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Court of Appeals of Alaska.

Jessica K. BEAGLEY, Appellant,
v.
MUNICIPALITY OF ANCHORAGE, Appellee.

No. A–11340.
|
July 29, 2015.
|
Rehearing Denied June 16, 2016.

Appeal from the District Court, Third Judicial District, Anchorage, David R. Wallace, Judge.

Attorneys and Law Firms

William H. Ingaldson, Ingaldson Fitzgerald, Anchorage, for the Appellant.

Cynthia A. Franklin, Municipal Prosecutor, and Dennis A. Wheeler, Municipal Attorney, Anchorage, for the Appellee.

Before: MANNHEIMER, Chief Judge, ALLARD, Judge, and COATS, Senior Judge.*

Opinion

MANNHEIMER, Judge.

***1** Jessica K. Beagley was convicted of violating the provision of the Anchorage Municipal Code prohibiting child abuse. Under this ordinance, a person commits the crime of child abuse if they cause or permit a child to be "tortured [or] cruelly punished", unless the person's actions were "taken as reasonable parental discipline".[1]

Beagley was prosecuted for this offense after the "Dr. Phil" television show aired a video that Beagley submitted to the show. In this video, Beagley is seen punishing her seven-year-old son in two ways. First, Beagley made her son drink hot sauce and hold the sauce in his mouth while Beagley yelled at him. Following this, Beagley ordered her son to take off all of his clothes; she then forced him to stand under a cold shower.

Viewing the evidence in the light most favorable to the jury's verdict, the Municipality's case rested on the following assertions:

Prior to making the video, Beagley had been in contact with the producers of the Dr. Phil show for several months. Beagley contacted the show's producers after she watched a segment of the show devoted to the subject of "Angry Moms". Beagley tried to convince the producers that she, too, was an angry mom, and that they should let her appear on a subsequent show devoted to this topic.

The producers showed some interest, but they told Beagley that they needed a provocative video showing how angry she was. They suggested that Beagley have one of her children follow her around with a video camera, so that there would be a video recording "if something happens".

Actingon the producers' suggestion, Beagley had her daughter hold a video camera while she subjected her son to the treatment we described above. She then sent the video to the producers of the Dr. Phil show, in support of her application to appear on the show. The video was a success: within days, Beagley flew to Los Angeles, where she appeared on a segment of the show entitled "Mommy Confessions", and the video was shown during the show.

In this appeal, Beagley contends that the ordinance's definition of child abuse is unconstitutionally vague, in that the ordinance provides no meaningful way to discern what actions constitute child abuse and what actions constitute reasonable parental discipline.

Beagley also argues that even if the ordinance is constitutional, she is entitled to a new trial because (1) the judge gave the jurors an erroneous instruction on the meaning of "cruel" punishment, and (2) the jurors, in an effort to understand the judge's instruction, committed misconduct by independently looking up the definition of "gratuitous" (a word used in the instruction).

In addition, Beagley argues that she should receive a new trial because the judge made several erroneous evidentiary rulings during the trial, and because the prosecutor made improper comments during her summation to the jury.

For the reasons explained in this opinion, we affirm Beagley's conviction.

A closer look at the ordinance in question: the 2003 version of Anchorage Municipal Code § 8.10.030

***2** Under subsection B of the 2003 version of AMC § 8.10.030 (and also under subsection B of the current version of the ordinance), the offense of child abuse consists of intentionally, knowingly, recklessly, or negligently "caus [ing] or permit[ting] a child to be ... tortured [or] cruelly punished[.]"

(The 2003 version of the ordinance defined a "child" as a person under the age of 16. *See* AMC § 8.10.030.C. The current version of the ordinance, enacted in 2014,[2] no longer contains a definition of "child". That definition is now found in AMC § 8.05 .015.A.2.)

Subsection E of the 2003 ordinance (subsection D of the current version) declares that it is "an affirmative defense to subsection B" that the person's action was taken as "reasonable parental discipline"—a phrase defined in subsection F of the ordinance (subsection E of the current version) as "action taken for the purpose of safeguarding the child or promoting its moral, social, or cultural welfare."

In other words, even when a person causes or permits the torture or cruel punishment of a child, the person is not guilty of child abuse under the municipal ordinance if the person affirmatively establishes that the torture or cruel punishment was done to promote the child's safety or the child's "moral, social, or cultural welfare".

The ordinance does not define either the term "torture" or the term "cruelly punish". However, the ordinance does contain extensive guidelines for determining whether an action qualifies as "reasonable parental discipline".

Under subsection F of the ordinance (subsection E of the current version), the factors to be considered in determining whether the defendant's action constituted "reasonable parental discipline" are:

1. Age of the child;
2. Condition of the child;
3. Type of misconduct;
4. Kind of punishment inflicted;
5. Degree of harm or pain to the child;
6. Options that existed;
7. Apparent motive of the parent; and
8. Cultural perspective of the parties.

