IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAVID STANDIFER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12069 Trial Court No. 3AN-10-4740 CR MEMORANDUM OPINION No. 6642 — June 20, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Kevin M. Saxby, Judge.

Appearances: Renee McFarland, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and James E. Cantor, Acting Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

David Standifer appeals his convictions for first-degree sexual assault, two counts of attempted first-degree sexual assault, second-degree assault, and fourth-degree

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

assault. Standifer raises three arguments on appeal. First, Standifer argues that the superior court erred in failing to conduct an *in camera* review of the victim's mental health records. Second, Standifer argues that the trial court's instruction on voluntary intoxication was deficient. Last, Standifer argues that the trial court should have referred his case to the three-judge sentencing panel.

For the reasons explained here, we reject Standifer's claims and affirm his convictions.

Background facts

While walking to her cousin's home in Anchorage after an evening of drinking, N.G. chanced upon a homeless man, David Standifer. N.G. accompanied Standifer to his campsite, where she expected to find other homeless persons; but upon her arrival, she discovered that Standifer was camping alone. Standifer then physically and sexually assaulted N.G. He choked her and punched her in the face, breaking her nose. He used force to digitally penetrate her vagina, and attempted to force her to submit to anal intercourse and fellatio.

N.G., naked from the waist down, escaped, ran through the woods, and collapsed on Commercial Drive. A passerby stopped and called 911. An ensuing sexual assault examination documented injuries to N.G.'s vagina, bruises and scratches on her face, neck and legs, and petechiae in her eyes.

After receiving medical care, N.G. led police officers to Standifer's camp, where she identified Standifer as her assailant. The State subsequently charged Standifer with first-degree sexual assault for digitally penetrating N.G.'s vagina, two counts of

attempted first-degree sexual assault for attempted fellatio and anal intercourse, second-degree assault for choking N.G., and fourth-degree assault for punching N.G.'s face.[1]

At trial, Standifer contended that N.G. falsely accused him in order to hide their consensual sexual activity from her boyfriend. Standifer also argued that N.G.'s history of bipolar disorder and alcoholic blackouts cast doubt on her credibility. The jury convicted Standifer of all charges.

Standifer's discovery request

Pretrial, Standifer moved for an *in camera* review of N.G.'s mental health records. He contended that these records might be relevant to N.G.'s ability to accurately perceive and recall what had happened to her. Standifer's motion referenced records suggesting that N.G. had previously suffered alcoholic blackouts. These records also suggested that N.G. had been diagnosed with bipolar disorder.

The State and the Office of Victims' Rights opposed this discovery motion, arguing that the psychotherapist-patient privilege codified in Alaska Evidence Rule 504 precluded disclosure of N.G.'s alcohol treatment and mental health records. Superior Court Judge Michael Wolverton disagreed and granted the defense motion. N.G. then petitioned this Court for review; we granted the petition and ultimately concluded that Standifer's attorney had failed to make a sufficient showing to justify disclosure of N.G.'s treatment records. We therefore vacated the trial court's order.[2]

Upon remand of his case to the superior court, Standifer renewed his motion for disclosure of N.G.'s mental health and alcohol treatment records. Dr. Mark

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[1] AS 11.41.410(a)(1); AS 11.41.410(a)(1) & AS 11.31.100(a); AS 11.41.210(a)(1); and AS 11.41.230(a)(1), respectively.

[2] *N.G. v. Superior Court*, 291 P.3d 328, 340 (Alaska App. 2012).

Zelig, an expert in forensic and clinical psychology, testified in support of Standifer's motion. He testified that a person with bipolar disorder can, during a manic episode, experience rapid thinking, distractibility, confusion, poor hygiene, and hallucinations. He noted that certain bipolar persons can experience memory deficits, and that heavy alcohol consumption can exacerbate this. Such persons may fill in memory gaps with false memories. But Dr. Zelig cautioned that in order to arrive at any conclusion regarding N.G., he would have to evaluate her in person. He had not reviewed N.G.'s police interviews, and he could not comment on the degree to which those interviews reflected N.G.'s ability to recall and relate the circumstances of the alleged crime.

Superior Court Judge Gregory Miller denied Standifer's renewed discovery motion, concluding that Standifer had failed to identify any disputed facts to which N.G.'s records would potentially be relevant. The judge noted that while Dr. Zelig testified that bipolar disorder and alcoholic blackouts can degrade a person's ability to perceive and to recall events, Standifer had pointed to no evidence suggesting that N.G. failed to recall the details of the beating or the sexual assault.

