

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

JOHN A. HERSH,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12087  
Trial Court No. 3PA-09-2193 CI

MEMORANDUM OPINION

No. 6466 — May 17, 2017

Appeal from the Superior Court, Third Judicial District, Palmer,  
Eric Smith, Judge.

Appearances: John A. Hersh, *in propria persona*, Palmer, for  
the Appellant. Terisia K. Chleborad, Assistant Attorney  
General, Office of Criminal Appeals, Anchorage, and Craig W.  
Richards, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

John A. Hersh was convicted of repeatedly sexually abusing his daughters.  
We affirmed his convictions on direct appeal in an unpublished opinion, *Hersh v. State*,  
Alaska App. Memorandum Opinion No. 5782 (December 21, 2011), 2011 WL 6450909.

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

In 2009, Hersh filed a petition for post-conviction relief, alleging that he received ineffective assistance from his trial attorney and also from the attorney who represented him on direct appeal. The superior court held an evidentiary hearing on Hersh's claims and, based on the evidence presented, the court ruled that Hersh had failed to establish that he was entitled to post-conviction relief.

Hersh now appeals the superior court's rejection of his claims. For the reasons explained in this opinion, we affirm the judgement of the superior court.

*Facts pertaining to the underlying criminal prosecution*

Hersh began sexually touching his daughter A.H. when she was about nine or ten years old. Hersh abused A.H. between ten and twenty times a month over the course of a "couple years". Hersh also began touching A.H.'s younger sister, C.H., when C.H. was eight years old.

The two girls initially decided not to tell anyone about this sexual abuse because they did not think that anyone would believe them, and because they believed that Hersh would get mad. But one evening, A.H. and C.H. finally told their mother, Suzanne, about the abuse. The next day, Suzanne reported her daughters' statements to the Alaska State Troopers in Palmer.

Suzanne agreed to speak with Hersh about the sexual abuse, and Trooper Investigator Sherry Ferno obtained a *Glass* warrant to record these conversations.<sup>1</sup>

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<sup>1</sup> See *State v. Glass*, 583 P.2d 872 (Alaska 1978) (holding that, under the Alaska Constitution, the police must obtain a warrant before electronically monitoring or recording a private conversation, even when one or more participants to the conversation consent to the police surveillance).

The first recorded conversation between Suzanne and Hersh took place over the telephone. Following this first recorded conversation, Suzanne agreed to meet Hersh in person at a Walmart in Wasilla.

During that second recorded conversation, Hersh made several admissions. Hersh admitted that “[t]he kids don’t lie.” And when Suzanne asked Hersh if he had used more than just his hands to abuse the children, he answered yes. In addition, Hersh promised Suzanne that he would “never offend [his] daughters’ honor in any way again ever”, and that he would “not touch [his] girls inappropriately again.” Hersh also told Suzanne that whenever he heard someone use the term “child molester”, it “made [him] sick. Because that’s what I’ve done.”

Hersh was ultimately convicted of one count of first-degree sexual abuse of a minor for engaging in sexual penetration with A.H., four counts of second-degree sexual abuse of a minor for engaging in sexual contact with A.H. and C.H., and one count of incest for engaging in sexual penetration with A.H. (Hersh was also convicted of two counts of first-degree unlawful contact, based on his act of sending birthday cards to A.H. and C.H. in violation of his conditions of release.)

#### *Facts pertaining to the post-conviction relief proceedings*

In 2009, Hersh filed an application for post-conviction relief in the superior court. Although counsel was initially appointed to represent him, Hersh later waived his right to counsel and elected to represent himself.

In his petition, Hersh made numerous allegations that his trial counsel, Andrew Weinraub, had provided ineffective assistance. Hersh alleged (1) that Weinraub failed to seek dismissal of the grand jury indictment on various grounds; (2) that Weinraub failed to adequately investigate whether Hersh’s father had sexually abused

one of Hersh's daughters some years earlier; (3) that Weinraub failed to object at trial to certain evidence introduced by the State, and to certain statements made by the prosecutor; (4) that Weinraub improperly allowed the jury to learn that Hersh had a previous conviction for driving under the influence; and (5) that Weinraub's friendship with the prosecutor created a conflict of interest that prevented him from zealously defending Hersh.