Subsection G of the ordinance (subsection F of the current version) then declares that the following actions are "prima facie unreasonable":

1. Scalding, branding, or burning of a child;
2. Injuries that require or reasonably should have required medical treatment;
3. Withholding of food for more than one meal;
4. Injuries located on multiple body sites;
5. Conduct likely to cause serious or permanent harm;
6. Conduct that is significantly disproportionate;
7. Conduct designed to torture or cruelly punish;
8. Injuries to face or head; and
9. Shaking a child under five years of age.

Beagley's claim that this ordinance is unconstitutionally vague because it fails to give fair notice of what constitutes "reasonable parental discipline"

Beagley asserts that the municipal child abuse ordinance is unconstitutionally vague, in that it fails to give fair notice of what parental conduct falls within the category of "reasonable parental discipline" and what parental conduct constitutes the offense of child abuse.

***3** We agree that the wording of the ordinance is potentially problematic. For instance, as we have already noted, the ordinance prohibits the "torture" or "cruel punishment" of a child, but then the ordinance declares that it is an "affirmative defense" that the defendant's action was "reasonable parental

discipline". Thus, even if the government proves that a defendant engaged in (or permitted) the torture of a child, this is no crime if the torture was part of "reasonable parental discipline".

The ordinance contains no definition of "torture". But it is safe to say that, in many people's minds, a claim of "reasonable parental discipline" is not a justification for torturing a child; rather, the torture of a child is strictly inconsistent with reasonable parenting.

There is also a potential problem with making "reasonable parental discipline" an affirmative defense. In Alaska law, the term "affirmative defense" typically refers to a defense that the *defendant* must prove in order to negate culpability.[3] It thus appears that the Anchorage Municipal Assembly intended that any parent charged with child abuse under the ordinance could be convicted unless the parent affirmatively proved that their treatment of the child constituted reasonable parental discipline.

Because the ordinance does not define "torture", it is conceivable that a jury might interpret this word broadly enough to encompass forms of treatment that some people (or even many people) might think of as reasonable parental discipline. If so, then it is arguably unconstitutional to make the *parent* prove that their discipline was reasonable, rather than making the government prove beyond a reasonable doubt that the discipline was not reasonable.

Beagley also points out another potential problem with the ordinance. Subsection F of the 2003 ordinance (now subsection E) defines "reasonable parental discipline" as "action[s] taken *for the purpose* of safeguarding the child or promoting its moral, social, or cultural welfare". This italicized phrase, "for the purpose", suggests that the issue of what conduct constitutes "reasonable parental discipline" hinges on the defendant's subjective motive—*i.e.,* what the defendant personally intended to accomplish by torturing or cruelly punishing the child.

But then the ordinance lists eight factors that a jury is directed to consider when assessing whether the defendant's actions constituted "reasonable parental discipline". *One* of these factors is the "[a]pparent motive of the parent". The other seven factors are criteria for assessing the *objective reasonableness* of the parent's actions.

Thus, it is unclear whether the ordinance defines "reasonable parental discipline" by reference to the defendant's subjective reasons for torturing the child or, conversely, by reference to the objective reasonableness of the defendant's decision to torture the child.

Although the ordinance does raise these questions, we conclude that all these questions are moot under the facts of Beagley's case.

***4** The Municipality's case against Beagley was premised on the theory that Beagley's actions—making her son hold hot sauce in his mouth, and then making him stand naked in a cold shower—were not done for *any* purpose of parental punishment or discipline. Instead, the Municipality argued that Beagley did these things to her son for a very different purpose: to achieve her goal of appearing on nationwide television on the Dr. Phil show.

This was the theory of the case that the prosecutor presented to the jury in her opening statement, and she amplified this theory in her summation to the jury at the end of the case. In that summation, the prosecutor conceded that Beagley's son had misbehaved, but she told the jury that the boy's misbehavior had nothing to do with Beagley's actions:

> *Prosecutor:* Would it have mattered if [the boy] had [not misbehaved]? We would still be here. The same video would have been made—because what the producer said to [Beagley] was, "What's the worst thing you've done?", and she said, "I used to give him hot sauce and a cold shower, but it didn't work." ... [And] the producer said, "We need to see something; we need to see you punishing him on [video]tape." And so she went back to a punishment that she already knew didn't work. She went back to that [punishment] to show them—to show them she was angry.
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> [S]he wanted to be on the show.... [S]he wrote [the producers] after "Angry Moms" aired, and [she] said, "How about me, over in Anchorage? I want to be on [your show]." And then she didn't hear anything for a year and a half [until] ... they called, out of the blue, [asking] "Are you still angry?" "Yes, I want to be on [the show]." And so she has to give them what they want in order to be on the show.... Does she find a legitimate offense to punish [her son] for? ... Yeah, she does. Does she know what she's going to do? ... [Yes], it's all about showing Dr. Phil ...; it's all about the show.... Why is [Beagley's attorney] able to tell you with certainty [that]

she told him exactly what was going to happen? Because she videotaped telling him exactly what was going to happen. It was part of [her] audition [for the show].

