

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

KOSMOS OLINGA SANDERS
HARRISON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11849
Trial Court No. 3AN-12-12886 CR

MEMORANDUM OPINION

No. 6539 — November 8, 2017

Appeal from the Superior Court, Third Judicial District,
Anchorage, Philip R. Volland, Judge.

Appearances: Callie Patton Kim, Assistant Public Defender,
and Quinlan Steiner, Public Defender, Anchorage, for the
Appellant. Donald Soderstrom, 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).

Kosmos Olinga Sanders Harrison was convicted of second-degree assault for assaulting his fiancée, Deanna Smith, in 2012. Harrison now claims that Superior Court Judge Philip R. Volland erred by precluding Smith's ex-husband from testifying that, in his opinion, Smith was not a truthful person. We agree that the judge erred by excluding this opinion testimony, but we conclude that the error was harmless.

Harrison also argues that the judge erred by preventing him from offering evidence that in 2010, two years before the incident charged in this case, Smith falsely accused Harrison of sexually abusing their then two-year-old daughter, Z.H. The judge properly limited this evidence because it was collateral to the material issues in this case and had the potential to confuse the jury and lead it to decide the case on an improper basis.

Lastly, Harrison argues that his 2-year sentence is excessive. We have no jurisdiction to decide Harrison's excessive sentence claim, and we therefore refer the claim to the Alaska Supreme Court for discretionary review.

Facts and proceedings

On December 7, 2012, Kosmos Harrison and his fiancée, Deanna Smith, went to a Christmas party with their four-year-old daughter, Z.H., and two of Smith's children from a former marriage. Harrison drank heavily before and at the party. On the drive home, Harrison and Smith got into an argument. They dropped the older children off at their father's house and then returned home with Z.H.

After they arrived home, the argument escalated. Smith testified that she tried to call 911 but that Harrison ripped the phone off the wall and threw it into the next room. Harrison then grabbed Smith's arm and twisted it behind her back. Smith said the pain was "excruciating," and that she lunged forward and bit Harrison's lip. Harrison

bled profusely from the bite, and Smith testified that he wiped the blood from the wound onto her face and mouth. He also spit blood onto her face.

Z.H. was crying and Smith tried to calm her down. Smith then left Z.H. in the living room and returned to the kitchen, where Harrison was yelling. Smith testified that Harrison grabbed her by the hair and slammed her head against the kitchen cabinet and countertop. Harrison then grabbed food remnants on dishes in the kitchen sink and forced the food into Smith's mouth. Smith said he also shoved a dish rag down her throat, cutting off her breath to the point that she saw spots.

When Harrison released Smith, she returned to the living room to soothe Z.H. She found her cell phone, pressed the emergency button, and stuffed the phone inside her shirt. The call connected with a dispatcher at the Anchorage police department. Officers eventually determined Smith's location and arrived at the couple's home.

Smith was taken to the hospital, where she was treated for injuries to her head, face, neck, shoulder, arm, and hand. Later, when Smith took a shower, clumps of her hair came out. Smith eventually required surgery to repair the injury to her shoulder. Z.H. also suffered bruises and scratches that Smith believed were sustained during Harrison's attack on Smith.

The State charged Harrison with first-degree assault, second-degree assault, fourth-degree assault (for injuring Z.H.), and interfering with a report of domestic violence (for pulling the phone from the wall).¹ Harrison testified that he only injured Smith in self-defense. He said that Smith bit his lip "out of the blue," and he tried to get her off of him. He also said that Smith was the one who ripped the phone from the wall.

¹ AS 11.41.200(a)(2), (3); AS 11.41.210(a)(1); AS 11.41.230(a)(1); and AS 11.56.745, respectively.

Harrison testified that, in 2010, Smith had falsely accused him of sexually abusing Z.H., during a “very heated” battle over custody of Z.H.

The jury found Harrison guilty of second-degree assault (a lesser-included offense of the first-degree assault charge) based on the injury to Smith’s shoulder, but acquitted him of the other charges. Judge Volland sentenced Harrison to 8 years with 6 years suspended (2 years to serve) for that offense. Harrison now appeals his conviction and sentence.

The judge erred by excluding the testimony of Smith’s ex-husband that Smith was not a truthful person, but the error was harmless

Harrison argues that the judge erred by excluding the opinion testimony of Smith’s ex-husband that Smith had a character trait for dishonesty.

