IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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| CARL ALEX CUSTER,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-11901<br>Trial Court No. 3AN-11-6484 CR<br><br>MEMORANDUM OPINION<br><br>No. 6531 — October 25, 2017 |

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: Megan Webb, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Tamara E. de Lucia, 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 SUDDOCK.

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

A jury convicted Carl Alex Custer of third-degree sexual assault after a woman walking through a public park saw him with his hand inside the pants of a woman, R.G., who was incapacitated by alcohol.

On appeal, Custer argues that the trial judge erred in allowing a nurse who examined R.G. to testify about the freshness and cause of a cut on R.G.'s perineum. Custer also argues that his sentence is excessive, that the judge should have redacted items from his presentence report, and that two of his probation conditions are unconstitutionally vague.

For the reasons explained here, we reject Custer's claim regarding the nurse's testimony, and his claim that his sentence is excessive. However, we remand Custer's case to the superior court to address Custer's objection to the presentence report and to reevaluate the challenged probation conditions.

*Background facts and proceedings*

On the day of the incident, Custer and R.G. were both drunk in Cuddy Park in midtown Anchorage. An eyewitness walking her dog in the park came upon the pair. She saw R.G. unconscious on the ground with her pants lowered and with Custer's hand moving vigorously between her legs.

After R.G. was transported to the hospital to detox, hospital staff determined that she had a .348 percent blood alcohol level. At trial, she testified that she could not remember drinking with Custer, or the incident.

Custer was indicted for second- and third-degree sexual assault for sexual penetration of or contact with an incapacitated person.[1] At trial, Custer conceded sexual contact, but claimed that R.G. had consented to this.

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[1] AS 11.41.420(a)(3)(B) and/or (C); AS 11.41.425(a)(1)(B) and/or (C), respectively.

The jury rejected Custer's defense of consent by R.G. and convicted him of third-degree sexual assault for sexual contact, but acquitted him of second-degree sexual assault (sexual penetration).

*Nurse Cain's testimony*

At trial, the State offered the testimony of Jessica Cain, the nurse who examined R.G. after the assault. Cain testified that she observed a small laceration on R.G.'s perineum (the area between the vagina and anus). She testified that she applied toluidine blue dye to the laceration; the dye adheres only to the inside portion of cuts, but not to skin, rendering the cut easier to view in a photograph.

The prosecutor then asked Cain about whether there was any sign of healing, and she replied, "No, there was not." But when the prosecutor asked her to explain, the defense attorney objected. At a bench conference, the defense attorney claimed that Cain's expert opinion about the wound's freshness had not been disclosed pretrial. The prosecutor rejoined that Cain's report indicating the absorption of the dye served as de facto notice that the wound was fresh.

In response to questioning by Superior Court Judge Michael L. Wolverton outside the jury's presence, Cain stated that the dye does not adhere well to healing lacerations. But she added that the dye might color a laceration occurring hours before the incident, and that she could not specify a time frame for R.G.'s cut.

The judge then ruled that he would allow Cain to testify to why there was no sign that R.G.'s cut had started to heal. But the prosecutor asked no further questions about the age of the cut or the effect of the dye. Cain agreed on cross-examination that the cut could have been inflicted an hour before the incident, or the evening before.

After the judge ruled on the defense objection regarding the dye, the prosecutor raised another issue outside the jury's presence. The prosecutor said that she

planned to ask Cain if the injury could have been caused by a fingernail. The defense attorney again objected that this opinion had not been revealed pretrial. The judge ruled that Custer had received adequate notice of the nurse's opinion, because a detective's report from seventeen months earlier stated that Cain had told the detective that a fingernail could have caused the laceration.

When the jury returned, Cain testified that the cut could have been caused by a fingernail, or could have been caused by something else. The prosecutor then moved on to other topics.

*Why we reject Custer's claim that the judge erred in allowing Cain's testimony about the cut*

On appeal, Custer argues that the judge erred in allowing Cain to offer expert testimony about the cut to R.G.'s perineum that was not previously disclosed in an expert report. But the cut to R.G.'s perineum was noted in Cain's report, which was disclosed in advance of trial; its very inclusion in the report suggested that the cut might have occurred during the assault, *i.e.*, that it might be fresh. And Cain's opinion that the cut could have been inflicted by a fingernail was also disclosed well in advance of trial, in the detective's report.

Moreover, Cain's testimony that the cut appeared fresh and that it could have been inflicted by a fingernail could equally have been offered by a lay witness as a matter of common human experience. Custer implies that, because the dye testimony resulted from training, Cain's opinion was expert in nature. But Cain merely testified that the dye makes the cut more visible in a photograph, and not that it reveals the age of the cut with precision. In any event, to the extent that aspects of Cain's testimony could qualify as expert opinion, this testimony played a minor role in the case, and Cain conceded that the cut could have been caused by something other than a fingernail and

that the cut could have occurred twelve hours before the incident. Accordingly, any error was harmless.