...

The punishment in this case was over the top. It was too much; ... it was abusive. But mostly, it was unnecessary. It was unnecessary. There was only one reason [Beagley] had [for doing] it, and you know what that reason was. She had to do it so she could show Dr. Phil just how angry she was. And that was the reason [her son] got this punishment. Not because he [misbehaved].... It was to show Dr. Phil that she was over the top. Look at the video: she's not overwhelmed; she's not tired. She's in control.

...

We've got to draw a line ... and say, "You can't hurt your kid to get on TV."

In other words, Beagley's jury was not asked to decide whether Beagley engaged in parental discipline that was unreasonable. Rather, they were asked to decide whether Beagley engaged in parental discipline at all—or whether, as the Municipality alleged, she mistreated her son as a ploy to get on national television.

***5** Because Beagley's case was litigated this way, we conclude that any potential vagueness in the ordinance's definition of "reasonable parental discipline" is moot in Beagley's case.

Beagley's claim that the ordinance is unconstitutionally vague because it fails to define "cruel" punishment

Beagley also argues that the child abuse ordinance is unconstitutionally vague because it does not define the term "cruelly punish". She argues that, absent a codified definition, the term "cruel" is a purely subjective concept—a concept that "depends on diverse values and subjective judgments."

But the fact that a word is not explicitly defined in a statute or ordinance does not mean that it lacks any objectively ascertainable meaning.

Here, Beagley's trial judge consulted the dictionary for the definitions of "cruel" and "cruelty", and he also examined this Court's decision in *Juneby v. State,* 641 P.2d 823, 840 (Alaska App.1982), where this Court defined the term "deliberate cruelty" as used in aggravating factor AS 12.55.155(c)(2).

Black's Law Dictionary defines "cruelty" as "the intentional and malicious infliction of mental or physical suffering on a living creature, esp[ecially] a human".[4] *Webster's New World College Dictionary* gives a similar definition: "willful infliction of physical pain or suffering upon a person or animal".[5] And in *Juneby,* this Court defined "cruelty" as "the infliction of pain or suffering for its own sake, or for the gratification derived therefrom". 641 P.2d at 840.

Although these three definitions are not exactly the same, they are close enough to each other that we can reasonably say that "cruelty" has an accepted, objectively ascertainable meaning. Thus, the term "cruelly punish" is not unconstitutionally vague.

In Beagley's case, the district court instructed the jury on the meaning of "cruelly". The court told the jurors that acting "cruelly" meant:

> to inflict pain or suffering for its own sake, or for the gratification derived there from [*sic*]; pain—whether physical, psychological, or emotional—that is inflicted gratuitously or as an end in itself.

This instruction adequately embodied the meaning of "cruelly", and it provided an objective standard for the jurors to use when they assessed whether Beagley's treatment of her son constituted "cruel" punishment.

On appeal, Beagley separately challenges this jury instruction; she asserts that it inaccurately defines "cruelly". But Beagley's attorney proposed this wording. Here is the exact instruction that Beagley's attorney initially offered:

> The term "cruelly" means to inflict pain or suffering for its own sake, or the gratification derived there from [*sic*]; to inflict pain or suffering gratuitously or as an end in itself.

After Beagley's attorney offered this instruction, the municipal prosecutor suggested the addition of "whether physical, psychological, or emotional". Beagley's attorney agreed to this addition, as well as to the other minor changes that were made to the last clause of the instruction.

***6** Thus, any arguable error in this jury instruction (and we see none) was invited. And whatever flaws there might be in

the wording of this instruction, they are not substantial enough to relieve Beagley of the consequences of this invited error.

The jurors' improper decision to independently consult a dictionary to find out the meaning of the word "gratuitously" (a term used in the jury instruction defining "cruelly")

Although the jury instruction defining "cruelly" accurately conveyed the meaning of this word, the instruction used a word—"gratuitously"—that apparently was unfamiliar to some of the jurors. After the trial was over, Beagley's attorney spoke to the jurors, and they revealed that one or more of them had gone home and consulted a dictionary to find the meaning of "gratuitous". The jurors discussed the dictionary definition during their deliberations. Based on this information, Beagley's attorney sought a new trial.

