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

MORGAN R. ASICKSIK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-11737, A-11728, & A-11738 Trial Court Nos. 4BE-13-119 CR, 4BE-10-122 CR, & 4BE-11-675 CR MEMORANDUM OPINION No. 6507 — August 9, 2017

Appeal from the Superior Court, Fourth Judicial District, Bethel, Randy M. Olsen, Judge.

Appearances: Catherine Boruff, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Kenneth M. Rosenstein, 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.

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

Morgan R. Asicksik was convicted of fourth-degree assault for hitting his girlfriend, Rosella Berlin. Based on this same incident, Asicksik was also found to be in violation of his probation from an earlier conviction.

In this appeal, Asicksik contends that the trial judge violated the "best evidence rule" (*i.e.*, Alaska Evidence Rules 1000 *et seq.*) when the judge allowed two witnesses — Rosella Berlin's sister and brother-in-law — to describe the contents of three videos that they discovered on Asicksik's iPhone. For the reasons explained in this opinion, we conclude that this challenged testimony was properly admitted.

Asicksik also argues that the superior court violated his right to advance notice of the grounds underlying the State's petition to revoke his probation. For the reasons explained here, we conclude that Asicksik was properly informed of the State's allegations, and thus he was not prejudiced by the superior court's procedure.

Underlying facts

On the evening of February 12, 2013, Rosella Berlin failed to respond to several text messages from her mother, Bessie Berlin. Bessie became concerned, so she went over to the apartment that Rosella shared with her boyfriend, Morgan Asicksik. When Bessie arrived, she found that her daughter's face was bruised and her lip was swollen. When Bessie asked her daughter what had happened, Rosella replied that Asicksik had beaten her up.

Bessie called the police to report the assault, and she also called her son-in-law, Thomas Wynn, and asked him to come to the apartment.

At one point while Wynn was in the apartment, he sat down on a sofa in the living room. When Wynn rose from the sofa, an iPhone fell off the sofa and onto the

floor. Mistakenly thinking that the iPhone was his, Wynn retrieved it, put it in his pocket, and later carried it home.

When Wynn got home, he realized that he had two iPhones in different pockets. Thinking that the unfamiliar iPhone belonged to his sister-in-law Rosella, he opened the phone to its home screen. When the home screen illuminated, Wynn saw that a video was open: the screen was displaying an unmoving screenshot with a large "play" button in the middle. According to Wynn's later testimony, this still video shot showed Rosella lying on the floor of her room, wearing pajama bottoms but no shirt.

Wynn pressed play and watched the video, which lasted about 30 seconds. Wynn later described the content of this video. According to Wynn, Rosella was lying on the floor, and she kept saying that she was sorry. There was blood on Rosella's face and her arm, and she was holding up her forearm. Meanwhile, Asicksik can be heard yelling at her — telling her, "This is what you get," and "I told you not to do this."

Wynn had just seen Rosella at the apartment, and she had been wearing the same pajama pants as the ones she was wearing in the video. Because of this, Wynn deduced that the video had been recorded earlier that same night.

After Wynn watched this first video, he looked through the iPhone's recent pictures and videos, and he discovered two more videos that apparently had also been recorded that same night. Wynn then watched these second and third videos.

In the second video, Rosella was sitting on a couch with her young son in her lap, looking scared. Asicksik can be heard telling Rosella that he was not going to let her leave — that she was not going anywhere.

The third video showed Rosella standing in the kitchen. She appeared angry, and she threw a plate of food on the floor.

In all three videos, Rosella was wearing the same pajama pants as the ones that Wynn saw her wearing at the apartment after the assault — but in the second and third videos (unlike the first video), Rosella was wearing a shirt.

While Wynn was watching the three videos, his wife Venissa (Rosella's sister) was next to him. Venissa watched only short portions — just a few seconds — of the first and second videos, because she found the videos so upsetting. However, she remained within earshot while her husband watched all three videos, and she overheard the audio.

After watching these three videos, Thomas Wynn turned off the iPhone and told his wife Venissa to give the phone to Rosella when she saw her the next day.

The next day (February 13th), Venissa went to her sister Rosella's apartment and returned Asicksik's iPhone to her. Later, Asicksik's grandmother came over to Rosella's apartment and picked up some of Asicksik's belongings — including the iPhone. Thus, Asicksik's iPhone was returned to his possession.

The litigation surrounding the three videos on Asicksik's iPhone

On February 14, 2013 (the day after Asicksik's grandmother picked up the iPhone for him), an attorney from the Bethel district attorney's office asked Rosella Berlin to come to the police department and give a statement about the three videos contained on the phone. Berlin was told that the authorities needed her statement "in order [for the State] to obtain [Asicksik's] iPhone for evidence". But the district attorney's office took no action at the time.

