IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CHARLES HARRY EDWARDS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12143 Trial Court No. 3AN-12-12247 CR MEMORANDUM OPINION No. 6623 — April 25, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack W. Smith, Judge.

Appearances: Lars Johnson, Assistant Public Defender (opening brief), Callie Patton Kim, Assistant Public Defender (reply brief), and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge MANNHEIMER.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Charles Harry Edwards appeals his convictions for felony driving under the influence and felony breath-test refusal. He raises three claims on appeal.

First, Edwards claims that the trial judge committed error by refusing to allow Edwards's attorney to introduce evidence that Edwards's vehicle was equipped with an ignition "interlock" device — *i.e.*, a breath-test device that is designed to prevent a motor vehicle from starting until the driver has blown into the device and has passed the built-in breath test.

The trial judge ruled that any test result obtained from an ignition interlock device (specifically, the "result" that the driver was allowed to start the vehicle) was "scientific evidence" for purposes of *State v. Coon*[1] — and that, therefore, Edwards could not introduce this evidence until he established the scientific validity of the ignition interlock's alcohol-sensing mechanism. The judge declared that he was willing to hold a hearing to allow Edwards's attorney to establish the scientific validity of the ignition interlock device under *Coon*, but Edwards's attorney never requested such a hearing. Instead, the defense attorney chose to abandon his attempt to introduce evidence pertaining to the ignition interlock device.

The trial judge could reasonably conclude that the alcohol-sensing mechanism in the ignition interlock device was an instrument whose reading was based on scientific principles or techniques. We therefore find no error.

Next, Edwards claims that the trial judge committed plain error by allowing a police officer to testify that a person's performance on the horizontal gaze nystagmus field sobriety test — specifically, the point at which a person's eyes exhibit nystagmus — is a direct indication of how much alcohol is in the person's blood.

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[1] 974 P.2d 386, 392-94, 402-03 (Alaska 1999).

Under this Court's decision in *Ballard v. State*,[2] a witness is not allowed to assert that there is a direct correlation between the onset of nystagmus and a person's blood alcohol level. But the challenged testimony was not elicited by the prosecutor; instead, it was elicited by Edwards's attorney. We therefore reject Edwards's claim of error.

Finally, Edwards claims that the trial judge committed plain error by allowing the prosecutor to vouch for the credibility of a witness when the prosecutor delivered the State's summation. We have examined the record, and we conclude that the prosecutor's improper remarks did not appreciably affect the verdict.

Underlying facts

In November 2012, Charles Edwards was driving northbound on Klevin Street in Anchorage. Edwards was driving at a high rate of speed toward Fourth Avenue. Ignoring a four-way stop sign, Edwards entered the intersection and collided with another vehicle.

A bystander, Frank Montoya, witnessed the collision. Montoya got out of his car to check on the driver of the other car, and then he spoke to Edwards. Edwards indicated that he wanted to leave, but Montoya insisted that Edwards remain at the scene until the police arrived. Montoya observed that Edwards had bloodshot eyes, that he smelled of alcohol, and that he was unsteady on his feet.

A little later, when the police arrived, Edwards claimed that he had not been drinking. But the police officers observed that Edwards smelled strongly of alcohol, that he was "wobbly" on his feet, and that his speech was "extremely slurred".

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[2] 955 P.2d 931, 940 (Alaska App. 1998).

After conducting field sobriety tests on Edwards (including the horizontal gaze nystagmus or "HGN" test), the police arrested Edwards and took him to the station for a breath test. Edwards refused the breath test.

Based on these events, and based on his prior record, Edwards was charged with felony driving under the influence and felony breath-test refusal.

The trial judge's ruling regarding the proposed evidence that Edwards was able to start his vehicle even though it was fitted with an ignition interlock device

Before trial, the prosecutor sought a ruling *in limine* barring Edwards from introducing evidence that his vehicle was fitted with an ignition interlock device.

(The prosecutor anticipated that Edwards's attorney intended to argue that Edwards's ability to start his car, even though it was fitted with an ignition interlock device, signified that Edwards was not impaired by alcohol.)

In his motion *in limine*, the prosecutor argued that Edwards should not be allowed to rely on the accuracy and reliability of the alcohol-sensing portion of the ignition interlock device until Edwards first demonstrated the scientific validity of this alcohol-sensing mechanism under the test adopted by our supreme court in *State v. Coon*, 974 P.2d 386 (Alaska 1999).

(See *Guerre-Chaley v. State*, 88 P.3d 539, 544-45 (Alaska App. 2004), where this Court upheld a trial judge's ruling that the defendant could not rely on the results of a breath test administered on a portable breath-testing device unless the defendant established the scientific validity of the portable testing device under *Coon*.)

