

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

ROBERT LEO BEANS JR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals Nos. A-12139 & A-12140
Trial Court Nos. 3PA-14-1540 CR
& 3PA-14-1541 CR

MEMORANDUM OPINION

No. 6506 — August 9, 2017

Appeal from the District Court, Third Judicial District, Palmer,
William L. Estelle, Judge.

Appearances: Laurence Blakely, Assistant Public Defender, and
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
Eric A. Senta, Assistant District Attorney, Palmer, and Craig W.
Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Coats, Senior Judge* and
Suddock, Superior Court Judge.**

Senior Judge COATS.

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

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

Robert Leo Beans Jr. was convicted after a jury trial of two counts of fourth-degree assault. In the first assault, he placed his victim, Jennifer Afcan, in fear of injury, and in the second assault, committed a few days later, he recklessly injured Afcan. The assaults were joined for trial.

On appeal, Beans contends that the district court erred when it allowed the State, under Alaska Evidence Rule 404(b)(4), to admit evidence of a prior assault that Beans committed on Afcan in October of 2013, approximately four months before the events in this case. Beans also contends that it was error to admit certain aspects of this prior assault. Specifically, he challenges the admission of evidence that he was intoxicated during the October 2013 incident, and the audio recordings of threatening voice messages he left for Afcan after she reported the October assault. He also challenges the admission of evidence that he constantly threatened Afcan with violence during their relationship.

For the reasons explained in this decision, we conclude there was no error, and we therefore affirm Beans's convictions.

Background

According to Afcan's testimony, she and Beans had been in a relationship for a few months when, on February 22, 2014, Beans became angry at Afcan and threatened to kill her with a knife, holding it inches from her face. One month later, on March 21, Beans again became angry at Afcan and struck her on her lower back five times, in the area of her kidneys. He then grabbed her around her waist, and shook her "like a rag doll," squeezing her so hard that she urinated. Afcan testified that Beans was always accusing her of "messing around with somebody," or having an "affair with somebody." She explained that he constantly threatened her in order to prevent her from leaving him, and to prevent her from reporting his assaultive behavior towards her.

On March 24, Afcan reported the February and March assaults to the Wasilla Police Department. Beans was charged with assault for threatening Afcan with the knife, and he was also charged with recklessly injuring her during the physical assault.¹ The charges were joined for trial.

Prior to trial, the State notified Beans that it intended to introduce evidence pursuant to Alaska Evidence Rule 404(b)(1) and (b)(4) of Beans's prior assaultive behavior. One of these prior episodes — from October 2013 — involved an assault by Beans on Afcan.

Beans moved to exclude this evidence on the grounds that it was inadmissible character evidence, was not relevant, and if relevant, was unfairly prejudicial. The State argued primarily that because both of the charged counts in the instant case involved domestic violence, its evidence of Beans's prior crimes of domestic violence was admissible under Rule 404(b)(4).

To resolve this matter, District Court Judge William L. Estelle held a hearing the day before the trial began. At the hearing, the State made an offer of proof regarding Beans's various prior convictions for assault; police reports from the prior cases were attached to the State's motion. Ultimately, Judge Estelle allowed the State to introduce evidence from just one of these prior cases — the one from October 2013 when Beans assaulted Afcan. With regard to the October 2013 assault, after weighing the *Bingaman* factors,² Judge Estelle ruled that this was an incident of domestic violence that was more probative than prejudicial, and was admissible under Evidence Rule 404(b)(4) to show Beans's propensity for domestic violence.

¹ AS 11.41.230(a)(3) and AS 11.41.230(a)(1), respectively.

² See *Bingaman v. State*, 76 P.3d 398 (Alaska App. 2003).

(Judge Estelle also found that Beans's other assault convictions were not admissible under Evidence Rule 404(b)(4) because the State had not shown they involved domestic violence.)

At trial, the jury found Beans guilty of both charged assaults. Beans now appeals.

Discussion

On appeal, Beans contends that the trial judge erred when he allowed the State to admit evidence of Beans's October 2013 assault on Afcán. Beans also contends that the judge erred by allowing Afcán to testify that Beans threatened her on a daily basis throughout their relationship. Additionally, regarding the evidence of the October 2013 incident, Beans separately asserts that two different aspects of that incident were erroneously admitted at his trial. Beans claims it was error to admit evidence that he was intoxicated during the October 2013 assault, and that it was error to play the threatening voice messages that he left when he called Afcán after she left the house to report the October incident to the police.