Hersh also claimed that his appellate attorney, Glenda Kerry, had provided ineffective assistance by not arguing on appeal that the grand jury indictment should have been dismissed on the ground that, when Hersh's case was presented to the grand jury, the prosecutor made improper references to the fact that Hersh declined to speak to the police about the charges.

Superior Court Judge Eric Smith held an evidentiary hearing into Hersh's claims. At this hearing, both Hersh and Weinraub testified, but Hersh did not call Kerry as a witness.

Based on the evidence presented, Judge Smith issued a written decision discussing Hersh's claims of ineffective assistance and explaining why he rejected them.

*Hersh's claim that his trial attorney incompetently failed to seek dismissal of the indictment because of the prosecutor's adverse comment on Hersh's right to remain silent*

Hersh claims that his trial attorney incompetently failed to seek dismissal of the indictment, based on the fact (1) that the prosecutor who presented Hersh's case to the grand jury informed the grand jurors that Hersh declined to speak to investigators about the allegations of sexual abuse, and (2) that the prosecutor compounded this error by eliciting testimony from Investigator Sherry Ferno that Hersh declined to discuss the charges with her.

As Judge Smith acknowledged in his written decision, both the prosecutor's comment and the ensuing testimony from Investigator Ferno were improper; they constituted "an impermissible comment on Mr. Hersh's constitutional right not to incriminate himself."<sup>2</sup> Judge Smith also declared that, had Mr. Weinraub raised this issue in a motion to dismiss the indictment, he would have granted the motion and dismissed the indictment.

But as Judge Smith correctly recognized, in order for Hersh to obtain post-conviction relief on this claim, Hersh had to show not only that Weinraub might have obtained dismissal of the indictment on this ground, but also that a favorable ruling on this point would have precluded the State from obtaining a second indictment. *See Shetters v. State*, 751 P.2d 31, 36 (Alaska App. 1988); *Wilson v. State*, 711 P.2d 547, 550 n. 2 (Alaska App. 1985).<sup>3</sup>

Judge Smith concluded that if Hersh's case had been resubmitted to the grand jury with the improper comments redacted, the State's evidence "would have been fully sufficient to support the same indictment on which Mr. Hersh was tried." The judge therefore ruled that Hersh had failed to prove his claim of ineffective assistance of counsel.

On appeal, Hersh argues that the rule of *Shetters* and *Wilson* does not apply to the circumstances of his case. He points out that the error in his case was not simply the introduction of evidence in violation of the rules of evidence; rather, the error was

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<sup>2</sup> *See Adams v. State*, 261 P.3d 758, 764-65 (Alaska 2011).

<sup>3</sup> *See also Ritter v. State*, 16 P.3d 191, 193-94 (Alaska App. 2001), and *Ryan v. State*, 899 P.2d 1371, 1383 (Alaska App. 1995) (holding that an attack on an indictment is not a "dispositive" claim for purposes of a *Cooksey* plea unless a ruling in the defendant's favor would preclude re-indictment).

an adverse comment on the fact that he exercised his Fifth Amendment right to remain silent.

We acknowledge this distinction, but we conclude that it does not make a difference in the context of Hersh's case. When a defendant seeks relief based on a grand jury error (either on direct appeal, or by claiming ineffective assistance of counsel in post-conviction relief litigation), the defendant must show prejudice. And in this context, "prejudice" does not mean merely that the indictment might have been dismissed and the progress of the prosecution delayed. Rather, under this Court's decisions in *Shetters*<sup>4</sup> and *Wilson*,<sup>5</sup> if a defendant is to establish prejudice, the defendant must show that a successful attack on the indictment would have led to a final dismissal of the charges, or at least to a final alteration of the charges in the defendant's favor.

