IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SHERRIE ACE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11508 Trial Court No. 3KN-10-1290 CR MEMORANDUM OPINION No. 6630 — May 9, 2018

Appeal from the Superior Court, Third Judicial District, Kenai, Sharon A. S. Illsley, and Charles T. Huguelet, Judges.

Appearances: Shelley K. Chaffin, Law Office of Shelley K. Chaffin, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

The State charged Sherrie Ace with first-degree hindering prosecution after she shielded her son, who had absconded from felony probation supervision, from

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

arrest.[1] Soon after Ace's son fled the scene of an automobile accident, Ace intentionally erased her cell phone's log of a call from her son that would have linked him to the accident.

At the close of her jury trial, the jury was instructed on four subsections of the hindering prosecution statute.[2] The jury convicted Ace under three of these four statutory subsections, including the subsection that prohibited destruction of evidence that might aid in the discovery or apprehension of another person.[3]

On appeal, Ace seeks reversal of her conviction on four grounds. First, Ace claims that the trial court committed plain error by allowing the State to introduce testimony that she refused to consent to a warrantless search of her cell phone. But on the particular facts of this case, the judge could reasonably have concluded that the testimony about Ace's refusal to consent to a search of her cell phone was admissible. Because reasonable judges could differ on the admissibility of the evidence that Ace withheld consent to the search, we find no plain error.

Second, Ace challenges as plain error the prosecutor's argument that she twice refused to consent to searches of her home. Reference to Ace's refusal to agree to warrantless searches was plainly improper. But, for reasons we will explain, the judge's failure to strike these references *sua sponte* was harmless error.

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[1] AS 11.56.770(a)(1).

[2] AS 11.56.770(b)(1) (prohibiting harboring or concealing the other person); (b)(3) (prohibiting aiding the other person with money, transportation, a dangerous instrument, a disguise, or other means of avoiding discovery or apprehension); (b)(4) (prohibiting preventing or obstructing anyone from performing an act which could aid in the discovery or apprehension of the other person); and (b)(5) (prohibiting concealing, altering, or destroying physical evidence which could aid in the discovery or apprehension of the other person).

[3] AS 11.56.770(b)(5).

Third, Ace claims that the judge should have given a factual unanimity instruction. But the judge actually did give such an instruction.

Last, Ace claims that the State engaged in vindictive prosecution. After Ace was initially charged with first-degree hindering prosecution — a felony — the State reduced the charge to attempted hindering — a misdemeanor — in order to facilitate a plea bargain. When the parties failed to reach a plea agreement, the State indicted Ace for the original felony charge of hindering prosecution. We conclude that this did not amount to vindictive prosecution.

We accordingly affirm Ace's conviction for hindering prosecution based on her destruction of evidence. Because we affirm Ace's conviction under this subsection of the hindering prosecution statute, we need not decide whether Ace's claims of error would require reversal as to the two other subsections of the hindering prosecution statute that the jury found to apply.

Background facts

On July 30, 2010, Kenai police officers responded to a report of a car accident called in by one of the involved drivers, John Phillips. When Officer Casey Hershberger arrived, Phillips and the defendant, Sherrie Ace, were the only two persons at the scene.

Ace was not the driver of the other car involved in the accident. That car, an SUV, belonged to Ace's boyfriend in Oregon, who had entrusted it to her — and Ace, in turn, had entrusted the SUV to her forty-four-year-old son, Robert Dodge (whom she called "Bobbie").

Ace did not inform Officer Hershberger that she had entrusted the SUV to Dodge. Instead, she told Hershberger that she had lent the car to an acquaintance named "Bobbie Tomass" to run a brief errand. She added that "Bobbie Tomass" had telephoned

her after the accident, telling her that he had left the scene because he had neither a driver's license nor liability insurance.

After hearing Ace's explanation, Officer Hershberger asked Ace to look in her cell phone's call log for the record of this incoming call. After searching for a time, Ace indicated that she had found the record of the call. Ace gave Hershberger the phone number from which she had received the call, along with the time of the call. From the phone number, Hershberger could tell that the call had been placed from a land line — meaning that the call could not have originated from the scene of the accident as Ace claimed. Hershberger also noted that the call Ace referenced had been placed twenty minutes before the accident occurred.

