

NOTICE

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

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAVID LESTER PIERREN JR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11470
Trial Court No. 3AN-11-2163 CR

MEMORANDUM OPINION

No. 6386 — September 28, 2016

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael Spaan, Judge.

Appearances: Renee McFarland, Assistant Public Defender,
and Quinlan Steiner, Public Defender, Anchorage, for the
Appellant. Mary A. Gilson, 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 ALLARD.

David Lester Pierren Jr. was convicted of multiple counts of sexual abuse of a minor for conduct involving S.S., the daughter of his former girlfriend, beginning when S.S. was about six years old. Pierren argues that he is entitled to a new trial

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska constitution and Administrative rule 24(d).

because the superior court refused to admit evidence that when S.S. was four years old, she reported sexual abuse by a different boyfriend of her mother's. For the reasons explained here, we conclude that the superior court did not abuse its discretion, or violate Pierren's constitutional right to present a defense, by excluding this evidence from Pierren's trial.

Pierren also argues that the superior court erred in allowing the State to amend the indictment to increase the date range of the charged abuse from May 2008 - March 2009 to May 2008 - January 2010. We conclude that Pierren waived this challenge to the indictment by failing to properly preserve it in the superior court.

Lastly, Pierren challenges his sentence of 29 years to serve as excessive. Having conducted an independent review of the record, we conclude that the superior court made sufficient findings to justify the sentence it imposed and the sentence is not clearly mistaken.

We therefore affirm Pierren's convictions and sentence.

Background facts

B. Brown met David Pierren in 2003 when her daughter, S.S., was about one year old. Brown and Pierren began a relationship, and S.S. considered Pierren to be her father, referring to him as "Daddy Dave."

In 2005, Brown and S.S. moved to Idaho, and for a brief period she dated a coworker named Burt. In June 2006, when Brown was helping four-year-old S.S. get dressed, S.S. said to Brown, "Burt touches me there," and she put her hand between her legs. Brown contacted the Boise police.

Ultimately, after police interviews in which Brown did not participate, S.S. made allegations against Burt involving penetration of S.S.'s vagina both digitally and with a massage tool. S.S. also alleged that Burt took photographs of her while she was

nude. Burt was not prosecuted — reportedly, because he passed lie detector tests and because the police determined that S.S. would not be an articulate witness.

Brown and S.S. eventually moved back to Anchorage.

In May 2008, before S.S. entered first grade, Brown and S.S. moved to a one-room efficiency apartment — referred to at trial as “apartment number 12.” Pierren and Brown resumed their relationship, and Pierren moved in with Brown and S.S. in August 2008.

Brown asked Pierren to move out in February 2009, and Pierren moved to Kenai. However, Pierren and Brown continued their relationship, and Pierren visited Brown and S.S. once or twice a month for time periods ranging from one day to one week.

Brown and S.S. lived in apartment number 12 until January 2010. Brown and Pierren ended their relationship around that time, and Brown became involved with Ed Janitscheck. Janitscheck eventually moved in with Brown and S.S. at their new apartment.

In July 2010, Brown noticed S.S. was rubbing Janitscheck’s back and clinging to him in a manner that concerned Brown. This behavior prompted Brown to ask S.S. if she had any “secrets.” S.S. told Brown that she and “Daddy Dave ... had sex.” S.S. told Brown that Pierren pulled his pants down and told S.S. to put her mouth on his penis. Brown reported this to the police in August 2010.

The police scheduled an interview with S.S. at Alaska CARES in early September 2010. Using anatomically correct dolls, S.S. told Police Detective Chris Thomas that Pierren put his “private” in her “private.” She also stated that Pierren made her put her mouth on his private and then “peed” in her mouth. She stated that these incidents happened in apartment number 12 when her mother was not there.

Prior proceedings

At grand jury, S.S. testified that all of the abuse occurred at apartment number 12. S.S. told the grand jury that the first incident involved anal penetration and occurred sometime in the spring. S.S. also told the grand jury that Pierren engaged in vaginal penetration and forced her to perform fellatio, but she did not recall what time of year these other acts occurred.

The grand jury indicted Pierren on three counts of first-degree sexual abuse of a minor (fellatio, penile-vaginal penetration, and penile-anal penetration) and two counts of second-degree sexual abuse of a minor (for touching S.S.'s anus and genitals in connection with the acts of vaginal and anal penetration).

Before trial, the State moved to preclude Pierren from presenting any evidence that S.S. reported being sexually abused in Idaho when she was four years old. Pierren opposed the State's motion, arguing that the Idaho allegations (which the defense treated as true) were relevant for several purposes: (1) to explain S.S.'s later sexualized behavior with Brown's boyfriend Ed Janitscheck; (2) to support the defense theory that S.S.'s accusations against Pierren were actually a confused response to the Idaho sexual abuse; (3) to show that S.S. had sufficient sexual knowledge from the Idaho sexual abuse to articulate a false claim of sexual abuse against Pierren; and (4) to explain Brown's over-protectiveness of S.S. and her response to S.S.'s behavior with Janitscheck.