The trial judge ruled that a new trial was not required because, even if the jurors did discover (and discuss) the dictionary definition of "gratuitous", this would not affect the fairness of Beagley's trial. The judge reasoned that, if the jurors had asked him to define the word "gratuitous" for them, he too would have used the dictionary meaning. The judge consulted six dictionaries for the meaning of "gratuitous", and he concluded that none of the six contained a misleading or ambiguous definition that might have led the jury astray when they decided Beagley's case.

On appeal, Beagley argues that the judge was mistaken when he concluded that none of the dictionary definitions of "gratuitous" could have led the jury astray. In particular, Beagley notes that the jurors reported that at least some of the dictionaries they consulted employed the word "unnecessary" in their definition of "gratuitous".

(Compare the definition in *Webster's New World College Dictionary:* "without cause or justification; uncalled-for".[6])

Because the jurors discovered that "gratuitous" could be defined as "unnecessary", Beagley argues that the jurors might have convicted her if they concluded (1) that she was justified in disciplining her son, but (2) her precise methods of discipline—the hot sauce, and/or the cold shower—were not strictly necessary to achieve her disciplinary goal.

We reject this contention for much the same reason we rejected Beagley's vagueness attack on the ordinance: given the facts of this case and the way it was litigated, the potential problem that Beagley has identified is moot.

As we explained earlier in this opinion, the Municipality prosecuted Beagley under the theory that, when she subjected her son to these measures, she did *not* act for the purpose of parental discipline. Instead (according to the Municipality), Beagley mistreated her son solely because she wanted to create a videotape that would secure her a place on the Dr. Phil show.

***7** Indeed, during her rebuttal summation to the jury, the prosecutor's main point was that Beagley's mistreatment of her son was "unnecessary"—not in the sense that it exceeded the bounds of proper discipline, but rather in the sense that it was not motivated by *any* parental purpose:

> The punishment in this case was over the top. It was too much; ... it was abusive. But mostly, it was unnecessary. It was unnecessary. There was only one reason [Beagley] had [for doing] it, and you know what that reason was. She had to do it so she could show Dr. Phil just how angry she was. And that was the reason [her son] got this punishment. Not because he [misbehaved].... It was to show Dr. Phil that she was over the top. Look at the video: she's not overwhelmed; she's not tired. She's in control.
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> We've got to draw a line ... and say, "You can't hurt your kid to get on TV."

For these reasons, we uphold the district court's denial of Beagley's motion for a new trial.

Beagley's other claim of juror misconduct

Beagley asserts that she should receive a new trial because one of the jurors in her case committed misconduct—either by giving false answers during jury selection, or by independently researching the case. Beagley bases this assertion on an affidavit filed by another juror; this affidavit states that, at some point during the trial, the juror in question declared that Beagley should have known better because Beagley's husband was a police officer.

Beagley points out that there was no mention of her husband's occupation during the trial proceedings. From this, Beagley assumes that the juror must either have lied during jury selection or must have independently researched the case.

This claim is inadequately presented for two independent reasons.

First, Beagley presents this claim in a single, conclusory paragraph in her brief. Rather than present the underlying facts and the legal arguments in support of this claim of juror misconduct, Beagley's attorney declares that he intends to rely on the pleadings that he filed in the trial court. This is not allowed. We explained this point of Alaska appellate procedure in *McCoy v. State,* 80 P.3d 755, 756 (Alaska App.2002):

> A party's briefs must contain the factual and legal arguments that the party wishes the appellate court to consider. A party may not argue a point by incorporating trial court pleadings by reference.

Accord, Anchorage Nissan, Inc. v. State, 941 P.2d 1229, 1240 (Alaska 1997).

In her brief, Beagley cites Alaska Appellate Rule 217(f) as authority for her purported ability to rely on her trial court pleadings instead of adequately presenting her claim in her brief. But Appellate Rule 217(f) states that, in district court appeals, a litigant may choose to rely on their trial court pleadings *in lieu of filing a brief,* Rule 217(f) does not authorize what Beagley is trying to do here: file a brief and *supplement it* with trial court pleadings that raise additional arguments.

***8** The second reason we do not reach the merits of Beagley's claim is that she has failed to present us with a sufficient record to allow us to ascertain whether error occurred.

As explained above, Beagley asserts that if the juror in question knew that Beagley's husband was a police officer, then the juror must have committed misconduct. But if the juror was already aware of Beagley's husband's occupation before the trial, this information would not be "extraneous" for purposes of Alaska Evidence Rule 606(b)—and, thus, the juror affidavit that Beagley presented to the district court would be inadmissible.

See *Titus v. State,* 963 P.2d 258, 263 (Alaska 1998), where the supreme court held that only a juror's "knowledge of specific facts surrounding the alleged crime and the defendant's connection to it" fall within the scope of the "extraneous prejudicial information" exception to Evidence Rule 606(b).