After confronting Ace with these inconsistencies, Hershberger requested Ace's permission to inspect her cell phone himself; Ace declined this request. Then, as Hershberger spoke with Phillips, he noticed Ace manipulating her keypad. Concerned that Ace might be deleting evidence, he seized her cell phone. Hershberger later obtained a search warrant for Ace's cell phone, and when he executed this warrant, he discovered that all of Ace's text messages and call logs had been deleted — even the log of the call that Ace described to Hershberger minutes before he seized the phone.

Hershberger subsequently learned from other sources that Ace's son Robert "Bobbie" Dodge was actually the driver of the SUV during the accident — and thus presumably the person who had telephoned Ace immediately thereafter. Hershberger also learned that Dodge had absconded from probation five years earlier, and that a felony warrant was outstanding for his arrest.

Ace was charged by complaint with first-degree hindering prosecution, tampering with physical evidence, and permitting an unlicensed person to drive her

vehicle.[4] Initially, the State did not take Ace's case to grand jury, and instead reduced the felony charges to "attempt" misdemeanor charges for purposes of plea negotiations.

While these plea negotiations were occurring, Ace was charged with two new crimes based on unrelated incidents — one involving a fish and game violation, and one involving Permanent Fund dividend fraud. The State proposed a "global" plea agreement encompassing all three pending cases. But when negotiations broke down, the State indicted Ace for the original felony charge of first-degree hindering prosecution, and dismissed the evidence tampering and unlicensed driver charges.

Ace proceeded to trial in front of *pro tem* Superior Court Judge Sharon A. S. Illsley. At the conclusion of Ace's trial, the jury found Ace guilty under three of the four subsections of the hindering prosecution statute: for destroying evidence, for providing material assistance to Dodge, and for lying to the police.[5] This appeal followed.

Testimony that Ace withheld her cell phone from the police had a case-specific purpose and was not plain error

As noted, Officer Hershberger testified that Ace refused him permission to search her cell phone. On appeal, Ace argues that this testimony was an impermissible comment on her constitutional right to withhold consent for a warrantless search of her

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[4] AS 11.56.770(a)(1), AS 11.56.610(a)(1), and AS 28.15.281(b), respectively.

[5] Under our recent decision in *Silook v. State*, 397 P.3d 352, 358-59 (Alaska App. 2017), the State's theory that Ace committed hindering prosecution by lying to the police is probably invalid, because the evidence did not establish that her lies actually hindered the police from "performing an act which might aid in the discovery or apprehension of the other person" as required by AS 11.56.770(b)(4). Ace did not raise this issue, and we do not resolve it.

possessions. Because Ace's attorney did not object to this testimony at trial, Ace must show plain error.

In *Padgett v. State*, our supreme court held that evidence of a defendant's refusal to consent to a warrantless search is inadmissible as evidence of the defendant's guilt, because admission of such evidence would penalize a defendant for invoking a constitutional right.[6] At least four federal circuit courts and fourteen other states have reached the same conclusion.[7]

But a narrow exception to this general rule of exclusion applies when evidence of a defendant's refusal to consent to a search is sufficiently relevant to some case-specific factor other than the defendant's consciousness of guilt. For example, the Ninth Circuit held in *Leavitt v. Arave* that even though it would normally be constitutional error to adversely comment on a defendant's exercise of their Fourth Amendment right to refuse to consent to a warrantless search (in that case, a blood draw),

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[6] *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979); *see also Bargas v. State*, 489 P.2d 130, 133 (Alaska 1971).

[7] *See United States v. Moreno*, 233 F.3d 937, 940-41 (7th Cir. 2000); *United States v. Dozal*, 173 F.3d 787, 793-94 (10th Cir. 1999); *United States v. Thame*, 846 F.2d 200, 206-07 (3d Cir. 1988); *United States v. Prescott*, 581 F.2d 1343, 1351-52 (9th Cir. 1978); *State v. Stevens*, 267 P.3d 1203, 1207-08 (Ariz. App. 2012); *People v. Wood*, 127 Cal. Rptr. 2d 132, 136 (Cal. App. 2002); *Gomez v. State*, 572 So.2d 952, 953 (Fla. Dist. App. 1990); *Longshore v. State*, 924 A.2d 1129, 1158-59 (Md. 2007); *People v. Stephens*, 349 N.W.2d 162, 164 (Mich. App. 1984); *Ramet v. State*, 209 P.3d 268, 270 (Nev. 2009); *Garcia v. State*, 712 P.2d 1375, 1376 (N.M. 1986); *State v. Jennings*, 430 S.E.2d 188, 200 (N.C. 1993); *State v. Wiles*, 571 N.E.2d 97, 118 (Ohio 1991); *Commonwealth v. Tillery*, 611 A.2d 1245, 1250 (Pa. Super. Ct. 1992); *Simmons v. State*, 419 S.E.2d 225, 226-27 (S.C. 1992); *State v. Bowker*, 754 N.W.2d 56, 70 (S.D. 2008); *Reeves v. State*, 969 S.W.2d 471, 496-97 (Tex. Crim. App. 1998); *State v. Banks*, 790 N.W.2d 526, 533-34 (Wis. App. 2010).