For this same reason, we reject Hersh's related argument that his appellate attorney, Kerry, was incompetent for failing to raise this grand jury issue on direct appeal.

*Hersh's claim that his trial attorney incompetently failed to seek dismissal of the indictment because of the prosecutor's mischaracterization of Hersh's recorded conversations with his wife*

Hersh offers a second reason why Weinraub was incompetent for failing to seek dismissal of the indictment. Hersh claims that, at grand jury, the prosecutor misrepresented the content of Suzanne Hersh's two recorded conversations with Hersh about the sexual abuse. Specifically, Hersh claims that the prosecutor lied to the grand

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<sup>4</sup> 751 P.2d at 36.

<sup>5</sup> 711 P.2d at 550 n. 2.

jurors when she told them that, when Suzanne confronted Hersh about their daughters' allegations, Hersh "didn't make any denials".

Hersh also claims that Investigator Ferno misrepresented the content of the recorded conversations when she testified that, during Suzanne's first conversation with Hersh (*i.e.*, the telephone conversation), Hersh "didn't make admissions, and he really didn't deny it either. He just said 'no', and that was it."

The record shows that, contrary to what the prosecutor told the grand jurors, Hersh *did* deny the allegations of sexual abuse during his first recorded conversation with Suzanne — the conversation that took place over the telephone. In the following excerpts from that first conversation, Hersh made direct denials:

*Suzanne:* I'm just wondering if it's true or not, John,  
... that you've been touching them where you shouldn't be.

*Hersh:* No.

. . .

*Hersh:* I'm not gonna get angry with the girls. You know. We watch movies. We haven't been doing anything inappropriately, you know.

. . .

*Suzanne:* Is that what I said? No, that's not what I said. I said before that, if they're gonna need counseling or something, something has to happen.

*Hersh:* Nothing has happened, Suze. Can we talk together as a family? Because I mean, you know what happens. You get involved with anything with the state, automatically, you know — you know, I've had enough of that.

*Suzanne:* I just, I don't understand why they would both say it, John.

*Hersh:* Well, I don't understand why either, Suze. I mean it hasn't, it's, it's been nothing. ... You know, same shit as, you know, pinch their butt, poke 'em in the sides, tickling 'em, wrestling 'em around. Nothing.

. . .

*Suzanne:* ... You don't know how hard it was for her to say it either. She didn't wanna tell me, and I had to pry it out of her. So did you touch them, John?

*Hersh:* No, Suze. They're my girls.

. . .

*Suzanne:* Has something happened, John?

*Hersh:* No, Suze. I mean, nothing that — no.

. . .

*Suzanne:* You're telling me that you haven't touched them inappropriately?

*Hersh:* That's what I'm telling you.

As shown by these excerpts, Hersh repeatedly denied the allegations of sexual abuse during these portions of the recorded telephone conversation. Thus, Hersh's trial attorney had a supportable argument that both the prosecutor and the investigator mischaracterized Hersh's responses when they summarized them to the grand jurors.

However, as we have already explained, Hersh made several admissions of criminality during the *second* recorded conversation with his wife — the conversation that took place face-to-face. During that second recorded conversation, when Suzanne asked Hersh if he had abused their children using more than just his hands, Hersh answered yes. Hersh promised Suzanne that he would “never offend [his] daughters’

honor in any way *again ever*”, and that he would “not touch [his] girls inappropriately *again*.” Hersh also told Suzanne that whenever he heard someone use the term “child molester”, it “made [him] sick” because “that’s what [he had] done.”

In light of Hersh’s admissions during the face-to-face conversation with his wife, Judge Smith concluded that Hersh’s trial attorney, Weinraub, could competently conclude that a motion to dismiss the indictment on this issue would not have succeeded. We reach the same conclusion.

*Hersh’s claim that his trial attorney incompetently failed to seek dismissal of the indictment because of the purportedly misleading testimony of the nurse who examined one of Hersh’s daughters*

Hersh offers yet a third reason why Weinraub was incompetent for failing to seek dismissal of the indictment. Hersh asserts that the nurse who testified at grand jury concerning her physical examination of A.H. gave misleading testimony.