Beagley suggests that if the juror in question knew before trial that Beagley's husband was a police officer, then the juror must have lied about this during jury *voir dire,* But we have no way of knowing what questions the juror was asked during *voir dire,* nor what answers the juror gave—because Beagley failed to designate jury selection as part of the trial court proceedings to be transcribed.

An appellant has the duty to present the reviewing court with a record adequate to permit meaningful appellate review of the appellant's contentions. In the absence of an adequate record, a reviewing court will refuse to address the appellant's claims. *See Adrian v. Adrian,* 838 P.2d 808, 811 & n. 5 (Alaska 1992) (holding that the appellant's failure to designate a transcript of the relevant proceedings constituted a waiver of the claim on appeal); *McBride v. State,* 368 P.2d 925, 927 n. 11 (Alaska 1962).

We accordingly conclude that Beagley's claim of juror misconduct is waived.

The sufficiency of the evidence to support Beagley's conviction

Beagley argues that the evidence presented at her trial was insufficient to support her conviction. More specifically, Beagley argues that there was "absolutely no evidence" that she mistreated her son gratuitously—that she inflicted pain on him "for its own sake, or for the gratification derived therefrom".

Beagley's argument is obviously based on construing the evidence in the light most favorable to herself. But when an appellate court reviews the sufficiency of the evidence to support a criminal conviction, the court must 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]

In the opening section of this opinion, we described the evidence at Beagley's trial in the light most favorable to upholding the verdict. Viewed in that light, the evidence is clearly sufficient to support the jury's conclusion that Beagley mistreated her son, not for the purpose of parental discipline, but rather for the purpose of securing an appearance on nationwide television.

***9** The evidence is therefore sufficient to support Beagley's conviction.

Beagley's challenges to the trial judge's evidentiary rulings

In addition to the foregoing claims of error, Beagley contends that the trial judge made several erroneous evidentiary rulings.

(a) The admissibility of the video recording of Beagley mistreating her son

Beagley argues that the Municipality should not have been allowed to introduce the video recording of Beagley mistreating her son, because (according to Beagley) the Municipality failed to establish the authenticity of this video recording.

Specifically, Beagley argues that the Municipality failed to establish a proper evidentiary foundation for the video because the video was introduced through the testimony of a state trooper (1) who was not present when the police served a search warrant at Beagley's house and seized the video camera that contained this recording, (2) who did not know exactly where the video camera came from, and (3) who had no personal knowledge that the video recording in question was actually retrieved from this camera.

Beagley contends that the Municipality was required to call the officer who seized the video camera from Beagley's residence, as well as the evidence custodian who could vouch for the video's whereabouts between the time of its seizure and the time of Beagley's trial.

There is no merit to Beagley's "lack of foundation" argument. Unless someone asserts that a photograph or video recording is concocted or has been tampered with, the proponent of this evidence does not have to establish who took the photo or the video, nor does the proponent of the evidence have to establish where the photo or video has been stored between the time it was made and the time it is introduced at trial. Rather, a photograph or a videotape is admissible if the proponent of the evidence establishes that it "accurately depicts the subject" it purports to portray. *Brigman v. State,* 64 P.3d 152, 165 (Alaska App.2003).[8] *See also* Kenneth S. Broun *et alia, McCormick on Evidence* (7th ed.2013), § 216, Vol. II, pp. 39–40.

We therefore conclude that the video was properly admitted at trial.

Beagley makes one other claim relating to the video. Shortly before the video was played for the jury, and in the jurors' presence, the trial judge characterized the video as a "critical piece of evidence" in the case. Beagley argues that it was improper for the judge to express any opinion to the jury regarding which evidence was important.

It is true, as Beagley contends, that judges should endeavor not to say things in the jury's presence that might be understood as a comment on the merits of the case, or that might improperly influence the jurors' evaluation of the evidence.[9] But the video was obviously one of the more important pieces of evidence in Beagley's case; Beagley does not contend otherwise. Thus, the jurors could hardly have been surprised to hear the judge characterize the video as a "critical piece of evidence".

***10** Moreover, the trial judge's very first instruction to the jury informed the jurors that it was their sole responsibility to "determine the facts from the evidence", and that "[n]o ruling or comment [the court] made during trial was intended to tell you how [the court thinks] you should determine the facts or decide the case ." This principle was reinforced in Instruction No. 14, which stated, "You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves." And Instruction 17 again reminded the jurors, "You are the ones to determine what evidence was given in this case, as well as what conclusions of fact should be drawn therefrom."

In short, there is no reasonable possibility that the judge's comment affected the verdict in this case.

(b) The proposed testimony of the Office of Children's Services investigator and the proposed testimony of Detective Torres

After Beagley's video came to light, the Office of Children's Services investigated Beagley's household. The investigator assigned to the case concluded that Beagley had not "maltreated" her son.