the comment was permissible on the particular facts of the case.[8] In *Leavitt*, when the defendant was interviewed by the police, he claimed ignorance about why his blood was found at the scene of the homicide.[9] Then, at trial, the defendant testified that the blood at the scene came from a nosebleed he had there.[10] And while he testified that he had been cooperative with the police investigation, Leavitt had refused to allow his blood to be drawn by the authorities in order to compare it with the blood found at the scene of the crime.[11]

On these facts, the Ninth Circuit held that the normal proscription against admission of evidence of a person's refusal to consent to a search did not apply — because the defendant's withholding of the blood sample contradicted his claim that he had cooperated with the police, thus giving the evidence a case-specific relevance distinct from the impermissible inference that Leavitt refused to consent to the search because he had something to hide.[12]

In the instant case, Ace's refusal to allow a search of her cell phone had a case-specific relevance beyond the mere inference that she was hiding something. Ace

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[8] *Leavitt v. Arave*, 383 F.3d 809, 828 (9th Cir. 2004).

[9] *Id.* at 815.

[10] *Id.*

[11] *Id.* at 828.

[12] *Id.*; *see also United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999) (finding no Fourth Amendment violation where defendant's refusal to consent to search of premises was admissible to show defendant's dominion over those premises); *United States v. McNatt*, 931 F.2d 251, 258 (4th Cir. 1991) (finding no Fourth Amendment violation when a refusal to allow search of a car was admitted to rebut an allegation that the police had planted drugs in the car); *State v. Thomas*, 766 N.W.2d 263, 270-71 (Iowa App. 2009) (recognizing the constitutional principle, and the exception, but finding no case-specific relevance to a refusal of consent to a search).

told Hershberger that an acquaintance named "Bobbie Tomass" had been driving the SUV, and that this acquaintance called her cell phone to alert her to the accident and to his flight from the accident scene. Hershberger then asked Ace to find the log of that incoming call. Ace agreed to do so. But when Ace described the details of the call log, Hershberger could tell that these details were inconsistent with the facts of the accident, and he all but accused Ace of lying about the call.

At trial, Ace admitted that, moments after her conversation with the officer, she did erase her cell phone's call log. But Ace claimed that she did this innocently, out of habit. Because Ace affirmatively placed her mental state at issue, the facts of her encounter with Officer Hershberger were relevant to show her awareness that the log was evidence sought by the police, and to rebut her claim of innocent erasure. In other words, Ace's refusal to consent to a search of her cell phone controverted her defense that she innocently erased the call log out of habit.

Thus, if Ace's attorney had objected to this evidence, and if the trial judge had analyzed the evidence pursuant to Alaska Evidence Rule 403 to determine whether the unfair prejudice to Ace outweighed its probative force, the judge might properly have ruled the evidence admissible.

Because this evidence was arguably admissible, we cannot say that the judge committed plain error when she failed to *sua sponte* preclude Officer Hershberger from testifying about Ace's refusal to allow him to inspect her call log.[13]

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[13] *See Woodbury v. State*, 151 P.3d 528, 531 (Alaska App. 2007) (explaining that "an error is 'plain' only if the error is so obvious that any reasonable judge would have perceived the error and taken action to correct it" — *i.e.*, if reasonable judges could not differ as to what the law requires).

Why we conclude that the prosecutor's references to Ace's refusal to consent to searches of her house were harmless error

At trial, the prosecutor claimed that Ace's refusals to consent to searches of her home, both before and after the accident, evidenced her guilt. But unlike Ace's refusal to consent to a search of her cell phone, any refusal on Ace's part to allow entry into her home had no case-specific relevance beyond the inference that she had something to hide. The judge committed plain error by not striking this testimony, and by allowing the prosecutor to argue it to the jury. We must decide whether this error was harmless beyond a reasonable doubt. For the following reasons, we conclude that it was, at least as to the destruction of evidence theory of hindering prosecution.