The judge allowed Harrison’s attorney to make an offer of proof outside the presence of the jury to establish the foundation for this proposed testimony. In that offer of proof, Smith’s ex-husband, Scott Smith, testified that he had known Smith for fourteen years and that they had divorced roughly four years before this trial. He said that he and Smith had interacted minimally since the divorce, incidental to sharing custody of two children. When the defense attorney asked Scott Smith about Smith’s character for truthfulness, he said “[s]he’s truthful and not.” But after further questioning by the defense attorney, Scott Smith responded that Smith was “distruthful.”

After hearing this offer of proof, the trial judge excluded this proposed opinion testimony. Based on Scott Smith’s testimony that he had had minimal contact with Smith in the four years since their divorce, the judge ruled that Harrison had failed to show that Scott Smith had sufficient knowledge of Smith’s character to offer an opinion about her truthfulness or untruthfulness. Harrison challenges this ruling on appeal.

We have not directly addressed the foundation required under Alaska Evidence Rule 608(a) before a witness will be allowed to offer an opinion regarding another person’s character for truthfulness or untruthfulness. But in *Hunter v. State*, we discussed this foundational requirement in the context of testimony about other character traits under Alaska Evidence Rule 405(a):

When a witness proposes to offer an opinion concerning another person’s trait of character, the law requires a foundational showing that the witness personally knows the other person well enough to have formed a reliable opinion concerning the particular character trait at issue. As a practical matter, this foundational showing will hinge on several factors — primarily, the nature of the relationship between the witness and the other person, the length and recency of that relationship, and the frequency and nature of their contacts.²

Even a brief acquaintance may provide adequate foundation for an opinion on a witness’s character so long as the experience “clearly demonstrate[s] the character trait at issue.”³

We conclude that the judge erred in ruling that the Smiths’ ten-year marriage, followed by four years in which they shared custody of two children, was an inadequate foundation for Scott Smith to offer an opinion on Smith’s character for dishonesty.

However, having reviewed the record in its entirety, we conclude that Scott Smith’s proposed testimony would not have appreciably affected the jury’s assessment of the evidence or of Smith’s credibility. It is apparent that the jury was skeptical of

² *Hunter v. State*, 307 P.3d 8, 16 (Alaska App. 2013).

³ *Id.* (implying that the trial court could properly allow a police officer to testify that the defendant has a character for aggression based on only one interaction).

Smith's testimony. The jury acquitted Harrison of all the State's charges but one — the lesser-included offense of second-degree assault for injuring Smith's shoulder. That charge did not rely solely on Smith's credibility, because it was corroborated by medical evidence that she underwent surgery on her shoulder following the assault. We accordingly conclude that the judge's error in excluding this evidence did not appreciably affect the jury's verdict.

The judge placed proper limits on the evidence related to Smith's purported allegation that Harrison sexually abused Z.H. in 2010

Although the facts are not clearly presented — either in the parties' briefs on appeal or in the superior court record — Smith apparently accused Harrison of sexually abusing Z.H. in 2010, two years before the incident charged in this case. Both the police and the Office of Children's Services (OCS) investigated these claims, but the sexual abuse was never substantiated, and no formal action was taken against Harrison.

Harrison argues that the judge made several errors by preventing him from introducing evidence related to these 2010 allegations. First, he argues that the court impermissibly barred him from cross-examining Smith about the allegations. Second, he argues that the court erred by preventing him from offering the testimony of investigators from the police department and OCS that the allegations were not substantiated. Third, he argues that he should have been allowed to testify in his defense about the results of the police and OCS investigations. As we explain here, none of these claims has merit.

Smith's cross-examination

During Smith's testimony, the prosecutor played an audio recording of Smith's interview with a police officer following the 2012 assault. During this interview,

the officer asked Smith what was going through her mind during the assault. Smith responded, “All I’m thinking is I’m going to protect my baby because they — really the first time the courts didn’t believe me.”

Harrison’s attorney argued that Smith’s statement that the “courts didn’t believe me” on an earlier occasion opened the door to inquiry into Smith’s allegation in 2010 that Harrison sexually abused Z.H. The defense attorney asked the judge to allow him to cross-examine Smith about those allegations, arguing that the evidence was relevant to Smith’s bias and motive. The judge ruled that Harrison could question Smith in general terms about the 2010 allegations in order to explain Smith’s state of mind when she commented to an officer that a judge had earlier not believed her.