On July 5th, about a month before Asicksik's trial, a different attorney from the Bethel district attorney's office interviewed Berlin and learned of the three videos on

Asicksik's iPhone. This prosecutor then sent an e-mail to Asicksik's public defender, Andrew Tonelli, asking him to provide these videos to the State.

Tonelli responded (by e-mail) that if the videos were in his client's possession (rather than in the defense attorney's own possession), then he was not required to turn them over to the State. Tonelli also argued that even if he (Tonelli) had these videos, he would not be required to turn them over to the prosecutor: Tonelli asserted that the videos did not constitute "physical evidence" for purposes of Alaska Criminal Rule 16(c)(6).

(Under Criminal Rule 16(c)(6), when a defense attorney or their agent acquires "physical evidence of the offense", they must immediately notify the prosecutor, and they must make arrangements to turn the evidence over to the government within a reasonable amount of time.)

A few days later, yet a third attorney from the district attorney's office contacted Tonelli. This new attorney, Carole Holley, was an assistant attorney general from Anchorage who was sent to Bethel to assist the district attorney's office in covering its caseload. Ms. Holley notified Tonelli that she had been assigned as the trial attorney in Asicksik's case, and that she intended to call Thomas Wynn and his wife Venissa to testify about the videos that they found on Asicksik's iPhone.

Tonelli responded by demanding that Ms. Holley "send over the videos, ... [since] none of that was disclosed in discovery."

The next day, the superior court held a pre-trial conference in Asicksik's case. At this conference, Asicksik was represented by Assistant Public Defender Amanda Harber. Harber noted that the State intended to call Thomas and Venissa Wynn to testify about the videos, and she argued that this testimony was barred by the "best evidence rule" — Alaska Evidence Rules 1000 *et seq.*

One week later, in response, the prosecutor filed a motion to compel the defense to produce Asicksik's iPhone (under the assumption that it still contained the three videos). In the alternative, the prosecutor asked permission to present the testimony of Thomas and Venissa Wynn, so that they could describe what they saw and heard when they played the videos. The prosecutor stated that if the defense produced the videos, the State would introduce the videos, and the Wynns' testimony would not be needed — but if the State could not obtain the videos, then it intended to introduce the Wynns' testimony about the videos.

In response to the prosecutor's motion, Asicksik's attorneys (both Tonelli and Harber) argued that Asicksik had a Fifth Amendment privilege to refuse to turn over the videos. The defense attorneys also renewed their argument that, even if the videos were in the attorneys' possession, they did not have to turn the videos over to the State because the videos did not constitute "physical evidence" for purposes of Criminal Rule 16(c)(6).

The superior court held a hearing to resolve this evidentiary matter. At this hearing, the judge asked Tonelli directly whether the Public Defender Agency had possession of the videos. Tonelli answered that the Agency did not have the videos.

(Despite this, Tonelli continued to argue that the videos were not "physical evidence" for purposes of Criminal Rule 16(c)(6) — thus potentially suggesting that the videos had been in the Agency's possession earlier. This issue was never resolved.)

The superior court then ruled that, because the videos were apparently in Asicksik's personal possession and unavailable to the State absent a search warrant, the court would allow Thomas and Venissa Wynn to testify about the videos. The Wynns did, in fact, testify at Asicksik's trial about the videos that they had viewed on Asicksik's iPhone.

Later in the trial, Asicksik took the stand and testified that he had thrown his iPhone away shortly after the incident in this case. According to Asicksik, when his grandmother returned the iPhone to him two days after the assault, "the battery was in the red; it was almost dead." Asicksik tried to charge the phone, but "it would just get real hot. It wouldn't charge; it wouldn't turn on." So, according to Asicksik, he filed an insurance claim and got a new phone — and he discarded the iPhone.

Thus, if Asicksik's iPhone contained videos relating to the assault (as the Wynns testified), and if Asicksik's testimony about discarding the iPhone was true, then *no one* was in possession of the videos at the time these matters were litigated in the superior court — because Asicksik had already thrown his iPhone away.

Why we uphold the trial court's ruling

Under Alaska Evidence Rule 1002, when the contents of a writing or recording are at issue, the proponent of the evidence must produce an original of the writing or recording, unless another provision of Article X of the evidence rules creates an exception to this requirement. [1]

In Asicksik's case, the relevant exceptions to the requirement of producing an original are found in Evidence Rule 1004. This rule states (in pertinent part) that the original of a writing or recording is not required, and that alternative evidence of the contents of the writing or recording is admissible, if:

> (a) all originals have been lost or destroyed (unless the proponent of the evidence lost or destroyed them in bad faith); or

[1] We say "an" original rather than "the" original because, under Evidence Rule 1001(3), the term "original" includes counterparts to the original, as well as prints from photographic negatives and print-outs of computer data.

(b) no original can be obtained by any available judicial process or procedure; or

(c) the party *against whom* the evidence is offered was put on notice, at a time when an original of the writing or recording was under that party's control, that the contents of the writing or recording would be a subject of proof at the trial or hearing, and that party does not produce an original at the trial or hearing.