During the prosecutor's opening statement, he claimed that, after the accident, officers went to Ace's house to search for the SUV's driver, but that they "weren't allowed to go inside." But when Officer Hershberger testified, he did not back up the prosecutor's claim. Instead, Hershberger testified that Ace gave him her home address so that a different officer could search for the car's driver there. This testimony implied that Ace *had* authorized the police to search her premises.

During her cross-examination of Hershberger, the defense buttressed this implication. The defense attorney asked Hershberger if he had requested Ace's permission to search her house. Hershberger replied that "she said that we could [search her house], but that she wanted to be present." Since the accident occurred very near to Ace's home, this testimony implied that Ace had agreed to a search of her home after she returned there. Thus, Hershberger's testimony effectively rebutted the prosecutor's claim that Ace had refused consent. And during his final argument, the prosecutor did not repeat his earlier claim that Ace denied the police access to her house after the accident.

In light of Hershberger's clarifying testimony, and in light of the strong evidence that Ace purposely erased her call log, we conclude that there is no reasonable possibility that the jury would have arrived at a different verdict had the prosecutor not, during his opening statement, commented on Ace's purported refusal to allow a search of her home.

We reach the same conclusion with respect to a probation officer's testimony that, several months earlier, Ace had refused him entry into her house. Probation Officer William Fenske testified that he went to Ace's house looking for her son. Ace answered the door and told Fenske that her son was back in Alaska after a trip to Oregon, but that he was not staying at her house.

The prosecutor then asked Fenske whether Ace told him that she had seen her son since his return to Alaska. Fenske's answer was not responsive to the prosecutor's question. Fenske instead testified that, after Ace told him that her son was not living with her, he requested entry into the house. But Ace only allowed him to look into the main common area of the residence, claiming embarrassment that her house was a "disaster inside."

The defense attorney did not object to this non-responsive answer by Fenske. During the prosecutor's final summation, he briefly stated, "And she wouldn't let [the probation officer] in. She wouldn't let [him] in to look around."

The foremost prejudice to Ace from the probation officer's volunteered testimony (and the prosecutor's later comment thereon) was the innuendo that Ace's son really had been living at Ace's home several months before the accident, and that Ace was harboring him in order to hinder his prosecution for violating probation. But the jury acquitted Ace of harboring her son by furnishing him lodging — the theory of prosecution under subsection (b)(1) of AS 11.56.770.

As to the State's theory that Ace destroyed evidence, any prejudicial effect from Fenske's testimony was attenuated. Ace's son was called as a defense witness. He testified that he was in fact the driver of the SUV during the accident and that, as he fled the scene of the accident through the woods, he called Ace on his cell phone to inform her of all this.

During Ace's testimony, she admitted to receiving this call, and she agreed that she erased the record of this call. Her defense to the destruction of evidence theory was that she mistakenly thought she had lent the SUV, not to her son Bobbie Dodge, but to an acquaintance named "Bobbie Tomass." When her son Bobbie called after the accident, Ace claimed that she did not recognize his voice, and that she originally suspected that it was a prank call. Ace insisted that she was telling the truth, as she understood it, when she told Officer Hershberger that Bobbie Tomass was the one driving the SUV. Ace asserted that when she erased her call log, she was not trying to protect her son Bobbie Dodge, or her acquaintance Bobbie Tomass, but that she was instead acting inadvertently, oblivious to the possibility that her cell phone contained evidence of a crime — even though she erased the call log shortly after she refused Hershberger's request to search her cell phone log.

In other words, Ace's defense to the State's destruction of evidence theory consisted of improbability layered upon improbability. In contrast, the State's case that Ace erased the cell phone log with criminal intent was both direct and compelling. We can discern no reasonable possibility that the jury's verdict under the destruction of evidence subsection of the statute would have been different if the trial judge had acted *sua sponte* to strike Probation Officer Fenske's volunteered testimony, and the prosecutor's comment thereon, about Fenske's visit to Ace's house months before the accident. The judge's error in allowing Fenske's testimony to stand was harmless beyond a reasonable doubt.

No factual unanimity problem was posed by the destruction of evidence theory

Ace argues that the jury's verdict could have been based on more than one act on her part, with no jury finding of factual unanimity as to which act. But the special verdict form instructed the jury that it had to agree on the factual basis for each of the State's four theories of hindering prosecution:

> You may find that the defendant rendered assistance in any one or more of these [four statutory subsections], but in order to find the defendant guilty you must agree as to the way or ways the defendant rendered assistance, and agree as to the action or actions of the defendant that supports any particular [subsection].