During cross-examination by the defense attorney, Smith admitted that she and Harrison fought over custody of Z.H. in 2010. But she said Harrison initiated the custody dispute and that the dispute ended when she and Harrison reunited. Smith also testified that Harrison was “terrified that there was going to be a custody investigator.” Following this testimony, the defense attorney did not ask Smith whether she had accused Harrison of sexually abusing Z.H. during this 2010 custody dispute. But the defense attorney later elicited testimony from Harrison that Smith accused him of sexually molesting Z.H.

On appeal, Harrison argues that the court precluded him from asking Smith about her claim that he abused Z.H. The record does not support this claim. As we just explained, the judge ruled that the defense attorney *could* question Smith in general terms about the sexual abuse allegations, but the defense attorney declined to do so. We therefore find no merit to Harrison’s claim that the judge prevented him from cross-examining Smith about this topic.

The police and OCS investigations

As we just explained, the trial judge ruled that Harrison could not introduce testimony concerning specific allegations of sexual abuse. Harrison argues that the superior court should have permitted him to present testimony by investigators from the police department and OCS that Smith's claims that Harrison sexually abused Z.H. were ultimately not substantiated and resulted in no formal action against him. He argues that this testimony was relevant and admissible to show that Smith's 2010 allegations were "specious," and that Smith had a plan to obtain sole custody of Z.H. by falsely accusing Harrison of crimes in 2010 and 2012.

The judge excluded this testimony as collateral; in other words, the judge found that the evidence was not relevant "to a fact of consequence on the historical merits of the case."⁴ We agree that this was a proper basis for excluding this evidence. The failure of the police and OCS to take formal action on the sexual abuse allegations did not establish as a foundational matter that Smith's allegations were false or, more importantly, that Smith knew them to be false.⁵ And to the extent that the evidence was relevant to establish Smith's motive or bias, the court allowed the defense attorney to question Smith and Harrison in general terms about the sexual abuse allegations for this purpose.

⁴ *Worthy v. State*, 999 P.2d 771, 774 (Alaska 2000) (quoting 1 John W. Strong, ed., *McCormick on Evidence* § 49, at 203 (5th ed. 1999) (footnote omitted)).

⁵ *See Morgan v. State*, 54 P.3d 332, 337 (Alaska App. 2002) (holding that it is not sufficient for the defendant to show that the prior accusation is "arguably false" or that the matter is reasonably debatable).

Harrison's testimony

Harrison next claims that the court erred by preventing him from testifying that the police and OCS never took action against him for sexually abusing Z.H. But as we just explained, the court was justified in excluding evidence of the results of the police and OCS investigations because that evidence was collateral and lacking in probative force. We also conclude that, even if the court had erred in excluding Harrison's testimony on the results of the police and OCS investigations, any error was harmless. Harrison was allowed to testify that he and Smith engaged in a "major custody battle" in 2010 and that Smith accused him of sexually abusing Z.H. Harrison was also permitted to testify that he had "never been in trouble in [his] life." And Smith testified that the 2010 custody battle ended when the couple reunited. Considering this record, if the jury believed Harrison's claim that Smith accused him of sexually abusing Z.H. in 2010, the jury likely also concluded that no action was taken against Harrison based on those allegations.

Harrison's excessive sentence claim

The superior court imposed a sentence of 8 years' imprisonment with 6 years suspended for Harrison's second-degree assault conviction. Harrison challenges this sentence as excessive. Because Harrison's felony term of imprisonment does not exceed 2 years to serve, he correctly acknowledges that this Court has no jurisdiction to hear his excessive sentence claim. We accordingly refer the claim to the Alaska Supreme Court for discretionary review.⁶

⁶ See AS 22.07.020(b); Alaska R. App. P. 215(a)(1) (providing this Court with jurisdiction to hear appeals of felony sentences in excess of 2 years to serve); Alaska R. App. P. 215(a)(5) (providing supreme court with jurisdiction to take discretionary review of (continued...))

Conclusion

We AFFIRM Harrison's conviction and refer his excessive sentence claim to the Alaska Supreme Court under Appellate Rule 215(k).

⁶ (...continued)
sentences falling outside 215(a)(1)); Alaska R. App. P. 215(k) (directing this Court to refer sentence challenges to supreme court after resolving merits issue); *see also Morris v. State*, 334 P.3d 1244, 1246 (Alaska App. 2014).