At Pierren's first trial, the superior court granted the State's motion in limine and ruled that the defense would not be permitted to question S.S. or her mother about the Idaho allegations. The court based its ruling on the fact that there was no clear evidence of the truth or falsity of these allegations and because the allegations were so dissimilar from the allegations against Pierren. The court acknowledged that the mere existence of these allegations might help explain S.S.'s sexualized knowledge and her mother's vigilance about possible sexual abuse. But the court concluded that the

marginal relevance of this evidence for that purpose was outweighed by the risk of jury confusion and unfair prejudice to the State's case.

The jury in Pierren's first trial was unable to reach a verdict on any of the charged offenses, and the superior court therefore declared a mistrial.

Before Pierren's second trial, Pierren asked the court to reconsider its decision to exclude evidence of the Idaho allegations. Pierren also argued that the prosecutor in the first trial had opened the door to this evidence by repeatedly arguing that Pierren must have abused S.S. because there was "no other explanation" for S.S.'s sexualized behavior and knowledge of sex.

The trial judge agreed to question S.S. and Brown about the Idaho allegations outside the presence of the jury. In response to the judge's questions, S.S. stated that she had no memory of those allegations or the events they purported to describe. Brown similarly testified that she had no knowledge of the specifics of S.S.'s allegations in Idaho because she had not been present when the police questioned S.S. Brown did recall, however, that there had been no criminal prosecution and that Burt had passed a lie detector test. The defense offered no additional evidence on these allegations.

The superior court subsequently reaffirmed its earlier ruling at the first trial and excluded this evidence from Pierren's second trial. In reaffirming its earlier ruling, the court reiterated its earlier finding that the Idaho allegations were "at best" marginally relevant and that admitting the evidence would unfairly prejudice the State, potentially mislead the jury, confuse the issues, and cause undue delay.¹ The court noted that the Idaho allegations involved digital penetration, vaginal penetration with an object, possible touching of the penis, and the taking of nude photographs — allegations that were factually dissimilar to the sexual abuse alleged in Pierren's case.

¹ See Alaska Evid. R. 403.

The court also stated its concern that the State would be unfairly prejudiced by this evidence. The court noted that the jury would have very little evidence from which to determine whether the allegations were true or false and that the jury might therefore draw unfair inferences about S.S.'s truthfulness.

At Pierren's second trial, the jury convicted Pierren of first-degree sexual abuse of a minor for the charged act of fellatio.² The jury acquitted Pierren of the other two counts of first-degree sexual abuse of minor: penile-vaginal and penile-anal penetration, convicting Pierren instead of the lesser-included counts of second-degree sexual abuse of a minor for penile-vaginal and penile-anal contact.³

At sentencing, the court imposed a composite sentence of 40 years with 11 years suspended (29 years to serve), a sentence within the applicable presumptive range.

Pierren appeals his convictions and sentence.

Given the limited evidence available with regard to the Idaho sexual abuse allegations, the court did not abuse its discretion by excluding evidence of these allegations

Pierren argues that the superior court abused its discretion, and violated his constitutional right to present a defense, by refusing to admit evidence that S.S. reported being sexually abused by another boyfriend of her mother's in Idaho four years before she disclosed the conduct charged in this case. Pierren asserts that the evidence of this prior report of sexual abuse was relevant and essential to his defense.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

² AS 11.41.434(a)(1) (first-degree sexual abuse of a minor).

³ AS 11.41.436(a)(2) (second-degree sexual abuse of a minor).

probable than it would be without the evidence.”⁴ However, even relevant evidence may be excluded under Alaska Evidence Rule 403 “if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or waste of time.”⁵ The trial court bears the “primary responsibility” for deciding when these dangers warrant the exclusion of relevant evidence.⁶ We accordingly defer to the trial court’s judgment on the admissibility of evidence under Rule 403 unless we are firmly convinced that the court exercised its discretion in a manner that was untenable or unreasonable.⁷

Here, the defense sought to introduce evidence of prior sex abuse allegations by the victim. But it was not clear what this evidence would be — the police reports were inadmissible hearsay; S.S. had no memory of the prior sexual abuse or the prior allegations; and Brown had only limited knowledge of the initial allegations and knew that there had been no actual criminal charges.

Under these circumstances, the trial court was properly concerned that the parties would be forced to “re-litigate the entire Idaho incident” — seemingly without any evidence with which to do so. As the trial court recognized, the truth or falsity of the Idaho allegations remains unknown — and essentially unknowable — based on the record currently before us.

On appeal, Pierren argues that there was no need for the parties to litigate the underlying truth or falsity of the Idaho allegations. But this was clearly not the case. Pierren wanted to make arguments that were directly based on his claim that the past

⁴ Alaska Evid. R. 401.

⁵ Alaska Evid. R. 403.

⁶ *Marsingill v. O’Malley*, 58 P.3d 495, 502 (Alaska 2002).

⁷ *See Schofield v. City of St. Paul*, 238 P.3d 603, 608 (Alaska 2010); *Sawyer v. State*, 244 P.3d 1130, 1133 (Alaska App. 2011).