And while some of the State's theories of hindering prosecution could have been proven by divergent acts, this was not true of the State's destruction of evidence theory. The State alleged only one relevant act supporting that theory of the case: Ace's erasure of the cell phone call log. Necessarily, the jury unanimously found that Ace had performed that act.

The State did not vindictively prosecute Ace

After the State charged Ace with felony hindering prosecution and other crimes, it reduced the felony charges against her to misdemeanor charges in anticipation of plea bargaining. During plea negotiations, the prosecutor sent the defense attorney an email stating that if the defense ended the negotiations, the State would indict Ace for a felony. When the parties failed to reach agreement, the defense announced that it was ready for trial on the misdemeanors. In response, the State, as promised, indicted Ace for the original charge of felony hindering prosecution, and it dismissed the other charges.

Ace moved to dismiss the indictment based on a claim of vindictive prosecution. Ace argued that the indictment amounted to State-inflicted punishment for her exercise of her constitutional right to trial. According to Ace, the State had repeatedly "upped the ante" by adding additional unrelated charges when she refused to accept the State's plea offers, and had then indicted her when she announced that she was ready for trial.

Superior Court Judge Charles T. Huguelet denied Ace's motion to dismiss the indictment. Citing United States Supreme Court precedent,[14] the judge explained that a prosecutor does not violate a defendant's due process rights by engaging in plea negotiations in which more serious criminal charges are a possible consequence of a failure to reach agreement. The judge noted that Ace was aware of the possible felony hindering prosecution charge from the outset of the negotiations.

Ace appeals this ruling, but her argument is not supported by law. In *North Carolina v. Pearce* and *Blackledge v. Perry*, the United States Supreme Court held that an accused's due process rights are violated when the prosecutor's institution of additional charges reasonably appears to constitute retaliation for the accused's assertion of a legal right.[15] But in a later case, *Bordenkircher v. Hayes*, the Supreme Court carved out a major exception to this rule, holding that the *Pearce*/*Blackledge* doctrine does not apply to pre-indictment plea bargaining negotiations.[16]

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[14] *United States v. Goodwin*, 457 U.S. 368, 384 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

[15] *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969); *Blackledge v. Perry*, 417 U.S. 21, 33 (1974).

[16] *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

Alaska's appellate courts have never expressly adopted the *Bordenkircher* rule.[17] But in *Nicoli v. State*, an unreported decision, this Court noted that "there is no prosecutorial vindictiveness when the prosecutor offers to forego a possible charge ... in exchange for the defendant's plea of guilty, and then files the additional charge ... after the defendant rejects the plea bargain."[18] This Court found that "the rationale behind the *Bordenkircher* holding is persuasive under [such] facts"[19] — facts which are present here.

Contrary to Ace's argument, the State's conduct in this case does not demonstrate a pattern of "upp[ing] the ante" by filing new charges. Rather, the record makes clear that, after charging Ace with the counts relevant to this case, the State's investigative efforts revealed other unrelated crimes committed by Ace — *i.e.*, a fish and game violation and Permanent Fund dividend fraud charges. The State's pursuit of these new charges does not imply retaliatory behavior; the State simply responded to newly acquired evidence of other crimes.[20]

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[17] *See Nicoli v. State*, 2003 WL 23096849, at *2 (Alaska App. Dec. 31, 2003) (unpublished) (noting that "Alaska's appellate courts have not yet decided the extent to which the doctrine of prosecutorial vindictiveness applies to plea negotiations"); *see also Morgan v. State*, 673 P.2d 897, 900 n.2 (Alaska App. 1983) (declining to address the applicability of *Bordenkircher* under Alaska law).

[18] *Nicoli*, 2003 WL 23096849, at *1.

[19] *Id.* at *3.

[20] *See, e.g., United States v. Jamison*, 505 F.2d 407, 416-17 (D.C. Cir. 1974) (explaining that, even applying the *Pearce*/*Blackledge* doctrine, "a charge increase might in some circumstances be justified by intervening events or by new evidence of which the government was excusably unaware at the time of the first indictment").

Lastly, the prosecutor's threat to pursue the original charge of felony hindering prosecution if negotiations reached an impasse is the type of negotiating tactic countenanced in *Bordenkircher* and *Nicoli*.

We conclude that Ace was not subjected to vindictive prosecution.

Conclusion

We AFFIRM the judgment of the superior court.