The nurse testified that when she examined A.H.’s and C.H.’s genitals, she observed some vaginal discharge and redness. According to Hersh, the nurse then asserted that the discharge and the redness tended to prove that A.H. and C.H. had been sexually abused.

But the grand jury record shows that this nurse did *not* assert that the vaginal discharge and redness tended to prove sexual abuse. Rather, the nurse testified that these factors were “indeterminate” of sexual abuse — because the observed discharge and redness “could be caused by other medical problems or mechanisms”.

At the evidentiary hearing on Hersh’s petition for post-conviction relief, Weinraub explained that he did not attack the indictment on this ground because he simply did not interpret the nurse’s testimony in the way Hersh suggested. Given the grand jury record, the superior court could properly conclude that Weinraub’s

interpretation of the nurse's testimony was reasonable, and that Weinraub's decision not to attack the indictment on this ground was likewise reasonable.

*Hersh's claim that his trial attorney was incompetent in his litigation of the motion that he filed seeking dismissal of the indictment*

Hersh's final argument regarding Weinraub's purportedly incompetent failure to attack the indictment arises from a pre-trial motion that Weinraub filed in which he *did* seek dismissal of two counts of the indictment: Count 1, which charged Hersh with first-degree sexual abuse of A.H., and Count 6, which charged Hersh with incest (again, involving A.H.).

Both of these counts required the State to prove that Hersh engaged in sexual penetration with A.H., not just sexual contact.<sup>6</sup> In his motion to dismiss these two counts, Weinraub argued that the grand jury evidence failed to support a finding of sexual penetration.

In the State's opposition to this motion, the prosecutor asserted that "A.H. described that her father rubbed his penis back and forth on her vagina. This action would constitute sexual penetration as it would penetrate beyond the labia majora." Weinraub did not file a response to the prosecutor's opposition.

In Hersh's petition for post-conviction relief, Hersh contended that Weinraub acted incompetently when he failed to challenge the prosecutor's assertion about the act of sexual penetration. Hersh noted that A.H. testified that both she and Hersh were wearing underwear when Hersh rubbed his penis "near where [A.H.] goes to the bathroom". Hersh argued that if both he and A.H. were wearing underwear at the time, then sexual penetration was physically impossible. Thus, Hersh contended,

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<sup>6</sup> See AS 11.41.434(a)(2) and AS 11.41.450(a)(1).

Weinraub represented him incompetently when he failed to challenge the prosecutor's assertion that A.H.'s description supported the grand jury's finding of sexual penetration. Hersh argued that if Weinraub had done a competent job on this issue, Counts 1 and 6 of the indictment would have been dismissed.

When Weinraub testified at the evidentiary hearing in the post-conviction relief litigation, Hersh asked Weinraub to explain why he failed to attack the prosecutor's assertion that the grand jury evidence supported a finding of sexual penetration. Weinraub replied that he did not consider the prosecutor to have misstated the evidence. Rather, Weinraub explained, he thought that the prosecutor was offering a legal argument as to the inferences that might reasonably be drawn from the evidence.

Judge Smith then asked Weinraub whether, "if somebody takes their finger and rubs [a child's] vagina, but [the child has] their underwear on, but nevertheless the underwear and the finger go in [the genital opening], would you consider that penetration?" Weinraub answered, "Yes."

Weinraub's answer to Judge Smith's question was legally correct. Under the definition of "sexual penetration" codified in AS 11.81.900(b)(60)(A), sexual penetration includes "an intrusion, however slight, of an object or any part of a person's body into the genital ... opening of another". Thus, sexual penetration could occur even if both Hersh and A.H. were wearing underwear when he rubbed his penis into her genital opening.

Hersh is therefore wrong when he asserts that the grand jury evidence is patently insufficient to support a finding of sexual penetration, and that Weinraub was incompetent for failing to see this.