According to the information presented to the trial court, Beans was drinking vodka and gin during the October 2013 incident and he was very intoxicated. Beans and Afcán got into an argument, and when she had the opportunity, Afcán hid the bottles of liquor. Beans then became angry, and he assaulted her. He pinned Afcán on the couch (according to a police report, Beans is six feet tall and weighed 322 pounds). Beans then punched Afcán in the back of her ribs. When Afcán started to scream, Beans put his hand over her face, covering her nose and mouth. Afcán could not breathe for about a minute, and she was afraid for her life.

Afcán managed to escape from Beans and to leave the apartment. She drove to the Wasilla police station and reported the assault. Meanwhile, Beans began to

call her cell phone, leaving a number of threatening voice messages. In these messages, Beans threatened to burn down her house, to kill her, “to fuck up everybody, anyone that comes to this house,” and to kill a man named Lester.

Beans’s threats frightened Afcan, and she consequently recanted her report of the October 2013 assault. The assault charge was dropped.

As already explained, the district court ruled that evidence of the October 2013 assault was admissible under Evidence Rule 404(b)(4). Evidence Rule 404(b)(4) provides in pertinent part that “[i]n a prosecution for a crime involving domestic violence ... evidence of other crimes involving domestic violence by the defendant against the same or another person ... is admissible.” Under this rule, courts are authorized to admit evidence of the defendant’s other crimes of domestic violence, and the jury may rely on that evidence in deciding if the defendant has a propensity to commit crimes of domestic violence, and, if so, whether the defendant acted true to that character in the criminal case currently being tried.³

Because of the danger that juries will be unduly prejudiced by evidence of other bad acts, this Court, in *Bingaman v. State*,⁴ set out factors that trial courts must consider in deciding whether to admit evidence under Rule 404(b)(4).⁵ These factors include the strength of the government’s evidence that the defendant actually committed the other acts, the relevance of this character trait to any material issue in the case, the degree of relevance, and the strength of the other acts’ tendency to prove the relevant character trait.⁶ Other factors the trial court must consider are the government’s need to

³ *Id.* at 408, 415.

⁴ 76 P.3d 398 (Alaska App. 2003).

⁵ *Id.* at 415.

⁶ *Id.*

offer evidence of the defendant's other acts, the likelihood that litigation of the defendant's other acts will require an inordinate amount of time, and the likelihood that evidence of the defendant's other acts will lead the jury to decide the case on improper grounds or will distract the jury from the main issues in the case.⁷

Bingaman also emphasized that, when applying these factors, trial judges “should analyze whether the defendant's other acts demonstrate the same type of situational behavior as the crime currently charged,” and that judges should take into account the recency or remoteness of the other acts.⁸

In the present case, Judge Estelle made the following *Bingaman* analysis: The evidence from the October incident was strong, and the State would present a firsthand witness as to both the underlying circumstances of the incident and Afcan's eventual recantation that Beans had assaulted her in that incident; the evidence was “strongly relevant,” was “very similar” to the current assaults, and was offered to show Beans's propensity to assault Afcan; it would not take an inordinate amount of time to present the evidence; the jury would be able to rationally evaluate the evidence and not decide the case on an improper basis; and finally, under Evidence Rule 403, the evidence was not unfairly prejudicial.

Beans now challenges the trial court's *Bingaman* decision. Beans first argues that, with regard to the first three *Bingaman* factors, the October 2013 assault was not similar enough to the charges in the current case to be relevant. Thus, Beans argues that it was error to admit any evidence of that prior assault. He next argues that the State's need for this evidence was minimal, primarily because Afcan testified about the current assaults at trial, and that introducing evidence of the October 2013 assault took

⁷ *Id.* at 415-16.

⁸ *Id.* at 415.

an inordinate amount of time. Beans contends that the nature of the prior incident likely distracted the jury from the main issues and led it to convict him on improper grounds.

Beans's argument primarily focuses on the fact that the October 2013 assault was dissimilar from the February and March incidents. He notes that alcohol was a factor in the October 2013 incident, as were threatening voice messages, but neither of these were factors in the February and March offenses. While this observation is true, the district court focused on the similarity that mattered most: for little to no reason, Beans threatened extreme violence towards Afcan and assaulted her in October 2013, much like he was accused of doing in February and March 2014. The October 2013 incident showed Beans's general propensity to physically assault, and to use the threat of violence and fear, to control his domestic partner.

Beans's defense was that Afcan was "a liar who wants to get back at Mr. Beans." Consequently, the State needed to corroborate Afcan's testimony, which is one of the reasons for allowing propensity evidence in domestic violence cases.⁹

Because the evidence of the prior domestic assault was admitted for proper purposes under Evidence Rule 404(b)(4), and because Judge Estelle did not abuse his discretion when he concluded that the evidence was not more prejudicial than probative under Evidence Rule 403, we uphold Judge Estelle's decision to admit this evidence.