Under the facts of this case, it is clear that either exceptions (a) and (b) apply or, alternatively, that exception (c) applies.

If Asicksik's account of what happened to his iPhone is true (*i.e.*, if Asicksik discarded the phone a few days after this incident), then exception (a) applies — because any originals of the videos were "lost or destroyed" within a few days after the incident. For the same reason, exception (b) would apply — since the videos could not have been obtained through any available judicial process or procedure.

If, on the other hand, Asicksik's account of what happened to his iPhone is false (*i.e.*, if he did not discard the phone), then exception (c) applies — because, at a time when the videos were under Asicksik's control, the State gave notice that it intended to prove the contents of the videos, and the defense failed to produce those videos at Asicksik's trial.

We accordingly uphold the trial court's decision to allow Thomas and Venissa Wynn to testify about the contents of the videos.

Asicksik argues in the alternative that even if the Wynns' testimony was admissible, it should have been excluded under Alaska Evidence Rule 403 because the unfair prejudice of the testimony outweighed its probative value.

Most of Asicksik's arguments regarding the asserted unfair prejudice of the Wynns' testimony are, in essence, arguments that might be made to a jury about the

potential weaknesses of the evidence — potential reasons to question the accuracy or the reliability of the Wynns' testimony. But these arguments hinge on viewing the facts in the light most favorable to Asicksik. We are obliged to view the facts in the light most favorable to the trial judge's ruling — and then determine whether a judge might reasonably deny Asicksik's motion to exclude the evidence under Rule 403. [2]

Having reviewed the record, we conclude that the trial judge did not abuse his discretion when he concluded that the Wynns' testimony should not be excluded under Evidence Rule 403.

Asicksik's claim that he was not given fair notice of the superior court's grounds for revoking his probation

According to the testimony at Asicksik's trial, both he and the victim, Rosella Berlin, had a significant amount to drink in the hours leading up to the assault. At the time, Asicksik was on probation from two prior criminal cases: a bootlegging conviction from 2010, and a fourth-degree assault conviction from 2011. In both of these prior cases, Asicksik's conditions of probation forbade him from consuming or possessing alcohol.

After the jury found Asicksik guilty of assaulting Berlin, the trial judge announced that he was going to revoke Asicksik's probation in the two other cases:

> *The Court*: Based upon the verdict in this case, as well as the testimony that I heard [at this trial], I am going to find violations of the probation. ... In each of the [prior] cases, ... there's a probation condition of no alcohol, no consumption [of alcohol], ... so there were violations of probation in both of those cases. And based upon that, I am going to

[2] *See Harmon v. State*, 193 P.3d 1184, 1201 (Alaska App. 2008).

> order Mr. Asicksik to be remanded into custody. Based on these verdicts, ... he's going to go into custody at this time.

In his brief to this Court, Asicksik acknowledges that his commission of a new criminal offense was sufficient reason for the court to revoke his probation. Asicksik also concedes that, in his trial testimony, he admitted drinking whisky on the night of the assault — another violation of his probation.

But Asicksik points out that, in the State's petitions to revoke his probation, the State alleged only the *first* ground (commission of a new crime), and not the *second* ground (consumption of alcoholic beverages). Thus, according to Asicksik, he was never properly notified that the court might revoke his probation for drinking.

Asicksik did not raise any objection to the trial court's action at the time, so he must now show that it was plain error for the court to rely in part on Asicksik's consumption of alcoholic beverages when the court revoked his probation.

Here, Asicksik has failed to show plain error because he has failed to show that he was prejudiced by the procedural irregularity.

The superior court relied on two grounds for revoking Asicksik's probation: Asicksik's commission of the assault, and Asicksik's admission (on the stand at trial) that he consumed whisky on the night of the assault. Either of these grounds was independently sufficient to support the court's action.

Asicksik was nevertheless potentially prejudiced in another regard. The record indicates that when the trial court sentenced Asicksik for these probation violations, the court gave significant weight to the fact that Asicksik had been drinking. If, because of lack of advance notice, Asicksik was unprepared to meet the judge's sentencing concern, then Asicksik might be able to show prejudice.

But Asicksik does not contest that his conditions of probation forbade him from drinking alcoholic beverages, nor does he contest that he was aware of his

conditions of probation. And Asicksik acknowledges that, in his trial testimony, he admitted drinking whisky on the night of the assault.

Finally, Asicksik does not suggest that his defense attorney's arguments at the disposition hearing would have been any different if his attorney had received earlier notice that the judge would be considering Asicksik's drinking. We note that, at the disposition hearing, Asicksik's attorney argued that Asicksik had forthrightly admitted his drinking, and that the court should view this forthright admission as a factor in Asicksik's *favor* — as an indication that Asicksik was receptive to rehabilitative treatment.

For these reasons, we find no plain error.

Conclusion

The judgement of the superior court is AFFIRMED.