Standifer subsequently renewed his motion to obtain N.G.'s mental health records three times during his trial. During N.G.'s direct testimony, she stated that she may have been "detoxing" from alcohol on the night of the assault. Standifer contended that this testimony put her mental health in issue because of symptoms that can accompany alcohol withdrawal. Superior Court Judge Kevin Saxby denied this renewed request, in part because the judge interpreted N.G.'s testimony to mean that she was sobering up, not that she was undergoing acute alcohol withdrawal.

Then, at the close of the defense attorney's cross-examination of N.G., Standifer argued that discovery of N.G.'s mental health records was justified because she denied suffering from a bipolar disorder. Standifer also argued that three statements made by N.G. during her police interviews suggested that she was hallucinating on the

night of the crime. The judge denied this renewed discovery motion, again citing a lack of evidence that N.G. was delusional.

Last, during the defense case, Dr. Zelig testified about the effects of alcoholic blackouts and about symptoms attending some extreme bipolar disorders. In light of the evidence that a doctor had diagnosed N.G. with bipolar disorder after seeing her only one time, the prosecutor asked Dr. Zelig whether a diagnosis of bipolar disorder could reliably be made after only one doctor-patient encounter. Standifer argued that by asking this question, the prosecutor opened the door to discovery of N.G.'s treatment records. The judge again overruled the motion.

The jury convicted Standifer of all charges. This appeal followed.

Standifer failed to present sufficient evidence to warrant in camera review of N.G.'s privileged mental health records

Standifer now argues that the standard set forth in *Booth v. State* should govern motions for production of mental health records for *in camera* review,[3] and that he met this standard. The State counters that we should prohibit altogether production of a victim's mental health records, or at least impose a standard more stringent than the standard set forth in *Booth* to justify *in camera* review of police personnel records.

In *Booth*, we required that, in order to obtain a review of a police personnel file, a defendant must identify a type of information relevant to the defendant's guilt or innocence (in light of the prosecution and defense theories of the case) that would be recorded in an officer's personnel file if the information existed.[4]

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[3] *Booth v. State*, 251 P.3d 369 (Alaska App. 2011).

[4] *Booth*, 251 P.3d at 374.

Standifer argues that he satisfied the *Booth* standard via his offer of proof that N.G. had once been diagnosed with bipolar disorder and had experienced alcoholic blackouts, and via Dr. Zelig's expert testimony confirming that these conditions can lead to perceptual and memory deficits. But Standifer's offer of proof fell well short of a case-specific indication that N.G. had somehow failed to accurately perceive what had happened to her. N.G. was found bloodied, bruised, half-naked, and collapsed on a road; when she led police to Standifer, he still had blood on his hands. N.G. told the police that Standifer had choked her; her ocular petechiae were consistent with this assertion. N.G. accurately described details of Standifer's camp, and when police were unable to locate it, she led them to it. Standifer offered no countervailing evidence that N.G. somehow misperceived that Standifer beat and sexually assaulted her, nor did he identify any memory gaps that she might have filled in with false memories.

We conclude that Standifer failed to satisfy even the relatively low bar of the *Booth* standard, and therefore the superior court did not err when it denied Standifer's motion for an *in camera* review of N.G.'s mental health records. Given our conclusion, we need not resolve the State's contention that a standard higher than *Booth*'s should apply to motions for production of mental health records for *in camera* review.

Standifer's claim that the trial court's instruction on voluntary intoxication was insufficient

Three counts of Standifer's indictment charged specific-intent crimes — two counts of attempted first-degree sexual assault and one count of second-degree assault for intentionally causing physical injury to N.G. by means of a dangerous instrument.[5] During trial, Standifer proposed the following jury instruction:

[5] AS 11.41.410(a)(1) & AS 11.31.100(a); and AS 11.41.210(a)(1), respectively.

> Voluntary intoxication is not a defense to Counts I or V. But evidence that the defendant was intoxicated may be offered whenever it is relevant to negate an element of a charge that requires the defendant intentionally cause a result. If you find that David Standifer was too intoxicated to form the intent necessary to commit the charges in Counts II, III and IV, as defined by law, then you must find him not guilty of those counts.

But the judge instead gave an instruction tracking the language of AS 11.81.630:

> Voluntary intoxication is not a defense to a prosecution for an offense, but evidence that the defendant was intoxicated may be offered whenever it is relevant to negate an element of the offense that requires that the defendant intentionally cause a result.