*Hersh's claim that his trial attorney failed to adequately investigate the allegation that Hersh's father sexually abused one of Hersh's daughters*

During the litigation of Hersh's underlying criminal case, evidence came to light suggesting that Hersh's father might have sexually abused one of Hersh's daughters, A.H., some years earlier. Hersh's wife Suzanne testified at an *in camera* pre-trial hearing that, when A.H. was three or four years old, A.H. reported to Suzanne that she had been abused by her grandfather. According to Suzanne, when she informed Hersh of what A.H. had said, Hersh believed that A.H. was telling the truth. Suzanne stated that Hersh became so angry that, "if he could have gotten to his father, he would have killed him."

Hersh's defense attorney, Weinraub, wished to have Suzanne testify at Hersh's trial about this incident, on the theory that Hersh's father had indeed sexually abused A.H., and that A.H. was now confusedly attributing this abuse to Hersh. But the State filed a pre-trial motion *in limine* to prevent Weinraub from introducing this evidence, and the superior court granted the State's motion (*i.e.*, the court ruled that the defense could not present this evidence).

On direct appeal, Hersh argued that Suzanne had accurately reported A.H.'s allegation of abuse, and that A.H. had in fact been abused by Hersh's father.<sup>7</sup> Hersh's appellate attorney contended that the trial judge committed error by refusing to allow Hersh's trial attorney to introduce this evidence, because the evidence was relevant for two purposes. The first purported ground of relevance was to prove that Hersh's father, and not Hersh himself, had sexually abused A.H., and that A.H. had confusedly attributed the acts of abuse to Hersh. The second purported ground of relevance was to

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<sup>7</sup> See *Hersh v. State*, unpublished, 2011 WL 6450909 at \*2 (Alaska App. 2011).

prove that Hersh’s wife, Suzanne, somehow blamed Hersh for what his father had done, and that Suzanne was therefore biased against Hersh.

When this Court decided Hersh’s direct appeal, we addressed both of these purported grounds of relevance.<sup>8</sup> We upheld the trial judge’s ruling that, even if A.H. had been sexually abused by Hersh’s father when she was three or four years old, Hersh offered no evidence to support the assertion that A.H. would confuse this earlier act of abuse with the repeated acts of sexual abuse that Hersh inflicted on her years later.<sup>9</sup> We also noted that Hersh had presented “no evidence suggesting that Suzanne blamed Hersh for his father’s misconduct.” Rather, Hersh “presented only unfounded speculation” that his wife might have been angry at him for what his father might have done.<sup>10</sup>

When Hersh filed his petition for post-conviction relief, he again raised this issue — but this time, Hersh claimed that the allegation against his father was *false*. In his application for post-conviction relief, Hersh insisted that his father had *not* sexually abused A.H. In fact, Hersh contended that his father had a medical condition that would have made it impossible for him to sexually abuse A.H. Hersh further contended that his trial attorney, Weinraub, had incompetently investigated this matter — that Weinraub would have learned about Hersh’s father’s inability to commit the act of sexual abuse if Weinraub had only interviewed Hersh’s mother and other family members. And Hersh contended that he had been prejudiced by Weinraub’s failure to properly investigate this matter — because, if Weinraub could have shown that it was medically impossible for Hersh’s father to sexually abuse A.H., and that Hersh’s wife Suzanne came forward with an allegation of sexual abuse that could not have happened, then (according to Hersh)

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<sup>8</sup> *See id.* at \*2-3.

<sup>9</sup> *Id.* at \*3.

<sup>10</sup> *Id.* at \*2.

this would have suggested that Suzanne's accusations against Hersh himself should also be distrusted.

But as Judge Smith declared in his written decision, Hersh "cannot have it both ways". If Hersh knew about his father's medical condition, or if Hersh thought for any other reason that A.H.'s accusation against his father was false, then Hersh "could have corrected the matter at the time Mr. Weinraub raised the issue." But instead, Hersh apparently allowed Weinraub to make accusations of sexual abuse against Hersh's father when Hersh knew that these accusations were not true.

