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

FRANKLIN PETER GREGORY JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11848 Trial Court No. 4SM-13-072 CR MEMORANDUM OPINION No. 6569 — January 10, 2018

Appeal from the Superior Court, Fourth Judicial District, Bethel, Dwayne W. McConnell, Judge.

Appearances: Megan R. Webb, 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 MANNHEIMER.

On June 20, 2013, in Mountain Village, Franklin Peter Gregory Jr. pointed a rifle at his live-in girlfriend, Heather Chandler, and at Heather's mother, Cheryl

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

Chandler, who was holding the couple's infant son. Gregory announced that they were all going to die, and he fired two or three shots from the rifle (but not in the direction of the women). Gregory then punched Cheryl, and when Heather tried to intervene, Gregory assaulted her too.

Based on this episode, Gregory was found guilty of third-degree assault against both Heather and Cheryl Chandler, as well as reckless endangerment (for placing his infant son at risk of harm) and fourth-degree weapons misconduct (for possessing a firearm while intoxicated). [1]

In this appeal, Gregory argues that the trial judge made several improper evidentiary rulings: allowing the State to introduce evidence of two prior instances where Gregory assaulted Heather Chandler, allowing a police officer to describe his earlier investigation of Gregory in 2010, and allowing the prosecutor to impeach Heather with her own prior statements after Heather, at trial, claimed to have no memory of the prior assault. Gregory also argues that he received an excessive sentence for these crimes. For the reasons explained in this opinion, we affirm Gregory's convictions and sentence.

Underlying facts

Following a night of socializing and drinking, Franklin Gregory and Heather Chandler returned to their home on the morning of June 20, 2013. They were accompanied by three friends: Serena Joe, Kalene Jones, and Nathaniel Kokrine. Heather's mother, Cheryl Chandler, was already in the home, taking care of the couple's infant son.

---

[1] AS 11.41.220(a)(1)(A) and (a)(5), AS 11.41.250(a), and AS 11.61.210(a)(1), respectively.

The adults were drinking and socializing, but Gregory became angry when the women — Heather Chandler, Serena Joe, and Kalene Jones — began calling him a "woman abuser" because he had beaten up Heather in the past. Gregory fetched a rifle, pointed it at Heather and her mother Cheryl (who was holding the baby), and told them that they were all going to die. After firing two or three shots into the ceiling, Gregory punched Cheryl and pulled her hair (while she was holding Gregory's infant son). When Heather tried to intervene, Gregory wrestled with her and dragged her by the hair.

Eventually, Gregory told all the women to leave, and they ran out of the house with the infant. (The other man in the house, Nathaniel Kokrine, was apparently passed out during this incident.)

Heather and Cheryl reported this assault to the local village public safety officer and to the Alaska State Troopers. When Cheryl was interviewed, her face was bruised and swollen, and she had difficulty speaking. When Heather was interviewed, her head was swollen and she had bruising on her arm.

The evidence of Gregory's prior assaults on Heather Chandler

Gregory's trial was held in early September 2013, less than three months after the incident we have just described.

Just before the trial started, the superior court granted the prosecutor's request to introduce evidence of two prior occasions in which Gregory assaulted Heather Chandler: an incident in Anchorage in 2010, when Gregory was convicted of fourth-degree assault for punching Heather in the mouth; and an incident in Bethel in 2011, when Gregory was convicted of fourth-degree assault for punching Heather in the face. The court found that this evidence was admissible under Alaska Evidence Rule 404(b)(4) (which authorizes the admission of a defendant's other crimes of domestic violence), and

the court further found that any potential unfair prejudice of this evidence was outweighed by its probative value.

After the trial judge made this ruling, Gregory's attorney argued that if the prosecutor was going to be allowed to introduce evidence of these two prior assaults, the State's evidence should be limited to "the complaint[s] and the judgment[s], as properly redacted". The judge agreed to this.

(As this Court explained in *Moran v. State*[2] and in *Jones v. State*,[3] a judgement of conviction is inadmissible hearsay if it is offered to prove that the defendant actually engaged in conduct that would justify the conviction. Thus, Gregory's attorney could have insisted that the State establish the two prior assaults through testimony. But hearsay is admissible if there is no objection.[4] Moreover, if a defendant has pleaded guilty to a crime, the State can offer the judgement as evidence that the defendant personally admitted engaging in the criminal conduct charged against them — the statement of a party opponent under Alaska Evidence Rule 801(d)(2).[5])

At Gregory's trial, the State's first witness was Cheryl Chandler. In her testimony, Cheryl supported the State's allegations of assault against herself and her daughter Heather.

Cheryl admitted that, when she testified at the grand jury, she told the grand jurors that "there was no gun, and that Frank [Gregory] didn't shoot ... or point[] the gun at [her]." But Cheryl declared that she lied to the grand jurors. She explained that, at the

---

[2] 380 P.3d 92, 97 (Alaska App. 2016).

[3] 215 P.2d 1091, 1098-1100 (Alaska App. 2009).

