

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RYAN WILBUR LLOYD DYER,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12175
Trial Court No. 3KN-13-2075 CR

MEMORANDUM OPINION

No. 6624 — April 25, 2018

Appeal from the Superior Court, Third Judicial District, Kenai,
Charles T. Huguelet, Judge.

Appearances: Peter R. Ehrhardt, Kenai, for the Appellant.
Terisia K. Chleborad, Assistant Attorney General, Office of
Criminal Appeals, Anchorage, and Craig W. Richards, Attorney
General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

Ryan Wilbur Lloyd Dyer appeals his convictions for third-degree assault, disorderly conduct, and fourth-degree weapons misconduct. These charges stemmed from a domestic disturbance that occurred in December 2013 at the house that Dyer shared with his mother, Debra Hansen.

In this appeal, Dyer contends that the trial judge committed error by allowing the prosecutor to play an audio recording of certain out-of-court statements that Dyer's mother made to him during the incident. Dyer contends that these statements were inadmissible hearsay, and he also contends that these statements constituted inadmissible character evidence because the statements implied that Dyer was engaging in bad acts inside the house.

Dyer also contends that his conviction for third-degree assault should be set aside. Dyer was convicted of this crime based on evidence that he started to draw a handgun when he was several feet from the state troopers who responded to the domestic disturbance call. Dyer argues that the state troopers entrapped him into committing this assault.

For the reasons explained in this opinion, we conclude that none of these claims of error have merit, and we therefore affirm Dyer's convictions.

Underlying facts

On the evening of December 28, 2013, several Alaska State Troopers responded to a report of a domestic disturbance at the Nikiski residence that Ryan Dyer shared with his mother, Debra Hansen.

In the middle of this disturbance, Hansen called 911 to seek help. During her conversation with the 911 dispatcher, Hansen reported that Dyer was drunk and that he was armed with a gun. Hansen also reported that her daughter Kaylee (Dyer's sister) was in the house with them.

Because Hansen warned the 911 dispatcher that Dyer was hostile to law enforcement, the troopers did not turn on their lights or their sirens when they drove to the house. They got out of their patrol vehicles some distance from the house, and they

approached on foot. During this time, the troopers maintained telephone contact with Hansen, and they recorded the call.

While the phone connection was open, Hansen also engaged in conversation with Dyer. In the troopers' audio recording, Hansen can be heard saying to Dyer:

Put the damn gun away, so you're not scaring your sister. Put it somewhere, Ryan. I don't care if it's empty or not. You don't need to pack it around Go put it somewhere.

A few moments later, Hansen can be heard saying:

Go put the damn gun away. You're scaring your sister. ... Look at what you've done to your sister.

Several minutes later, the audio recording picked up the following conversation between Hansen and Dyer:

Dyer: You want to talk to her? Are you okay, Mom? Mom, are you okay? Are you okay? Are you?

Hansen: Not after you just pushed me, I'm not.

Trooper Sgt. Ronny Simmons also spoke to Dyer over the telephone. During their conversation, Dyer exhibited slurred speech and mood swings, and he kept repeating things. From this, Simmons concluded that Dyer was intoxicated. Simmons told Dyer that the troopers wanted Dyer and his mother and his sister to come out of the house, so that the troopers could be sure that every member of the family was all right. Simmons also told Dyer to leave his gun inside the house when he came out.

While Simmons was talking to Dyer on the phone, Hansen and her daughter came out of the house, but the troopers were unable to get Dyer to leave the house.

Hansen spoke with Dyer on the phone and asked him to at least bring out her cell phone. Simmons then got on the phone with Dyer and told him that, if he was going to bring his mother's cell phone outside, he should leave his gun inside the house.

Dyer brought his mother's cell phone out of the house — but as he came down the stairs, he kept putting his right hand into his pocket. Simmons repeatedly ordered Dyer to remove his hand from his pocket, but Dyer kept walking down the stairs.

When Dyer got to the bottom of the stairs, he put his mother's cell phone on the ground; then he turned and looked over his shoulder.