Before Hersh took the stand at the evidentiary hearing on his petition for post-conviction relief, Judge Smith warned Hersh that he would "have to explain why [he] let [Weinraub] go through an entire [pre-trial] hearing making an argument that was predicated on [the truth of A.H.'s accusation against Hersh's father]", instead of informing Weinraub that A.H.'s accusation could not be true. But when Hersh took the stand at the evidentiary hearing, he never offered an explanation for his allowing Weinraub to litigate the matter in this fashion.

Just as importantly, even assuming that Weinraub could reasonably have handled this matter differently, this does not show that Weinraub's representation of Hersh was incompetent.

Hersh now argues that Weinraub should have doubted A.H.'s report, and that Weinraub should have investigated the matter to see if this alleged act of sexual abuse by Hersh's father was medically possible. But there was an obvious tactical benefit in arguing that the reported act of sexual abuse *had* occurred. And it was Hersh's burden to show that *no* reasonably competent defense attorney would have handled this matter as Weinraub did.<sup>11</sup>

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<sup>11</sup> *State v. Jones*, 759 P.2d 558, 568 (Alaska App. 1988).

For these reasons, we uphold Judge Smith’s ruling that Hersh failed to establish his claim of ineffective assistance of counsel on this point.

*Hersh’s claims that his trial attorney incompetently represented him at trial*

In addition to attacking the competency of Weinraub’s representation in the pre-trial litigation of his underlying criminal case, Hersh also claimed in his petition for post-conviction relief that Weinraub provided him ineffective assistance at trial.

Hersh argued that Weinraub failed to effectively cross-examine the nurse who examined A.H. and C.H. following the report of the sexual abuse. In particular, Hersh criticized two aspects of Weinraub’s cross examination.

First, Hersh argued that Weinraub incompetently failed to challenge the nurse’s purported testimony that the results of the physical examinations tended to show that the two girls had been sexually abused. Second, Hersh argued that Weinraub incompetently failed to object when the prosecutor, through the nurse’s testimony, introduced photographs showing the physical condition of the girls’ genitals at the time of their examinations.

With regard to Hersh’s assertion that Weinraub failed to effectively cross-examine the nurse about the results of the physical examinations, we have already explained how Hersh mischaracterized the nurse’s testimony. The nurse did *not* assert that the results of the physical examinations tended to prove that the two girls had been sexually abused. Rather, the nurse characterized the results as “indeterminate” — potentially consistent with sexual abuse, but also consistent with other medical problems or conditions.

With respect to Hersh's claim that Weinraub should have objected to the photographs of A.H.'s and C.H.'s genitals that were introduced through the nurse's testimony, Weinraub directly addressed this claim when he testified at the post-conviction relief evidentiary hearing. Weinraub explained that, while he agreed that the photographs might have been prejudicial because of their nature, he concluded that the photographs were helpful to Hersh's defense because they showed a lack of physical injury. Weinraub acknowledged that the photographs showed redness in the children's vaginas, but Weinraub concluded that, given the long interval between the time when the sexual abuse allegedly occurred and the time when the photographs were taken, he could credibly argue to the jury that any redness in the victims' vaginas was not caused by Hersh.

Judge Smith credited Weinraub's explanation of this matter, and the judge concluded that Weinraub's approach to this issue was a competent tactical decision.

The record supports Judge Smith's findings, and we therefore affirm his ruling on this claim of ineffective assistance of counsel.

Hersh also claims that Weinraub was ineffective at trial because he failed to object to portions of the prosecutor's final argument where the prosecutor discussed the recorded conversations between Hersh and his wife — the conversations during which Hersh's wife confronted him about their daughters' reports of sexual abuse.

Focusing on the second recorded conversation, the prosecutor told the jurors that Hersh did not deny the accusations, nor did he offer any explanation. In his petition for post-conviction relief, Hersh claimed that the prosecutor was improperly commenting on Hersh's right to remain silent, and that Weinraub was incompetent for failing to object to the prosecutor's argument.

