] *See id.* at 969.

basis for doing so — essentially requiring the judge to participate in Ancheta's defense. To the extent there is error in this case, it is error by Ancheta's attorney in apparently failing to fully understand the scope of the limiting instruction, and how that limitation might potentially disadvantage his client.

Additionally, we note that because the parties did not litigate the applicability of the statement against interest hearsay exception, the parties did not explore — and the judge made no factual findings — as to whether Hart's text message was sufficiently damaging to his penal interest, and sufficiently corroborated, as to demonstrate its trustworthiness as required by Alaska Evidence Rule 804(b)(3). The absence of a factual record precludes us from finding that any error was obvious in the first instance.

For these reasons, we reject Ancheta's claim regarding Hart's text message.

Conclusion

The judgment of the superior court is AFFIRMED.