We conclude that Judge Wolverton did not abuse his discretion when he overruled the defense attorney's objections to the two challenged questions.[2]

*Custer's excessive sentence claim*

At sentencing, the court imposed 25 years with 5 years suspended (20 years to serve). As a third felony offender, Custer's presumptive sentencing range was 15 to 25 years.[3]

Custer argues that this sentence is excessive because the court failed to give adequate weight to Custer's age (he was in his mid-fifties), to his remorse and apology to the victim during his allocution, and to his argument that the offense was only a "drunken touching" and not an otherwise violent act. Custer does not dispute that he had a lengthy history of crimes fueled by alcohol, including seven felonies.

When we review a sentence for excessiveness, we independently review the sentencing record to determine whether the sentence imposed is within the range of sentences that reasonable judges would impose under the circumstances.[4] We have examined the record in this case, and we conclude that the sentencing judge gave adequate consideration to the *Chaney* criteria.[5] The judge's remarks focused on Custer's lengthy criminal history, the public nature of the attack, and the role of alcohol in this

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[2] *See State v. Coon*, 974 P.2d 386, 398 (Alaska 1999) ("We review a trial court's ruling on the admissibility of expert testimony for abuse of discretion.").

[3] AS 12.55.125(i)(4)(D).

[4] *McClain v. State*, 519 P.2d 811, 813 (Alaska 1974).

[5] *State v. Chaney*, 477 P.2d 441, 443 (Alaska 1970).

crime and Custer's past crimes. The judge noted that he was encouraged by Custer's apology, but he also noted that this was a "horrible attack" in a very public location. The judge found Custer's rehabilitation prospects to be "beyond guarded," and did not believe that significant suspended time was warranted, due to Custer's history of "going back to . . . alcohol and . . . hurting people."

Based on this record, we conclude that Custer's sentence of 20 years (the midpoint of the sentencing range) was within the range of sentences that reasonable judges would impose, and so was not clearly mistaken.[6]

*Why we remand Custer's case to address other aspects of the superior court's sentence*

Custer claims that the judge should have revised the presentence report after Custer objected to certain allegations contained therein.

At sentencing, Custer disputed the presentence report's inclusion of R.G.'s allegation that, prior to the charged incident, Custer had chased her in the park and attempted to rape her. According to Custer, this allegation was contradicted by R.G.'s trial testimony that she had no recollection of the events in the park.

Assertions in a presentence report may be challenged under Alaska Criminal Rule 32.1(d)(5). If the defendant's offer of proof raises a genuine dispute, a sentencing judge must resolve the matter and redact any unproven assertions.[7]

The State argues that Custer's claim is not preserved because he did not press the court for a ruling on the presentence report objection. We disagree. Custer disputed the specific factual allegations in the report and asked the court to strike or

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[6] *See State v. Hodari*, 996 P.2d 1230, 1232 (Alaska 2000).

[7] Alaska R. Crim. P. 32.1(f)(5).

modify those allegations; this triggered the court's obligation to resolve the dispute.[8] We therefore remand Custer's case for the court to rule on this issue.

On remand, the superior court should also address two probation conditions that Custer argues are unconstitutionally vague.

The court prohibited Custer from entering any establishment "whose primary business is the sale of sexually explicit material" and required him to disclose his history of sexual offenses to persons with whom he maintains a "significant personal relationship" as that term may be defined by his probation officer.

The State concedes that these probation conditions are vague. Based on our prior decisions criticizing similar conditions of probation, we accept the State's concessions of error and remand for the superior court to modify Custer's probation conditions to comport with this Court's recent decisions.[9]

*Conclusion*

We AFFIRM Custer's convictions and his sentence, but we REMAND his case to the superior court to address Custer's objection to the presentence report and to reconsider the two challenged conditions of probation.

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[8] *See Smith v. State*, 369 P.3d 555, 558 (Alaska App. 2016); *Davison v. State*, 307 P.3d 1, 4 (Alaska App. 2013).

[9] *See Smith v. State*, 349 P.3d 1087, 1095 (Alaska App. 2015) (remanding for clarification of the term "significant relationship"); *Diorec v. State*, 295 P.3d 409, 417 (Alaska App. 2013) (remanding for clarification of the term "sexually explicit material"); *see also Edenfield v. State*, 2017 WL 2894132, at *2 (Alaska App. July 5, 2017) (unpublished); *Whiting v. State*, 2014 WL 6713200, at *1-2 (Alaska App. Nov. 26, 2014) (unpublished).