This claim lacks merit as a matter of law. Hersh was being interrogated by his wife, not by the police, and he was unaware that the police were monitoring the

conversation. Moreover, Hersh did not remain silent when his wife confronted him with the allegations of sexual abuse; he did not refuse to discuss these matters with her. Rather, Hersh made admissions indicating that he acknowledged the truth of what his children had said. Thus, when the prosecutor argued that Hersh had not denied the allegations or offered any explanation, this was not an impermissible comment on Hersh's right to silence under the Fifth Amendment.<sup>12</sup>

Hersh next argues that Weinraub was incompetent for introducing evidence that Hersh was in jail for driving under the influence. Weinraub decided to introduce this evidence in response to a mid-trial motion made by the prosecutor.

During Hersh's trial, the prosecutor alerted Judge Smith that she wanted to introduce evidence that Hersh had previously been in jail. The prosecutor explained that her request was based on the content of the defense opening statement. Apparently, in his opening statement, Weinraub suggested that, prior to the allegations of sexual abuse coming to light, Suzanne Hersh had wanted to divorce Hersh, but that Suzanne's religious scruples prevented her from initiating a divorce. Weinraub implied that Suzanne contrived the allegations of sexual abuse so that she could not be blamed for seeking a divorce.

The prosecutor told the judge that she wanted to rebut the defense attorney's suggestion that Suzanne had fabricated allegations of sexual abuse in order to force an end to the marriage. The prosecutor proposed to introduce evidence that, during the marriage, Hersh had been jailed for various periods of time, but Suzanne had stood by her husband rather than using those opportunities to remove him from the household.

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<sup>12</sup> See *Barr v. State*, 320 P.3d 816, 821-22 (Alaska App. 2014); *Hilburn v. State*, 765 P.2d 1382, 1390 (Alaska App. 1988).

When the prosecutor's motion was argued, Weinraub conceded that evidence of Hersh's prior incarcerations might be admissible on this ground. Judge Smith granted the motion, although the judge clarified that the prosecutor could introduce only the *fact* that Hersh had been incarcerated, and not the reasons for it.

Thus, during the State's direct examination of Suzanne Hersh, the prosecutor asked Suzanne about her husband's prior incarcerations — in particular, how many times Hersh had been in jail, and for how long. In response, on cross examination, Weinraub asked Suzanne to clarify that Hersh's incarcerations had only been for DUI offenses.

In his petition for post-conviction relief, Hersh asserted that Weinraub acted incompetently when he elicited this information from Suzanne (*i.e.*, the reasons for Hersh's prior stints of incarceration). But at the evidentiary hearing, Weinraub explained that he discussed this issue with Hersh, and that Hersh and he had “collectively decided [that] the benefits of attacking Hersh's wife on that point” — *i.e.*, her purported desire for a divorce — “outweighed the detriment of the door being opened [to evidence of Hersh's prior incarcerations].”

Weinraub further explained that, because the prosecutor would be allowed to introduce evidence of the *fact* of Hersh's prior incarcerations, Weinraub was concerned that the jurors might assume that Hersh had been jailed for assaultive behavior. Weinraub wanted the jurors to understand that Hersh had been jailed only for DUI, and nothing worse. Weinraub therefore made the “strategic decision” to elicit this information from Suzanne Hersh.

In light of Weinraub's explanation, and because Hersh offered no evidence that competent attorneys would not have done this, Judge Smith concluded that Weinraub's decision was competent, and that Hersh had failed to substantiate his claim

of ineffective assistance of counsel on this point. We agree that the record supports Judge Smith's conclusion.

For these reasons, we uphold Judge Smith's rulings that Hersh failed to prove that he received ineffective assistance of counsel at trial.

*Hersh's unlitigated claim that his trial attorney represented him incompetently*

In his brief to this Court, Hersh raises one additional attack on his trial attorney's competence.