Idaho allegations were true and the current sexual abuse allegations against Pierren were false and a “manifestation” of the past abuse. Pierren also wanted to argue that S.S.’s sexualized behavior towards Brown’s most current boyfriend and her general knowledge of sexual terms and conduct could be explained by the prior sex abuse in Idaho, rather than by the current allegations.

Thus, the trial judge was correct when he concluded that, if evidence of the Idaho allegations was admitted for the purposes suggested by Pierren’s attorney, the jurors would likely have to resolve the truth or falsity of those allegations. And they would have little or no evidence to enable them to do that.

Pierren argues on appeal that the trial judge could have eliminated this problem by instructing the jury that the parties had stipulated to the truth of the Idaho sex allegations. But Pierren never proposed such a stipulation and it is not clear that the parties would have been able to agree on a stipulation (or that the court would have accepted one). S.S.’s lack of memory of the alleged Idaho sexual abuse, Brown’s lack of knowledge about these prior allegations, and the general lack of information about what might have happened in Idaho, make it unclear how this alleged abuse may or may not be relevant to the current allegations.

We note that Pierren never proposed an expert to substantiate his claim that S.S.’s current allegations against Pierren could be a manifestation of her early sexualization due to her alleged prior sexual abuse in Idaho. On appeal, Pierren contends that he could have used his proposed expert on false memory, Dr. Deborah Davis, to discuss the early sexualization theory. But Pierren never proffered Dr. Davis as an expert on the early sexualization theory or an expert in children’s reports of sexual abuse. Instead, Pierren offered Dr. Davis only as an expert on false memory generally. Additionally, Dr. Davis conceded during her voir dire that she had never worked with children who had reported sexual abuse and could testify only as to how false memory

works in general. She also conceded that she had not reviewed any of the specific interviews in this case or any of the police reports from Idaho.

Having reviewed the entire record in this case, and considering the paucity of admissible evidence that existed on the Idaho allegations, we conclude that the trial court's decision to preclude this evidence was not an abuse of discretion.⁸ Accordingly, we reject this claim on appeal.

We likewise reject Pierren's related constitutional claim. When a court properly applies Alaska Evidence Rule 403, the court does not violate a defendant's constitutional right to present a defense.⁹

Pierren waived his objection to the amendment of the indictment

Pierren next claims that the superior court erred by allowing the State to amend the indictment shortly before his first trial to expand the date range of the sexual abuse charges.

In the superior court, Pierren objected to the amendment on the ground that the late notice of the expanded dates gave him insufficient time to investigate the new dates. The record shows that Pierren was later given additional time for investigation between the first trial (which resulted in a hung jury) and the second trial (which began three and a half months after the hung jury). Pierren does not renew his "insufficient time to investigate" claim on appeal.

Instead, Pierren raises a different claim. He asserts that the State used a narrower date range (May 2008 - March 2009 rather than May 2008 - January 2010) in

⁸ See *Hersh v. State*, 2011 WL 6450909, at *3 (Alaska App. Dec. 21, 2011) (unpublished) (rejecting a similar argument where the past incident was different in nature and several years earlier).

⁹ *Larson v. State*, 656 P.2d 571, 575 (Alaska App. 1982).

its presentation to the grand jury to avoid presenting exculpatory evidence that S.S. denied being sexually abused during an Office of Children’s Services investigation in June 2009.¹⁰ Pierren claims that the prosecutor had a duty to present this evidence under *Frink v. State*.¹¹ But Pierren never challenged the grand jury indictment based on the State’s failure to present this alleged *Frink* evidence, and he therefore waived this claim.

Pierren’s sentence

Pierren argues that the superior court failed to make adequate findings to support his sentence of 40 years with 11 years suspended (29 years to serve). Specifically, he asserts that the *Chaney* sentencing criteria do not support a sentence 4 years above the aggregate statutory minimum in his case.¹²

The superior court analyzed the sentencing criteria and concluded that Pierren was not a typical offender, and that the aggravating aspects of Pierren’s conduct warranted a sentence above the statutory minimum.¹³ The court emphasized that Pierren planned the assaults, groomed the victim, and abused his position of trust, saying, “I do find there was a plan involved. It wasn’t rocket science. But mom would leave and you would take advantage of a seven-year-old girl. I find a very vulnerable victim.” The court also found that there were “permanent and severe scars on the child,” and the court felt “extremely guarded” about Pierren’s prospects for rehabilitation. The court further concluded that deterrence was “critical both for you specifically and ... [for] the general public.”

¹⁰ *Frink v. State*, 597 P.2d 154, 165 (Alaska 1979) (holding that prosecutor has a duty to present exculpatory evidence to the grand jury).

¹¹ *Id.*

¹² *See Chaney v. State*, 477 P.2d 441, 443 (Alaska 1970).

¹³ *See id.*; AS 12.55.005 (codifying the Cheney criteria).

We have independently reviewed the sentencing record in this case and we conclude that the sentence imposed was within the permissible range of sentences a reasonable judge would impose under these circumstances and the superior court's sentence was therefore not clearly mistaken.¹⁴

Conclusion

We AFFIRM Pierren's convictions and his sentence.

¹⁴ See *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).