In Edwards's case, the trial judge ruled that a test result obtained from an ignition interlock device (specifically, the "result" that the driver was allowed to start the vehicle) was "scientific evidence" for purposes of *Coon*. Thus, the court concluded,

unless Edwards's attorney established that the alcohol-sensing mechanism of the ignition interlock device was scientifically valid under *Coon*, the defense attorney would be prohibited from relying on the fact that Edwards was able to start the vehicle as proof that Edwards was not impaired, or as proof that his blood alcohol level was within the legal limit.

The judge declared that he was willing to hold a hearing to allow the defense attorney to establish the scientific validity of the ignition interlock device under *Coon*. But Edwards's attorney never requested such a hearing. Instead, the defense attorney abandoned his attempt to introduce evidence pertaining to the ignition interlock device.

On appeal, Edwards argues that he has a constitutional right to present a defense, and that the trial judge violated this right by insisting that Edwards comply with the evidence rules that pertain to scientific evidence. But as this Court stated in *Cleveland v. State*, 91 P.3d 965, 974 (Alaska App. 2004), "the right to present a defense does not include the right to demand that the trial judge disregard the rules of evidence."

Here, Edwards does not challenge the trial judge's ruling that his proposed evidence was "scientific evidence" for purposes of *Coon*. And as this Court explained in *Guerre-Chaley* and in *Lewis v. State*,[3] if evidence constitutes "scientific" evidence for purposes of the *Coon* rule, and if the method by which this evidence was derived has no scientific validity, then the evidence is essentially irrelevant.[4]

Alaska Evidence Rule 402 bars the admission of irrelevant evidence. At the same time, evidence that has no underlying scientific validity presents the danger that

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[3] *Lewis v. State*, 356 P.3d 795 (Alaska App. 2015).

[4] *Guerre-Chaley*, 88 P.3d at 544; *Lewis*, 356 P.3d at 802.

the jury's verdict will be influenced by assertions that have no basis in science, but that are nevertheless cloaked with an "aura of scientific respectability". [5]

For these reasons, we uphold the trial judge's ruling that, until Edwards established the scientific validity of the breath-testing mechanism incorporated in the ignition interlock device, Edwards could not introduce evidence that he had apparently passed the interlock device's breath test.

The testimony that linked Edwards's performance on the horizontal gaze nystagmus test to the level of alcohol in his blood

The police officer who arrested Edwards, Officer Michael Wisel, testified at trial regarding the three field sobriety tests that he performed on Edwards, including the horizontal gaze nystagmus test. Wisel testified that Edwards failed all three field sobriety tests, and that Edwards was "obviously impaired". The audio recording of the field sobriety tests corroborated Wisel's assertion that Edwards failed the tests. [6]

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[5] *Lewis*, 356 P.3d at 802; *see also Guerre-Chaley*, 88 P.3d at 544.

[6] According to the audio recording of the field sobriety tests, Officer Wisel asked Edwards to recite the alphabet starting with the letter "E" and continuing to the letter "P". Edwards responded:

Edwards: W, X, Y, Z.

Officer Wisel: No — start at "E" and stop at "P".

Edwards: E. E, W (indiscernible), Z, A, P.

Wisel: Okay, I'm not understanding what you're saying.

Edwards: W, X, Y, E, P.

(continued...)

With particular respect to the horizontal gaze nystagmus test, Wisel explained what the HGN test is, how it is administered, and how a police officer evaluates a driver's performance on the test. Specifically, Wisel told the jurors that the test consists of asking the driver to track the sideways movement of an object held about 12 to 14 inches from the driver's face, and then watching for "nystagmus" — *i.e.*, a jerking motion of the driver's eyeballs, rather than a smooth pursuit of the moving object.

In *Ballard v. State*, 955 P.2d 931 (Alaska App. 1998), this Court held that the horizontal gaze nystagmus test is a scientifically valid method for determining

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[6] (...continued)

Wisel: "W, X, Y, E, P" ?

Edwards: Yeah.

Wisel: Okay. How about counting? Can you count to 100?

Edwards: 1, 2, 3, 4, ...

Wisel: No, I'm asking you if you can. Can you count to 100?

Edwards: Yes, I can.

Wisel: Okay. I want you to count backwards, starting at number 69, and I want you to stop at 54.

Edwards: Oh. 69, 68, 67, 67, 68, 69 ...

Wisel: Okay. ... I think you had way too much to drink tonight, sir.

Edwards: All right.

whether a person has consumed alcohol and is potentially intoxicated. *Id.* at 933, 940. Thus, the government can offer evidence of a driver's performance on this test to prove that the driver has consumed alcohol and is potentially impaired — provided that the government "makes no attempt to correlate the HGN test result with any particular blood-alcohol level, range of blood-alcohol levels, or level of impairment." *Id.* at 940.