At Hersh's trial, evidence was introduced regarding a telephone call that Hersh made from jail while he was awaiting trial. In his brief on appeal, Hersh argues that the prosecutor improperly commented on this evidence. Hersh contends that the prosecutor's comment improperly called for speculation, that it placed improper emphasis on Hersh's failure to deny the allegations of sexual abuse, and that it attributed a statement to Hersh that he never actually made.

Hersh never raised this issue during the post-conviction relief litigation in the superior court. It was not included in Hersh's application, nor did Hersh ask Weinraub about the prosecutor's comment during the evidentiary hearing. Thus, this claim is not preserved for appeal.<sup>13</sup>

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<sup>13</sup> See, e.g., *Mitchell v. Mitchell*, 370 P.3d 1070, 1077 (Alaska 2016); *Bourdon v. State*, 370 P.3d 1116, 1118 (Alaska App. 2016).

*Hersh's claim that his trial attorney labored under a conflict of interest arising from his friendship with the prosecutor*

Hersh's remaining claim of ineffective assistance of counsel arises from the fact that his trial attorney, Weinraub, was friends with the prosecutor handling Hersh's case. Hersh contends that this friendship prevented Weinraub from representing him zealously.

Hersh raised this claim in his application for post-conviction relief, and he provided an affidavit from his mother in support of this claim. In her affidavit, Hersh's mother declared that Weinraub "[felt it] necessary to remind [her], on sep[a]rate occasions, that he was friends with [the prosecutor] outside of court[,] and [that he] would not compromise that integrity."

But Hersh did not call his mother to testify at the post-conviction relief evidentiary hearing. Nor did Hersh ask Weinraub any questions about his relationship with the prosecutor during the evidentiary hearing. And Hersh never asked Judge Smith to rule on this issue.

Because Hersh presented no evidence at the hearing to support this claim, and because Hersh received no ruling on this claim from the superior court, we conclude that this claim is not preserved for appeal.<sup>14</sup>

In his brief to this Court, Hersh asserts that there was no need for him to elicit any testimony on this issue because Judge Smith accepted the affidavit of his mother as true (without requiring Hersh to present her testimony). Hersh appears to be referring to the portion of the evidentiary hearing where Judge Smith indicated that he was "prepared to accept, as an offer of proof, ... that [Hersh's] mother would testify *that*

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<sup>14</sup> See, e.g., *Snowden v. State*, 352 P.3d 439, 444-45 (Alaska App. 2015).

*the [defense] investigator never asked her about the accuracy of the allegations [of sexual abuse] involving her husband [i.e., Hersh's father]”.*

The State did not oppose Judge Smith's proposal to treat this one portion of Hersh's mother's affidavit as an offer of proof regarding Hersh's claim that Weinraub was incompetent for failing to discover that Hersh's father had a medical condition that would have prevented him from sexually abusing A.H.

But this portion of the mother's affidavit was not relevant to Hersh's claim regarding Weinraub's friendship with the prosecutor. And contrary to Hersh's suggestion on appeal, neither Judge Smith nor the State accepted Hersh's mother's affidavit as true *in its entirety*.

*Hersh's claim that Judge Smith improperly prevented him from calling relevant witnesses at the post-conviction relief evidentiary hearing, and improperly gave him too little time to litigate his claims for post-conviction relief*

Finally, Hersh contends that Judge Smith failed to give him sufficient time to properly litigate his petition for post-conviction relief, and that Judge Smith improperly prevented him from calling relevant witnesses.

But Hersh does not point to any specific portion of the record where Judge Smith restricted Hersh's testimony or his questioning of witnesses, nor does Hersh identify any witnesses whom he was prevented from calling at the evidentiary hearing. Nor does Hersh explain what other claims of error he would have raised, or what other evidence he would have presented, if he had been given more time.

We therefore reject Hersh's contention that Judge Smith failed to give him a fair opportunity to litigate his post-conviction relief claims.

*Conclusion*

The judgement of the superior court is AFFIRMED.