Standifer now claims that the judge's instruction did not adequately explain to the jury that evidence of intoxication could serve to negate a specific intent to commit a crime.

Both the instruction proposed by Standifer's attorney and the instruction ultimately given by the trial judge suffer from the same defect: these instructions refer only to the fact that voluntary intoxication can negate an element of an offense "that requires that the defendant intentionally cause a result."

This language adequately described the role of voluntary intoxication as it applied to the charge of second-degree assault. This charge required the State to prove that Standifer actually caused a result (physical injury), and that he did so intentionally.

But the two charges of attempted first-degree sexual assault did not involve actual causation of a result. Rather, those charges required the State to prove that Standifer *intended to cause a result* (sexual penetration). Standifer was charged with attempted sexual assault precisely because he did *not* cause this intended result.

Thus, the jury should have been instructed that voluntary intoxication could negate an element of an offense that requires that the defendant intentionally cause *or attempt to cause* a specified result.

However, this flaw was remedied by the summations of the parties. We note in particular that, during the State's summation, the prosecutor told the jurors that intoxication could negate a person's specific intent to commit a particular act, and the prosecutor acknowledged that the jurors would have to decide "whether Mr. Standifer's level of intoxication rose to the point where he was unable to form an intent during those actions that [N.G. described]." (The prosecutor then argued that Standifer's actions, and his statements to the police afterward, showed that his intoxication did not rise to that level.)

We further note that Standifer's attorney did not argue that Standifer was too intoxicated to form a specific intent. Instead, the defense attorney argued that N.G.'s testimony was not credible, and that any sexual contact between Standifer and N.G. was consensual. The defense attorney only mentioned Standifer's intoxication in one connection: he argued that if Standifer had been too intoxicated to maintain an erection, then Standifer would not have intended to engage in penile penetration with N.G.

Given the way this case was litigated and argued to the jury, we conclude that the flaw in the jury instruction on voluntary intoxication had no appreciable effect on the jury's verdicts.

Why we conclude that Standifer's ground for a referral of his sentencing to the three-judge panel is not preserved for appeal

Standifer asked Judge Saxby to refer his case to the statewide three-judge sentencing panel, arguing that even the minimum composite sentence permitted by law amounted to a functional life sentence, and so was manifestly unjust. But buried in

Standifer's motion was an alternative argument: that Standifer's status as a third felony offender was based on two prior felony DUIs, and that these prior driving offenses were not sufficiently grave to justify the thirty-year discrepancy between the minimum composite sentence Standifer was subject to as a third felony offender (about 61 years), versus the minimum sentence Standifer could receive as a first felony sexual offender (about 31 years). The judge did not rule on this briefly mentioned alternative basis for a referral, and the defense attorney did not alert the judge to this oversight and request a ruling.

On appeal, Standifer abandons his argument for a referral to the three-judge panel based on a functional life sentence, and instead elaborates upon the DUI-based ground for referral that the judge did not rule on. We conclude that Standifer failed to preserve this argument for appellate review.

Standifer had two prior felony DUI convictions, and so was sentenced as a third felony offender.[6] Accordingly, he faced a 40-60 year presumptive range for his first-degree sexual assault conviction.[7] As to each of the two counts of attempted first-degree sexual assault, Standifer faced a presumptive range of 35-50 years; one-quarter of the middle of that presumptive range (10.625 years per count) had to be imposed consecutively to Standifer's other sentences.[8] Additionally, the superior court had to impose at least one day of each of Standifer's other two assault convictions

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[6] *See* AS 28.35.030(a) & (n).

[7] AS 11.41.410(a)(1); AS 12.55.125(i)(1)(E).

[8] AS 11.41.410(a)(1) & AS 11.31.100(a); AS 12.55.125(i)(2)(E); AS 12.55.127-(c)(2)(E) & (e)(3).

consecutively.[9] Thus, Standifer was subject to a minimum composite sentence of slightly over 61 years of active jail time. (The judge imposed this minimum composite sentence.)

Standifer's motion requesting a referral of his case to the three-judge panel contended that even the lowest permitted sentence within the presumptive range would be manifestly unjust.[10] His principal argument was that even the minimum composite sentence functionally amounted to a life sentence, because he would not become eligible for parole until age seventy-eight. (He was thirty-eight years old at the time of his crime). Standifer argued that this was an inordinately heavy sentence for a first-time sexual offense, and was manifestly unjust.