Before Beagley's trial started, the Municipality filed a motion *in limine* asking the district court to preclude Beagley from introducing evidence of the investigator's finding. When the district court took up this motion, Beagley's attorney contended that the evidence was admissible; the defense attorney argued that the investigator's opinion was expert testimony, and he noted that experts are allowed to offer an

opinion even when the opinion "goes to the ultimate issue". *See* Alaska Evidence Rule 704.

The trial judge indicated that he would allow the investigator to testify about what she saw when she investigated the Beagley household, but that he would not allow the investigator to tell the jury about her ultimate conclusion (*i.e.,* no maltreatment). The judge declared that this conclusion appeared to be irrelevant—since there was no indication that the investigator applied the municipal ordinance's definition of child abuse when she reached her conclusion that there was no maltreatment. (In fact, the judge stated that he thought the standards used by the Office of Children's Services were materially different from the standard set forth in the child abuse ordinance.)

The judge brought this matter up again the next morning, before trial began. He again said that, without any information as to what standard the OCS investigator used when she concluded that there was no "maltreatment", the proposed testimony about the investigator's conclusion would have little probative value, while at the same time it would be likely to mislead or confuse the jury. The judge thus declared that he would exclude the proposed evidence under Evidence Rule 403, given the absence of an offer of proof regarding the criteria that the investigator used when she reached her conclusion.

(Despite the judge's implicit invitation, Beagley's attorney never asked the investigator to describe the criteria she applied in reaching her conclusion, nor did the defense attorney make any other offer of proof on this issue.)

***11** However, the judge also told the parties that he would allow the investigator to testify that the Office of Children's Services investigated the Beagley household, and that they decided not to intervene. In response, Beagley's attorney indicated that he would have the investigator "go through all the areas that she investigated." The trial judge expressed no objection to the defense attorney's proposal.

Later, when the investigator was called as a witness at trial, she testified to essentially everything that the defense attorney wanted—including the favorable conclusion that the Municipality had tried to exclude.

The witness testified that she was a supervisor in the "initial assessment" unit. She said that she investigated the Beagley household for "maltreatment"—a term that included "neglect, physical abuse, sexual abuse, domestic violence in the home, and substance abuse." During her investigation of the Beagley household, she interviewed Beagley and her husband and some of their children, and she reviewed other people's interviews of the Beagley's other children. She also testified that she reviewed information gathered by other agencies from co-workers, school officials, and police reports.

The investigator declared that she found no reason to intervene in the Beagley family. She found no neglect, no sexual abuse, no domestic violence, no substance abuse, and no physical abuse—although she clarified that, under OCS guidelines, a finding of "physical abuse" requires proof of physical injury.

The defense attorney explicitly asked the investigator, "Did you make a determination that OCS should intervene in this matter?" The investigator answered that OCS affirmatively decided that they should not intervene. The defense attorney then asked the investigator if OCS would have intervened if the investigator "[had] thought that the children were in danger of harm". The investigator responded, "Yes, sir."

It thus appears that the OCS witness testified to everything that Beagley's attorney wanted the jury to hear.

To the extent that Beagley now argues that the OCS witness should have been allowed to say anything else, we conclude that the trial judge did not abuse his discretion in limiting the witness's testimony under Evidence Rule 403. See *Kodiak v. Samaniego,* 83 P.3d 1077, 1088–89 (Alaska 2004), and *Grandstaff v. State,* 171 P.3d 1176, 1201–02 (Alaska App.2007), both holding that a trial judge can properly preclude an expert witness from offering "conclusions on points that the [jurors are] ... equally capable of determining [for themselves]".

For this same reason, we reject Beagley's claim that the trial judge improperly excluded similar testimony from the lead police investigator in the case, Anchorage Police Detective Leonard Torres. (Torres apparently would have testified that, in his opinion, forcing a child to hold hot sauce in his mouth, and forcing a child to stand naked in a cold shower, did not constitute "child abuse" if these methods were employed for the purpose of legitimate parental punishment.)

(c) The trial judge's refusal to let Beagley's attorney elicit (1) hearsay testimony that Beagley's husband admitted to using the same methods (hot sauce and cold showers),

and (2) testimony that the Municipality had not charged Beagley's husband with child abuse

***12** During the defense attorney's examination of Detective Torres, the defense attorney attempted to have the detective testify (1) that Beagley's husband had also punished their son with hot sauce and cold showers, and (2) that the Municipal Prosecutor's Office had not charged Beagley's husband with child abuse.

The trial judge ruled that the first portion of this proposed testimony was inadmissible hearsay, and that the second portion was irrelevant.