[4] *See*, *e.g.*, *Wilson v. Alaska Dept. of Law*, 355 P.3d 549, 556 (Alaska 2015); *Christian v. State*, 276 P.3d 479, 489 (Alaska App. 2012).

[5] *Moran*, 380 P.3d at 97.

time of her grand jury testimony, she was still living in Mountain Village, and her daughter Heather convinced her to give this false exculpatory testimony.

The State's next witness was Heather Chandler — and she proved to be an uncooperative witness.

The prosecutor's first substantive question to Heather was, "We're here to talk about an incident that happened at the end of June of this year, okay? Can you tell us what happened?" Even though less than three months had elapsed since the incident in question, Heather's answer was: "It's been a while. I can't recall."

When the prosecutor followed up with, "Let me just better direct you. How about the 19th of June?", Heather answered, "The 19th of June — I can't even think that far back." The prosecutor then asked Heather a series of questions based on what Heather told the state troopers immediately after the incident. Heather's repeated response was, "I don't remember", "I can't recall", "I don't know", or variations on this theme.

At various points during this questioning, the prosecutor interrupted his examination of Heather to play the pertinent segments of her recorded interview with the trooper about the current incident. After playing each segment, the prosecutor would ask Heather, "Do you remember now?" or "Did that refresh your recollection?". Each time, Heather would continue to deny any memory of the incident.

The prosecutor then began asking Heather about the two prior assaults: the Anchorage assault from 2010, and the Bethel assault from 2011. When the prosecutor asked Heather if Gregory had been convicted of assaulting her before, she said no. The following colloquy ensued:

> *Prosecutor*: So you don't remember an incident involving Mr. Gregory in Anchorage, where he assaulted you by punching you in the face?

Heather Chandler: No.

Prosecutor: Do you remember having the top row of your teeth punched in?

Chandler: No.

Prosecutor: Blood was covering your face?

Chandler: I don't — that was a few years ago, and it — it's a whole different story. It wasn't abuse.

Prosecutor: Do you remember speaking with the officer who responded to the incident? ... Officer Cory Crane?

Chandler: No.

Prosecutor: Did you tell Officer Crane that you were injured because Mr. Gregory had punched you in the face several times, until you lost consciousness?

Chandler: No.

Prosecutor: Do you remember having swollen lips?

Chandler: Of course I'm going to remember being injured the next day. But it was because I fell. I was wearing high heels. And I don't see how this is related.

(The prosecutor then turned his questions to the Bethel assault that occurred in 2011. We will describe this portion of the prosecutor's examination in the next section of our opinion.)

On the following day of trial, the prosecutor called Anchorage Police Officer Cory Crane to rebut Heather's testimony concerning the 2010 assault in Anchorage — the assault that, according to Heather's testimony, had never occurred.

Officer Crane testified that he responded to a report of a physical disturbance. He described going to the hospital and finding Heather with "a very swollen ankle that appeared to be broken, ... extensive bruising to her jaw line, both of her lips ... split and extremely swollen, ... [and] her top two teeth ... pushed in."

When the prosecutor asked Officer Crane if Heather told him how she sustained these injuries, Gregory's attorney objected that this was improper impeachment, because the prosecutor should not be allowed to introduce "extrinsic evidence on a collateral matter".

The trial judge overruled the defense attorney's objection, concluding that Heather's statement to Officer Crane was admissible as a prior inconsistent statement. Following this ruling, Crane then testified that Heather told him that "she was punched in the face several times by her boyfriend Frank ... until she lost consciousness."

On appeal, Gregory concedes that evidence of his prior assaults on Heather was relevant and admissible, and he acknowledges that the State could properly introduce documentary evidence of those two assaults (*i.e.*, the charging documents and criminal judgements), as well as Heather's own testimony about these prior assaults.

However, Gregory argues that it was unfairly prejudicial for the trial judge to allow the State to present Officer Crane's testimony about the 2010 Anchorage assault — in particular, Crane's description of what Heather looked like after the assault, and Crane's testimony that, at the time, Heather told him that Gregory had inflicted her injuries.

We conclude that the trial judge did not abuse his discretion when he admitted this evidence. Heather testified at trial that Gregory did not assault her in

Anchorage — that she received her injuries when she tripped while wearing high heels. Crane's testimony was a direct rebuttal to Heather's testimony on this point.

We further note that Crane's testimony on direct examination was quite short: it consisted of a terse description of what Heather looked like when Crane interviewed her, and an equally terse description of what Heather told him regarding how she had sustained these injuries. It was Gregory's attorney who, during cross examination, asked Crane several more questions about what Heather said (or failed to say) when Crane interviewed her in 2010.

For all these reasons, we conclude that the trial judge did not abuse his discretion when he allowed the prosecutor to present Crane's testimony.

The prosecutor's cross examination of Heather Chandler based on the content of her handwritten statement to the police — a statement in which she described the 2011 assault in Bethel

As we described in the preceding section of this opinion, after the prosecutor questioned Heather Chandler about the 2010 assault that occurred in Anchorage, he began questioning Heather about the 2011 assault that occurred in Bethel.