As Dyer turned, one of the troopers (Trooper Hunter Hull, who was positioned approximately 5 to 7 yards away) saw that Dyer was gripping a pistol in his right hand, and that he was pulling this pistol from his pocket. Trooper Hull yelled “gun”, and the other troopers then rushed at Dyer, grabbed him, and handcuffed him. After Dyer was handcuffed, the troopers found the gun on the ground at their feet.

Dyer was charged with third-degree assault for placing Trooper Hull in apprehension of imminent serious physical injury by means of a dangerous instrument.¹ Dyer was also charged with disorderly conduct² and fourth-degree weapons misconduct (possession of a firearm while intoxicated).³ Following a jury trial, Dyer was convicted of all three charges.

¹ AS 11.41.220(a)(1)(A).

² AS 11.61.110(a)(6).

³ AS 11.61.210(a)(1).

Dyer's claim that it was error for the trial judge to admit the audio recording of Hansen's out-of-court statements

Debra Hansen initially asserted that Dyer had assaulted her and her daughter during this incident, but she later recanted those accusations. Fearing that she might be prosecuted for perjury if she testified at Dyer's trial, Hansen invoked her Fifth Amendment privilege.

The superior court upheld this claim of privilege, so Hansen was unavailable as a witness at Dyer's trial. The prosecutor sought permission to introduce portions of the audio recording of Hansen's out-of-court statements on the open phone line.

Dyer's attorney objected that Hansen's statements on the recording were hearsay. The trial judge agreed that several of Hansen's statements were inadmissible hearsay. But with respect to the statements that we quoted in the preceding section of this opinion, the trial judge concluded that Hansen's statements were statements of present sense impression, *see* Alaska Evidence Rule 803(1), and that they were therefore admissible over a hearsay objection.

On appeal, Dyer no longer pursues his hearsay objection. That is, Dyer does not contest the trial judge's ruling that Hansen's statements were statements of present sense impression.

Instead, Dyer raises a completely new objection to this evidence: he contends that Hansen's statements should have been excluded under Alaska Evidence Rule 403 because (1) the statements had no probative value and (2) the statements were unfairly prejudicial because they suggested that Dyer had committed other bad acts.

Dyer's trial attorney never challenged the evidence on this basis, so this argument is not preserved for appeal.

Moreover, the record does not demonstrate plain error. Dyer argues that Hansen’s descriptions of his actions constituted improper character evidence. But this evidence was not offered to show that, because of Dyer’s actions on some other occasion, he was more likely to have acted violently or aggressively during the episode being litigated.⁴ Rather, Hansen was describing Dyer’s behavior during the episode that was being litigated, and her statements were offered as direct evidence of Dyer’s actions during this incident.⁵

For these reasons, we uphold the trial judge’s admission of Hansen’s out-of-court statements.

Dyer’s claim that the troopers entrapped him into committing assault

Dyer’s attorney asked the trial judge to dismiss the third-degree assault charge on the basis that the troopers had “entrapped” Dyer into committing this assault when the troopers repeatedly urged Dyer to come out of the house. (See the definition of entrapment codified in AS 11.81.450.)

The trial judge denied this motion. More specifically, the judge rejected the defense attorney’s contention that the troopers had “persuaded” or “induced” Dyer to

⁴ See *Smithart v. State*, 946 P.2d 1264, 1270-71 (Alaska App. 1997) (explaining that, for purposes of Alaska Evidence Rule 404(b)(1), “character evidence” or “propensity evidence” is evidence that “has no genuine purpose other than to show the defendant’s character and the consequent likelihood that the defendant acted in conformity with that character during the episode being litigated”).

⁵ See *Lerchenstein v. State*, 697 P.2d 312, 317-19 (Alaska App. 1985), where this Court upheld the admission of evidence that a murder defendant had been “angry and combative ... immediately prior to the [homicide].”

commit the assault. The record fully supports the judge's conclusion, and we therefore uphold the judge's rejection of Dyer's entrapment claim.

Conclusion

The judgement of the superior court is AFFIRMED.