After setting forth this argument, Standifer's motion raised, in a single paragraph, another ground for referral to the three-judge sentencing panel — that his 61-year minimum composite sentence was 30 years higher than the comparable minimum composite sentence he would have received as a first felony sexual offender, and that this discrepancy was solely due to Standifer's two prior felony DUIs.[11] Standifer argued this 30-year sentence enhancement was too severe a consequence for his prior DUIs, and so was manifestly unjust on that ground.

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[9] Former AS 12.55.125(d)(4) (2010); former AS 12.55.135(a) (2010); AS 12.55.127-(c)(2)(F).

[10] *See* AS 12.55.165 & AS 12.55.175.

[11] A first felony offender would have been subject to a minimum active term of 20 years for first-degree sexual assault. The two attempted first-degree sexual assaults would each require consecutive sentences of 5.625 years, and the two physical assaults would each require a minimum consecutive additional day.

Relying on our decision in *Beltz v. State*, the judge declined to refer Standifer's case to the three-judge sentencing panel.[12] The judge ruled that Standifer had not satisfied the *Beltz* test for referral, because Standifer failed to established either specific circumstances that rendered him significantly different from a typical offender, or specific circumstances that made his conduct significantly different from a typical offense. But the judge did not rule on Standifer's alternative argument that a 30-year sentencing enhancement accorded a disproportionate weight to Standifer's two felony DUIs.

On appeal, Standifer relies solely on his brief alternative argument below that the particular nature of his prior felonies (as DUIs) gave rise to an unconscionable sentencing enhancement. Standifer elaborates that these prior DUIs consisted of conduct that would otherwise be a misdemeanor but for its recidivist nature. He concedes that, under our holding in *Totemoff v. State* (rejecting a proposed nonstatutory mitigator that a defendant's prior felony was less serious than the felony for which the defendant was being sentenced),[13] any per se mitigator based on "misdemeanor conduct" would be "inappropriate." But Standifer nonetheless urges that, because his prior DUIs were less serious than his current offenses, his case should have been referred to the three-judge sentencing panel.

In the superior court, Standifer raised this argument in skeletal form in a single paragraph. Apparently, the judge did not understand that Standifer's brief reference to his prior DUI convictions represented a stand-alone argument for a referral to the three-judge sentencing panel, distinct from Standifer's far more developed theme that a functional life sentence was manifestly unjust. In any event, the judge made no

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[12] *Beltz v. State*, 980 P.2d 474, 480 (Alaska App. 1999).

[13] *Totemoff v. State*, 739 P.2d 769, 776-77 (Alaska App. 1987).

ruling on this alternative argument, and the defense attorney did not press the judge for a ruling.

Standifer is not entitled to pursue a claim on appeal that he did not adequately raise in the trial court, and as to which he did not obtain a ruling from the judge on its merits.[14] Here, while Standifer's trial motion briefly criticized the presumptive sentencing effect of his two prior felony DUIs, the motion did not discuss Standifer's appellate argument that DUIs are not intrinsically felonious, but only become so by virtue of recidivism — a distinction that Standifer now relies upon as crucially significant. Nor did Standifer alert the judge that he had failed to rule on this separate ground for referral to the three-judge sentencing panel.

Reasonable judges could differ as to the fairness of the sentencing consequence flowing from Standifer's prior felony DUIs. We have no way of knowing how the sentencing judge would have ruled on this matter, had he been pressed for a ruling. We are unable to review a ruling that the judge never made. Accordingly, we conclude that Standifer failed to preserve his argument for referral to the three-judge sentencing panel.

Conclusion

We AFFIRM the judgment of the superior court.

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[14] *See, e.g.*, *Sengupta v. University of Alaska*, 139 P.3d 572, 581 (Alaska 2006) ("To preserve a claim based on [the lower] court's failure to rule on a motion, a party must make every effort to request and obtain a ruling before proceeding to trial.") (quoting *Taylor v. Johnston*, 985 P.2d 460, 467 (Alaska 1999)); *Pierce v. State*, 261 P.3d 428, 430-31 (Alaska App. 2011); *Bryant v. State*, 115 P.3d 1249, 1258 (Alaska App. 2005) ("Normally, an appellant may only appeal issues on which he has obtained an adverse ruling from the trial court."); *Mahan v. State*, 51 P.3d 962, 966 (Alaska App. 2002) ("To preserve an issue for appeal, an appellant must obtain an adverse ruling.").