

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

LESTER C. PITKA,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11635  
Trial Court No. 4SM-12-067 CR

MEMORANDUM OPINION

No. 6467 — May 17, 2017

Appeal from the Superior Court, Fourth Judicial District, Bethel,  
Dwayne W. McConnell and Ethan Windahl, Judges.

Appearances: John Page, Assistant Public Defender, and  
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.  
Nancy R. Simel, 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.

Lester C. Pitka appeals his conviction for third-degree assault under  
AS 11.41.220(a)(5) (*i.e.*, a repeat offender convicted of fourth-degree assault). Pitka was

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

convicted of this crime based on evidence that, during an argument with his girlfriend, Allison Housler, he burned her on the cheek with a lit cigarette.

At Pitka's trial, the State wished to offer evidence of eight prior instances where Pitka committed acts of domestic violence against Housler. *See* Alaska Evidence Rule 404(b)(4). The trial judge ultimately ruled that the State could introduce evidence of four of these prior crimes — although the judge reserved the authority to curtail this evidence “[if] we're getting too far away from the current case.”

On appeal, Pitka concedes that he pleaded guilty to the four prior assaults, and that these assaults qualified for admission under Alaska Evidence Rule 404(b)(4). But Pitka argues that the trial judge abused his discretion when he allowed the State to introduce evidence of so many of Pitka's prior assaults on Housler.

The judge's decision must be analyzed in light of the facts that Housler opposed the State's decision to prosecute Pitka, and that she proved to be a very reluctant witness at Pitka's trial.

Housler testified that she was the one who initiated the confrontation with Pitka, and she repeatedly declared that Pitka did nothing to hurt her. Housler also repeatedly tried to deflect the prosecutor's questions about the prior occasions when Pitka had assaulted her. Later, the trial judge remarked that Housler “was as difficult a witness as anyone will ever have to deal with”.

Given the obstacles that Housler tried to place in the path of the State, we conclude that the trial judge did not abuse his discretion when he allowed the prosecutor to introduce evidence of Pitka's four prior assaults on Housler.

Pitka also attacks certain remarks that the prosecutor made during the State's opening statement, and other remarks that the prosecutor made during the State's closing argument.

In the prosecutor's opening statement, he spoke of Pitka's pattern of abusing Housler, and of Housler's pattern of returning to Pitka, only to be abused again. The prosecutor told the jurors that the story of Pitka's case "is very sad, but it's all too common in the [Yukon-Kuskokwim] Delta." And, after outlining the State's evidence of the assault charged in this case, as well as the evidence of Pitka's past assaults on Housler, the prosecutor told the jurors: "[I am] certain that you will be convinced beyond a reasonable doubt ... , just the same as I am, that [Pitka] did in fact ... assault Allison Housler."

A prosecutor is not allowed to express their personal opinion that a defendant is guilty.<sup>1</sup> Pitka's attorney objected to the prosecutor's remarks, and he asked for a mistrial. The trial judge agreed that the prosecutor had crossed the line when he declared his personal belief in Pitka's guilt, but the judge denied the defense attorney's request for a mistrial.

During closing arguments, the prosecutor returned to his theme that Pitka and Housler had an ongoing abusive relationship. Referring to the evidence of Pitka's four prior assaults on Housler, the prosecutor asserted that Pitka's case demonstrated a "cycle of violence", and he told the jurors that the State's criminal prosecution of Pitka was designed to "help cure the abusive qualities within [this] relationship".

And during his rebuttal summation, the prosecutor spoke directly to the jurors and tried to elicit personal responses from them:

*Prosecutor:* We talked about Mr. Pitka's prior bad acts. Don't vote guilty because of what he did in the past. Vote guilty because of what you know to be true on June 3,

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<sup>1</sup> See Alaska Professional Conduct Rule 3.4(e) ("A lawyer shall not ... state a personal opinion as to the justness of a cause ... or the guilt or innocence of an accused."); *Patterson v. State*, 747 P.2d 535, 538 (Alaska App. 1987).

2012. [But consider the defense] argument ... that Allison [Housler] lied, [but] she's telling the truth now. ...

In 2009, he assaulted her, and they're saying that's true. Again in 2009, he assaulted her, and [they concede] that was true. Again in 2010, he assaulted her, and that was true. Again in 2011, he assaulted her, and that was true. [But on] June 3rd, 2012, he assaulted her? Nope, that's where [Ms. Housler says] she lied. ...

Does that make any sense to anybody? Does that make any sense that she would pick the one time where he's on trial, the one time [when he goes to trial], [and] that's when she's lying? Really? Does anybody believe that? Look around. None of you are raising your hands. None of you look like you believe that.

*Defense Attorney:* Judge, that's objectionable.

*The Court:* I agree.

[The defense attorney then turns to a different objection, without asking the judge for relief.]

Several minutes later (at the conclusion of the prosecutor's rebuttal argument), Pitka's attorney moved for a mistrial. But the defense attorney did not ask for a mistrial based on the theory that the prosecutor had implicitly asked the jurors to support the State's efforts to "cure" Pitka and Housler's "abusive relationship". Nor did the defense attorney ask for a mistrial based on the fact that the prosecutor had tried to elicit personal responses from the jurors. Rather, the defense attorney asked for a mistrial because, at one point in the State's closing argument, the prosecutor had referred to Housler as a "victim".

*Defense Attorney:* Your Honor made a very specific ruling: no use of the word “victim”. That [ruling] ... was based [on] Alaska case law ... that the State was not to use the term “victim”. Your Honor made that ruling. [And the prosecutor] used the word “victim”. I can’t believe that. And we’re entitled — and that is exactly why we have these protective orders, and that is what taints the jury, is using these words. So we cannot use the word “victim”. There needs to be a mistrial.

The trial judge declined to declare a mistrial on this basis.

After the judge refused to declare a mistrial based on the fact that the prosecutor had once used the word “victim”, the defense attorney raised a different argument: he pointed out that it was improper for the prosecutor to try to elicit personal responses from the jurors during his summation. The trial judge again declared that he agreed with the defense attorney — *i.e.*, agreed that the prosecutor’s action had been inappropriate — but the judge declined to declare a mistrial.

On appeal, Pitka argues that the prosecutor’s comments were so prejudicial to the fairness of his trial that the judge was required to declare a mistrial when the defense attorney asked for one.

We agree with Pitka that it was improper for the prosecutor to express his personal belief in Pitka’s guilt. It was also improper for the prosecutor to suggest that the jurors should find Pitka guilty so that the State could “cure” Pitka and Housler’s ongoing “abusive relationship”. And finally, it was improper for the prosecutor to try to elicit personal responses from the jurors during final argument.<sup>2</sup>

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<sup>2</sup> Compare *Olson v. State*, 364 P.3d 454, 456-58 (Alaska App. 2015), where this Court discussed the related problem of a prosecutor’s addressing individual jurors by name.

But our duty is to evaluate the likely effect of those remarks when they are evaluated in the context of the entirety of the prosecutor’s opening statement and summation, as well as the evidence in Pitka’s case. Both the prosecutor’s opening statement and the prosecutor’s summation focused primarily on the evidence in the case — and why, based on that evidence, the jurors should reject Housler’s testimony that Pitka did nothing to assault her. Based on the record as a whole, we conclude that the prosecutor’s improper remarks did not undermine the fundamental fairness of Pitka’s trial.<sup>3</sup>

Accordingly, the judgement of the superior court is AFFIRMED.

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<sup>3</sup> See *Hess v. State*, 382 P.3d 1183, 1186 (Alaska App. 2016).