In Edwards's case, during Wisel's direct examination by the prosecutor, Wisel testified that Edwards failed the HGN test — that he displayed all six "clues" during the test. According to Wisel, two of the "clues" were the fact that Edwards exhibited nystagmus in each eye before his eyes deviated 45 degrees from straight ahead.

Wisel testified that this nystagmus was "an indication of intoxication". But Wisel did not assert that Edwards's performance on the HGN test demonstrated anything about the particular level of alcohol in Edwards's blood — that is, not until Edwards's attorney questioned Wisel on this subject during cross-examination.

The defense attorney asked Wisel a series of questions which required Wisel to explain why it is significant that a person's eye exhibits nystagmus before the person's eye has deviated 45 degrees from straight ahead:

> *Defense Attorney*: Okay. When you do the — you mentioned something about when you do [this] field sobriety test, you're looking for onset [of nystagmus] at about 45 degrees.
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> *Officer Wisel*: Correct.
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> *Defense Attorney*: And then you said something about the average person's shoulder width. What is that?
>
> *Wisel*: Usually it — you know, what we're [looking for is] 45 degrees from ... your nose. For the average person, from your nose to your shoulder, you know — 45 degrees ...

> is just going to be about to the inside of the shoulder of, of the person, is approximately 45 degrees. ... It's the standard in the academy, is about the inside to the shoulder is approximately 45 degrees. [*sic*]
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> . . .
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> *Defense Attorney*: And why is that angle important?
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> *Wisel*: It becomes important whether you're seeing the nystagmus before that degree, before you get to that point. If you see nystagmus after you've gone past [45 degrees], it's not as signif — well, it's significant as you may be under that .10, which was the old standard. And there's a certain percentage — I'd have to get out my book to see the exact percentage ...
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> *Defense Attorney*: So is it the sort of thing that if you see nystagmus after 45 degrees, it's not as meaningful to you?
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> *Wisel*: Well, it's meaningful as an [indication] — it's a possibility [that] he's not over the legal limit. After 45 [degrees]. If it's onset before 45 degrees, then there's a strong indication that he's over the legal limit, his intoxication level.

Now, on appeal, Edwards claims that the trial judge committed plain error by allowing Wisel to respond to the defense attorney's questions.

As we explained earlier, this Court's decision in *Ballard* holds that there is an insufficient scientific basis for asserting that a person's performance on the horizontal gaze nystagmus test can be directly correlated to a particular blood alcohol level. *Id.*, 955 P.2d at 940. Based on *Ballard*, Edwards argues on appeal that it was error for Officer Wisel to testify that there was a correlation between (1) whether a driver's

nystagmus occurs before 45 degrees and (2) the likelihood that the driver's blood alcohol level is over a particular amount.

But this testimony was expressly elicited by Edwards's own attorney when he cross-examined Wisel.

Rather than acknowledge that his own attorney actively elicited this testimony, Edwards merely states that his trial attorney "did not object to this testimony". Edwards further asserts that the record contains "no indication that [his attorney] strategically withheld objection" to this testimony.

We disagree. The record shows that Edwards's trial attorney actively led Officer Wisel through a series of questions that elicited this information.

This fact distinguishes Edwards's claim of error from typical assertions of plain error. Under the doctrine of plain error, trial judges are required to police the proceedings so that, even when a defense attorney fails to object, the judge must nevertheless take corrective action when a prosecutor elicits testimony that is manifestly improper, or when a witness offers manifestly improper testimony unsolicited. But here, the record plainly shows that Edwards's defense attorney *wanted* Wisel to give this testimony.

By asking this Court to declare that the admission of Wisel's testimony was plain error, Edwards is implicitly asking this Court to hold that when a defense attorney actively elicits improper testimony, the trial judge must interrupt the defense attorney, ask the defense attorney whether they understand that the testimony would normally be prohibited, ask the defense attorney whether they have some tactical reason for eliciting this testimony, and then (if the defense attorney asserts that there is a reason for their actions) evaluate whether the defense attorney's tactic is competent.

This kind of intervention in the trial process goes far beyond the recognized scope of a judge's duty under the doctrine of plain error. [7]

Edwards's brief does not acknowledge that the facts of his case go beyond the normal bounds of plain error, nor does he discuss why this Court should expand the doctrine of plain error in this fashion, or what authority there might be to support his position. We therefore conclude that Edwards's claim of plain error is waived because of inadequate briefing.

Alternatively, we conclude that any error was harmless. As can be seen from Edwards's attorney's summation to the jury, the defense offered no rebuttal to the State's evidence that Edwards had been drinking. Instead of contesting that issue, Edwards's attorney argued that the State had failed to show that Edwards's driving was impaired. The defense attorney argued that the collision was purely the result of icy road conditions, and that it would have happened no matter who was behind the wheel. Thus, according to the defense attorney, the State had failed to show that Edwards's driving deviated from the conduct of a driver who was acting with normal prudence and caution.