On appeal, Beagley argues that the first portion of the proposed testimony was *not* hearsay, in that it was not being offered for the truth of the matter asserted. But it was. The fact that the Municipality did not charge Beagley's husband with child abuse had little relevance absent proof (1) that Beagley's husband did, in fact, engage in the same conduct toward their son, and (2) that Beagley's husband was not imposing reasonable parental discipline when he did so.

Moreover, even assuming that Beagley's husband *claimed* to have engaged in the same conduct, and that the Municipality knew of the husband's claim and chose not to charge him, Beagley presented no evidence (1) that the police and prosecutors *believed* her husband's statement; (2) that the police and prosecutors had no reason to think that Beagley's husband was honestly trying to administer parental discipline to the boy when he engaged in this conduct; (3) that the prosecutor's office believed that they could successfully prosecute the husband for child abuse even without corroborating video evidence; and (4) that there was no other valid reason for the prosecutor's office to refrain from prosecuting the husband. Beagley's attorney offered nothing on these issues.

Finally, even if Beagley had been able to prove that the Municipality singled her out for prosecution when her husband was equally culpable, and when the Municipal prosecutors knew that their case against the husband was just as strong as their case against Beagley herself, this information would not be relevant to any of the issues that the jury had to decide. This is, in essence, a claim of selective prosecution.

A claim of selective prosecution does not rest on an assertion that the defendant is innocent of wrongdoing; rather, it is a claim that the government violated constitutional guarantees when it singled out this particular defendant as the target of prosecution.[10] Thus, a claim of selective prosecution is a matter for the court to decide, not the jury.[11]

We therefore uphold the trial judge's evidentiary ruling.

(d) The testimony of the municipal water employee regarding the temperature of cold water at residences in Anchorage

The Municipality called an employee of the Anchorage Water and Wastewater Utility to testify regarding the approximate temperature of the cold water supplied to Anchorage residences.

According to the witness's testimony, the Municipality prevents the municipal water lines from freezing in the winter by heating some of the water in the municipal system to 59 degrees Fahrenheit, and then constantly mixing this warmer water with the 45–degree water that enters the system from Eklutna Lake, the municipality's main source of water. The Municipality uses a network of temperature probes to constantly monitor the temperature of the water in the system. Based on data collected from the temperature probes located near the Beagley residence, the witness estimated that the cold water supplied to the residence on the date and time in question had a temperature of somewhere between 45 and 53 degrees.

***13** On appeal, Beagley argues that this witness's testimony was irrelevant because there are several reasons why this estimated temperature of the water supplied to the residence might not accurately reflect the exact temperature of the cold water that was coming out of the shower in the Beagley house. Beagley also argues that any testimony about water temperature was irrelevant unless it was accompanied by expert testimony describing how human beings are affected by water in this temperature range.

All of Beagley's objections go to the weight of the witness's testimony, not its relevance. The trial judge properly admitted this testimony.

(e) The admissibility of the airline itinerary found in Beagley's house, showing that she booked air travel to Los Angeles

The Municipality alleged that Beagley mistreated her son on the afternoon of Thursday, October 21, 2010. Four days

later, on October 25th, Beagley took a flight to Los Angeles to be a participant in the Dr. Phil television show. The Municipality wished to prove that Beagley booked this flight herself—circumstantial evidence that she subjected her son to mistreatment so that she could appear on television.

To prove that Beagley had likely booked the flight to Los Angeles, the Municipality offered an airline itinerary that a police detective found among the files contained on the computer seized from Beagley's home.

This computer file showed that the October 25th flight to Los Angeles had been booked by someone at the Beagley residence. The names of the travelers listed on the itinerary were Beagley and some of her children.

On appeal, Beagley contends that the Municipality failed to establish the required foundation for this document, and that there were "serious questions as to the reliability of [this] document". But Beagley does not dispute that the airline itinerary was found on the computer seized from her residence.

Beagley points out that she did not actually travel with any of her children when she went to Los Angeles, so the airline itinerary was inaccurate in that respect. But this discrepancy (the difference between the planned trip reflected in the itinerary and Beagley's actual airline travel) did not undermine the proposition for which the Municipality offered the document: to prove that Beagley was making plans to travel to Los Angeles at about the time she mistreated her son.

This evidence was properly admitted.

Beagley's attack on the prosecutor's rebuttal summation

Beagley's next claim on appeal is that the prosecutor made improper comments during her rebuttal summation to the jury. In particular, Beagley asserts that the prosecutor misstated the evidence on three different occasions during the summation.

Beagley's first challenge to the prosecutor's summation involves the prosecutor's argument that Beagley subjected her son to the hot sauce and cold shower mistreatment because the producers of the Dr. Phil show told her that she could secure a spot on the show if she provided them with a video of this kind of mistreatment—"if we could see something like that".