Testimony that Beans was intoxicated during the October 2013 incident

Beans separately argues that Afcan's testimony that he was intoxicated during the October 2013 domestic assault should not have been admitted. When the

⁹ See, e.g., *Lamplery v. State*, 2009 WL 891008, at *9 (Alaska App. Apr. 1, 2009) (unpublished) (discussing how Rule 404(b) evidence corroborated State's case).

issue of alcohol use arose during trial, Beans did not object on the ground he raises in this appeal.

The record shows that Beans objected when Afcan testified that October had been “a really bad month for his alcohol” and that the family’s permanent fund dividends went to paying for Beans’s alcohol. When asked for the grounds of the objection, Beans’s attorney responded “under [Rule] 404.” Based on this response, the trial judge overruled the objection. The judge found that “the subject of how money was spent, sources and uses of funds, are not [Rule] 404 [evidence].” Beans did not correct the judge’s assumption that Beans was objecting to evidence regarding how Beans obtained the money to buy the alcohol. Nor, on appeal, does Beans challenge this particular ruling. But to the extent that Beans now contends it was error to allow evidence of Beans’s intoxication during the October 2013 assault, we conclude that Judge Estelle did not commit error when he admitted this evidence as part of his Evidence Rule 404(b)(4) ruling.

The audio evidence of the voice messages

Beans claims that the audio recordings of the threatening voice messages he left on Afcan’s telephone were unduly prejudicial. Initially, as part of the trial court’s *Bingaman* analysis, the transcripts of the voice messages were part of the evidence deemed admissible. But just before trial started, the State announced that the police had found the audio recordings of the threatening voice messages from October 2013. The State indicated that it intended to play the recordings during trial. At that point, however, neither the State nor Beans had listened to the audio and neither had any idea of what the audio recordings actually contained. The court did not rule at that time on the admissibility of the audio recordings but instead decided to wait until the parties had listened to the audio during the lunch break. The entire audio was approximately 35

minutes long, and the voice messages the State wanted to play totaled 2 minutes and 40 seconds.

After the lunch break, the parties, without the jury present, played the portion of the audio that the State intended to introduce. The audio was the recording a police officer made while speaking with Afcan after she reported the October 2013 assault; the officer's recording device recorded both Beans's voice messages as Afcan played them to the officer, and the brief discussions the officer then had with Afcan about the messages. For instance, when Beans, in the voice message, threatened to kill "Lester," the officer asked who "Lester" was, and Afcan answered the question. When Beans threatened "to kill you, too," the officer said to Afcan, "so he said he will kill you too."

Beans's conceded that his statements in the voice messages were admissible, but he objected on hearsay grounds to the commentary by Afcan and the officer. The judge overruled the hearsay objection, noting that with regard to Afcan's out-of-court statements on the audio, Beans's attorney could cross-examine her on those. Judge Estelle then ruled that the commentary was not inadmissible hearsay, and he allowed the State to include the commentary when the State played the voice messages to the jury.

Considering that the jury heard the actual threatening messages that Beans left on Afcan's voice mail, we conclude that even if the brief accompanying commentary was inadmissible, any error was harmless. The commentary did not appreciably affect the jury's verdict.¹⁰

¹⁰ See *Love v. State*, 457 P.2d 622, 630-32 (Alaska 1969).

Afcan's testimony that Beans constantly threatened her

Beans also contends that it was error to allow Afcan to testify that Beans constantly threatened her during their relationship. Afcan testified that to keep control of the relationship — which lasted only a few months — Beans threatened her on a daily basis. When Beans's attorney objected to Afcan's testimony, the prosecutor took the position that these threats were not prior bad acts. The parties then had a side bar discussion with the court. As Beans acknowledges in his opening brief, this discussion is indiscernible in the transcripts, but when the side bar was completed, Beans's attorney was apparently satisfied that the prosecutor would steer Afcan away from any further similar testimony.

Later, however, Beans's attorney raised this issue again. Contending that the State had improperly introduced prior bad act evidence, he asked for a corrective jury instruction. But Judge Estelle rejected Beans's request, finding that Afcan's testimony that Beans constantly threatened her was not "specific conduct" that would be considered prior bad acts under Evidence Rule 404(b).

Even if Judge Estelle's characterization of Afcan's testimony was erroneous, we conclude that this testimony was an extension of the evidence the judge had expressly admitted under Evidence Rule 404(b)(4). That is, this was evidence of domestic violence that explained the relationship between Afcan and Beans, and Beans's desire to control Afcan. When Beans's constant threats of violence towards Afcan are considered in the context of their relationship, his threats were admissible evidence under Rule 404(b)(4) to show his propensity for domestic violence towards her.

Conclusion

The judgment of the district court is **AFFIRMED**.