It is true, as Edwards points out, that at one point in the prosecutor's summation, the prosecutor referred to Edwards's performance on the horizontal gaze nystagmus test in a way that suggested that Edwards's degree of failure on this test was an indication of how much Edwards was impaired. Specifically, the prosecutor told the jury: "He had all six clues. ... [And] he had all six because he was really impaired."

But this was an isolated statement in a lengthy summation. And immediately after the prosecutor mentioned the horizontal gaze nystagmus test results, he urged the jury to focus on the "totality of the circumstances" and "all [the]

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[7] *See Barrett v. State*, 772 P.2d 559, 568 n. 10 (Alaska App. 1989): "We customarily consider issues of plain error when the [defense attorney] remains silent, failing to object to an alleged error, and then urges the error on appeal."

observations". During his summation, the prosecutor reminded the jurors of the following evidence:

- that Edwards slid through an intersection that other drivers were able to safely navigate,
- that Edwards's breath smelled strongly of alcohol,
- that Edwards appeared to be plainly impaired, both to bystanders and to the police officers, because of his slurred speech and his stumbling, unsteady walking, and
- that Edwards wanted to immediately leave the scene of what was obviously a serious accident.

In addition to these aspects of the evidence, the prosecutor also urged the jurors to review the audio recording of Edwards's field sobriety tests. (We quoted a portion of that audio recording in footnote 6 of this opinion.) And the prosecutor ended his discussion of the DUI charge by telling the jurors, "You've got to put it all together."

For these reasons, whatever the error in Officer Wisel's testimony, and whatever the error in the prosecutor's summation to the jury, these things had no appreciable effect on the jury's verdict. Accordingly, if any error occurred, it was harmless. [8]

[8] *See Love v. State*, 457 P.2d 622, 634 (Alaska 1969) (holding that, for instances of non-constitutional error, the test for harmlessness is whether the appellate court "can fairly say that the error did not appreciably affect the jury's verdict").

Edwards's claim that the prosecutor engaged in improper argument regarding the credibility of Frank Montoya's statements to the 911 operator at the scene of the collision

As we explained toward the beginning of this opinion, the collision in this case was witnessed by a bystander, Frank Montoya. Montoya spoke to a 911 operator shortly after the collision occurred. When speaking to the operator, Montoya described the collision, he described Edwards's driving leading up to the collision, and he described some of Edwards's reactions at the scene.

The audio recording of this 911 call was played for the jury during Edwards's trial, after the trial judge ruled that Montoya's statements to the 911 operator were admissible as statements of present sense impression under Alaska Evidence Rule 803(1).

Montoya also took the stand himself at Edwards's trial, and he described the occurrence in much more detail.

During the prosecutor's rebuttal summation, the prosecutor mentioned that the audio of the 911 call had been admitted into evidence "because [it was] a present sense impression". The prosecutor told the jurors that "a lot of times, out-of-court statements don't come in, but [the 911 call was] a present sense impression. It has honesty; it has truth to it. That's why that is allowed to come in."

It was obvious error for the prosecutor to imply that the judge's ruling on the admissibility of the 911 call constituted a judicial certification that Montoya's statements to the 911 operator were "honest", "truth[ful]", or otherwise more credible than any other evidence. But the defense attorney did not object to the prosecutor's remark — much less did the defense attorney ask the trial judge to reprimand the prosecutor or to caution the jurors. Thus, Edwards must show that the prosecutor's

remark affected Edwards's substantial rights and was plainly prejudicial to the fairness of the trial. [9]

Based on the record as a whole, we conclude that the prosecutor's error did not prejudice the fairness of the proceedings.

First, the trial judge explicitly instructed the jurors not to view his rulings on the admissibility of evidence as constituting "any opinion as to the weight or effect of that evidence" — and that it was the jurors' job "to decide how much weight to give the evidence." The judge also instructed the jurors to disregard the arguments of counsel if those arguments departed from the law as stated in the jury instructions.

Second, the jury heard from Frank Montoya directly, and Montoya's trial testimony was considerably more detailed than his statements to the 911 operator.

Third, most of Montoya's statements to the 911 operator were descriptions of the collision and its aftermath, and descriptions of the accident scene. These matters were not disputed at trial.

The only exceptions to this were Montoya's assertion that Edwards "came barreling through" the intersection (implying that Edwards was speeding), and Montoya's statements that Edwards "was going to take off", and that Edwards "got mad" when Montoya pointed out that Edwards had gone through a stop sign.

Given the overall evidence in this case, there is little chance that the jury's verdict was affected by the prosecutor's improper argument regarding the credibility of these statements. We therefore conclude that the error was harmless. [10]

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[9] *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

[10] *See Love v. State*, 457 P.2d 622, 631-32, 634 (Alaska 1969).

Conclusion

The judgement of the superior court is AFFIRMED.