

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

FRANK W. LEE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11939  
Trial Court No. 1JU-12-1114 CR

MEMORANDUM OPINION

No. 6470 — May 17, 2017

Appeal from the Superior Court, First Judicial District, Juneau,  
Louis J. Menendez, Judge.

Appearances: Renee McFarland, Assistant Public Defender,  
and Quinlan Steiner, Public Defender, Anchorage, 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.

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

Frank W. Lee was convicted of second-degree sexual assault for sexually penetrating his adult stepdaughter while she was sleeping.<sup>1</sup> He appeals his conviction, arguing that his trial judge committed error by prohibiting Lee's attorney from introducing evidence of the stepdaughter's bias. Lee also appeals several conditions of his probation.

For the reasons explained in this opinion, we conclude that any potential error in the trial judge's evidentiary ruling was harmless. With respect to the challenged probation conditions, the State concedes error, and we accept the State's concession.

### *Underlying facts*

On September 10, 2012, Frank Lee's family was celebrating his birthday, and his wife's adult daughter, L.M., spent the night in their home. While L.M. was sleeping, Lee came into the room. He digitally penetrated L.M. and performed cunnilingus on her. L.M. woke up to find Lee's hand on her leg, and she saw Lee's head between her legs. As soon as she had gathered her wits, L.M. yelled at Lee to stop, and the police were called.

The police applied for and obtained a *Glass* warrant so they could monitor a telephone call between L.M. and Lee.<sup>2</sup> During this telephone call, L.M. confronted Lee about what he had done — demanding to know why Lee thought he could pull down her pants and touch her genitals. Lee repeatedly apologized, and he admitted to engaging

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<sup>1</sup> AS 11.41.420(a)(3)(B)-(C).

<sup>2</sup> *See State v. Glass*, 583 P.2d 872, 881 (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).

in this sexual activity with L.M. But Lee also suggested that the sexual activity had been consensual — that L.M. had removed her own pants, and that she was “enjoying it”.

Lee was arrested and charged with one count of first-degree sexual assault and two counts of second-degree sexual assault.

At Lee’s trial, the prosecutor relied primarily on the testimony of L.M. and on Lee’s own admissions during the monitored telephone call.

Lee’s attorney spent a good deal of his closing argument focusing on minor and largely inconsequential inconsistencies in the State’s case. But the defense attorney’s primary theory was that L.M.’s allegation of sexual assault was entirely fabricated.

Lee’s attorney argued that L.M. did not like Lee because he would nag her and he would not let her watch the TV shows she wanted to watch. The defense attorney suggested that L.M. might have decided to tell a “quick and impulsive” lie about Lee, and then that lie “turn[ed] into a bigger thing.”

In support of this theory, Lee’s defense attorney relied on the testimony of Albert Lord, who was a member of the grand jury that indicted Lee. According to Lord, he overheard a young woman — either L.M. or L.M.’s friend Jolene Wheaton — talking on the phone after Lee was indicted. Lord testified that, during this phone conversation, he heard the young woman say, “If you want to get rid of somebody that you don’t want around, accuse them of rape, take it to the grand jury, and it’ll all be said and done.”

The jury rejected this defense and convicted Lee of second-degree sexual assault.

*The challenged evidentiary ruling*

In this appeal, Lee argues that the trial judge improperly restricted his attorney's cross examination of L.M.

The defense attorney wished to question L.M. as to whether, during the weeks before Lee's birthday, family members had been threatening to report L.M. to the Office of Children's Services for neglect of her young child. The defense attorney's theory was that L.M. concocted a story of sexual assault so that her family members would feel sorry for her and would want to support her, and so that they would drop any thought of reporting her to the child protection authorities.

The trial judge ruled that the proposed evidence was irrelevant — or, that if the evidence was marginally relevant, it was too prejudicial to be admitted under Evidence Rule 403.

At first blush, this ruling is problematic. If L.M. had a motive for fabricating a claim of sexual assault against Lee, then evidence of that motive would clearly be relevant. However, the trial judge appears to have ultimately based his ruling on the defense attorney's failure to articulate a good-faith basis for the underlying *factual* premise of his proposed cross examination — *i.e.*, the assertion that L.M. made her accusation of sexual assault at a time when she was afraid that family members were going to report her to Children's Services.

L.M. testified that she was afraid that Children's Services would get involved, and that she might lose custody of her son, *if she reported Lee's sexual assault*. But there was no evidence that anyone threatened to report L.M. to the Office of Children's Services, or that L.M. was otherwise afraid of OCS involvement for any reason other than her report of the sexual assault.

When Lee's attorney explained his basis for the proposed cross examination, he relied on L.M.'s testimony that she feared OCS involvement if she reported Lee's sexual assault to the police. The defense attorney then argued that L.M.'s testimony "didn't make any sense" — insinuating that L.M. must have had some *other* (unspecified) reason for fearing that Children's Services would become involved with her family. But the defense attorney did not offer any proof as to what this other reason might be.

Given that the defense attorney's offer of proof apparently rested on unsupported speculation, the trial judge could reasonably conclude that the defense attorney's proposed impeachment had little relevance and great potential for unfair prejudice.

Moreover, even assuming that the trial judge should have allowed the defense attorney to question L.M. on this matter, we conclude that any error was harmless beyond a reasonable doubt.

As we have explained, the jury heard a recording of the statements Lee made during the monitored telephone conversation between him and L.M. In these recorded statements, Lee repeatedly apologized for sexually assaulting L.M. Lee expressly acknowledged that he had put two fingers into L.M.'s vagina, and he also told L.M. that he had "licked her butt". At trial, the only explanation that Lee's attorney offered for these recorded statements was that Lee had been drunk at the time, and that Lee was a "crude" and "dirty old man".

Given the other evidence presented at Lee's trial, we conclude that if the trial judge committed error in prohibiting Lee's attorney from cross-examining L.M. on this matter, that error was harmless beyond a reasonable doubt.

*Lee's challenges to his conditions of probation*

At Lee's sentencing, the court imposed several conditions of probation, and Lee now challenges four of these probation conditions.

First, the court ordered Lee to have no contact with minors under the age of 16, even though Lee's case did not involve sex with a minor. The court also ordered Lee not to possess "sexually explicit material", and not to enter any establishment whose primary business is the sale of "sexually explicit material". In addition, the court ordered Lee to consent to searches of his residence, his vehicles, his computers, and any other electronic devices that connect to the Internet (*e.g.*, his cell phone) for the presence of "sexually explicit material". Finally, the court ordered Lee to inform "all persons with whom he has a significant relationship", or with whom he "is closely affiliated", of his sexual assault conviction.

The State concedes that all four of these probation conditions are either factually unsupported or unconstitutionally vague. Based on our independent review of the record, we accept the State's concessions of error.<sup>3</sup> In particular, see this Court's decisions in *Diorec v. State*, 295 P.3d 409, 417 (Alaska App. 2013), and *Johnston v. State*, unpublished, 2013 WL 4780812, \*2-4 (Alaska App. 2013).

*Conclusion*

Lee's conviction for second-degree sexual assault is AFFIRMED.

The probation condition prohibiting Lee from associating with minors is REVERSED as having no factual basis. The other three challenged probation conditions

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<sup>3</sup> See *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess any concession of error by the State in a criminal case).

are VACATED. If the superior court decides to re-impose some version of these three conditions, the court must make specific findings as to why such conditions are justified under *Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977), and the court must clarify and narrow the scope of these conditions so that they are no longer unconstitutionally vague or overbroad.