***14** Beagley's attorney objected to the last part of the prosecutor's statement, arguing "There is no testimony of this at all."

Beagley's attorney was wrong. Although there was no testimony that the producers spoke those exact words to Beagley, there was ample evidence that the producers encouraged Beagley to make a video recording of this mistreatment. When Beagley was interviewed by the police, she told the detective that the Dr. Phil show wanted a video of her giving her son a cold shower.

But in any event, the trial judge *sustained* the defense attorney's objection—and the defense attorney asked for no further relief. Accordingly, Beagley is not allowed to attack her conviction on appeal on this ground.

(In addition, soon after the prosecutor's challenged remark, the trial judge instructed the jury that the arguments of counsel are not evidence and that, to the extent the attorneys' arguments "depart from the facts or from the law, [they] should be disregarded.")

Beagley's second challenge to the prosecutor's summation involves the fact that the prosecutor reminded the jury that, following Beagley's mistreatment of her son in the late afternoon of October 21st, she sent her son to bed. The prosecutor argued, based on this evidence, that "the reasonable inference is that ... he didn't get his supper, right? So he doesn't get to eat dinner."

Beagley's attorney objected to the prosecutor's argument; he asserted that "there's no evidence at all that [Beagley's son] didn't get to eat dinner." The trial judge overruled the defense attorney's objection, finding that the prosecutor's argument was a reasonable inference from the evidence. We agree with the trial judge that the prosecutor's argument was a reasonable inference from the evidence.

There is a separate problem with the prosecutor's argument: it dealt with an issue that was apparently irrelevant to the jury's decision. But Beagley's attorney did not object on this ground. And there is essentially no possibility that the jury's verdict was affected by the prosecutor's comment.

Beagley's third challenge to the prosecutor's summation arises from the fact that the prosecutor argued to the jurors that, in addition to the physical mistreatment that Beagley's son

suffered, he also suffered the humiliation of having the video of his mistreatment posted on the Internet.

When Beagley's attorney objected that "there's no evidence that Jessica Beagley posted this [video] on the Internet," the trial judge overruled the defense attorney's objection.

Again, the prosecutor's argument was a reasonable inference from the evidence. Two witnesses at Beagley's trial testified that they had seen the video on the Internet.

As the defense attorney noted, there was no evidence that Beagley herself posted the video on the Internet—but the prosecutor did not say that she had. Rather, the prosecutor argued that the *presence* of the video on the Internet was a source of humiliation to Beagley's son. And the evidence clearly was sufficient to establish that Beagley was the one who made the video, and that she was responsible for the fact that it was disseminated to the public—because she was the one who submitted the video to the Dr. Phil show.

***15** In short, the trial judge could properly overrule the defense attorney's objection to this argument.

On appeal, Beagley argues for the first time that the prosecutor's latter two remarks were designed solely "to paint [Beagley] as a bad person" and to encourage the jurors to consider uncharged bad acts when they deliberated on Beagley's case.

But Beagley did not raise this argument in the district court, and on appeal Beagley does not argue that the trial judge committed plain error by failing to raise this issue *sua sponte,* Nor does the record bespeak plain error—because, as we have explained, both of the prosecutor's challenged remarks were based on fair inferences from the evidence presented at Beagley's trial.

Conclusion

The judgement of the district court is AFFIRMED.

All Citations

Not Reported in P.3d, 2015 WL 4599602

Footnotes

* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

1 AMC § 8.10.030.B & D. Beagley was prosecuted under a former version of this ordinance (the version enacted in 2003), but the applicable wording of the ordinance is the same in both versions.

2 *See* Anchorage Ordinance No.2014–42, § 1, enacted June 21, 2014.

3 Compare AS 11.81.900(b)(2), which defines "affirmative defense" for purposes of the state criminal statutes.

4 Bryan A. Garner (editor in chief), *Black's Law Dictionary* (Tenth Edition, 2014), p. 459.

5 *Webster's New World College Dictionary* (Fourth Edition, 2004), p. 348.

6 *Id.* at p. 620.

7 *Ross v. State,* 586 P.2d 616, 617–18 (Alaska 1978); *Beck v. State,* 408 P.2d 996, 997 (Alaska 1965).

8 Quoting *Johnson v. State,* 636 P.2d 47, 67 (Alaska 1981).

9 *Landt v. State,* 87 P.3d 73, 77 (Alaska App.2004); *Cook v. State,* 36 P.3d 710, 724–25 (Alaska App.2001).

10 *Noy v. State,* 83 P.3d 545, 546 (Alaska App.2003).

11 *Scudero v. State,* 917 P.2d 683, 686 (Alaska App.1996); *Woodward v. State,* 855 P.2d 423, 429 (Alaska App.1993).