The prosecutor first asked Heather if she remembered an incident outside Swanson's grocery in October 2011. Heather responded, "I'm not sure what you're talking about." But then the prosecutor told Heather that he had the handwritten statement about the assault that Heather had given to the Bethel police. The prosecutor showed this document to Heather, and she acknowledged that the document was in her handwriting.

Once Heather identified the handwritten document as hers, the prosecutor moved the document into evidence. Gregory's attorney objected, and the trial judge held a bench conference. Toward the end of this conference, the judge declared that the

handwritten document itself was *not* admissible, but that the prosecutor could question Heather about the statements she made in that document. The defense attorney immediately told the judge that this ruling was correct:

> *The Court*: She's recognized that it's hers, ... [so] I think you can ask her questions about it. You can ask her about every line [in] it, but ... it's not going to go to the jury as a piece of evidence, back in the jury room. It's properly marked as 18 [for identification], [and] you can ask her questions about it, sure.
>
> *Defense Attorney*: And I would go one step further, Your Honor. It's okay for [the prosecutor] to question her about it. [But] I would object if he attempts to have her read it out aloud in front of the jury, or if he attempts to offer it, which I understand the Court has already said he can't do.
>
> *The Court*: I'm saying he can read each line and [ask], "Did you say this?"
>
> *Defense Attorney*: Right.
>
> *The Court*: Okay. [end of bench conference]

Following the bench conference, the prosecutor asked Heather a series of questions about the statements she made in the handwritten document. Specifically, the prosecutor asked Heather about her statements that she had been assaulted by her boyfriend, Franklin Gregory; that he had threatened to kill her; that he had attacked her and punched her in the face; and that she had punched him back, but only to defend herself. Heather admitted that she made all of these statements in her handwritten document.

Consistent with what the defense attorney had told the trial judge during the bench conference, the defense attorney did not object to any of the prosecutor's questions.

During Heather's cross examination by the defense attorney, Heather attempted to undermine her earlier testimony about the written statement. She conceded that she had *written* all the things that the prosecutor asked her about, but she indicated that her handwritten statement to the Bethel police was largely a fabrication. She declared that *she* was the one who started the fight — by punching Gregory — and that Gregory was merely trying to defend himself and push her away. According to Heather, she was upset with Gregory, so she immediately went to the police and had Gregory arrested.

Now, on appeal, Gregory contends the trial judge committed error by allowing the prosecutor to question Heather about the various statements contained in the handwritten document that Heather furnished to the Bethel police. But as we have explained, Gregory's trial attorney expressly told the trial judge that it was proper for the prosecutor to use the document in this fashion.

Moreover, it is clear from the record that Heather's prior statements in the handwritten document were probative. As we have explained, when the prosecutor first asked Heather about the 2011 incident in Bethel, Heather responded by claiming that she did not know what the prosecutor was talking about. Only when Heather was confronted with the statements in her own handwriting did she concede that she told the police that Gregory had assaulted her.

For both of these reasons, we uphold the trial judge's decision to allow the prosecutor to confront Heather Chandler with the various statements that she made in the handwritten document.

Gregory's claim that his sentence is excessive

Gregory was convicted of third-degree assault against both Heather Chandler and her mother, Cheryl Chandler. Third-degree assault is a class C felony,[6] and Gregory was a second felony offender for presumptive sentencing purposes. Thus, Gregory faced a presumptive sentencing range of 2 to 4 years' imprisonment for each of his assault convictions.[7]

The sentencing judge found that Gregory's offense was aggravated under several provisions of AS 12.55.155(c): (c)(8) (Gregory's criminal history included several instances of assaultive behavior); (c)(19) (Gregory was adjudicated a delinquent minor for conduct that would have been a felony if he had been an adult); (c)(21) (Gregory's criminal history included repeated instances of conduct similar to his current offense); and (c)(31) (Gregory had five or more prior convictions for class A misdemeanors). Because of these aggravating factors, the judge was authorized to sentence Gregory to up to 5 years' imprisonment for each of the assaults.[8]

Gregory's other convictions — reckless endangerment of his infant son, and possession of a firearm while intoxicated — were class A misdemeanors,[9] for which Gregory faced up to 1 year's imprisonment.[10]

In addition, based on these new convictions, Gregory faced revocation of his probation in a separate case, where he faced 90 days of suspended imprisonment.

---

[6] AS 11.41.220(e).

[7] Former AS 12.55.125(e)(2) (pre-2016 version).

[8] AS 12.55.155(a)(1).

[9] AS 11.41.250(b) and AS 11.61.210(d).

[10] Former AS 12.55.135(a) (pre-2016 version).

For all these offenses and the probation revocation, the superior court sentenced Gregory to a composite term of 5 years, 9 months to serve, with an additional 7 years suspended. (At the sentencing hearing, the judge declared that Gregory's sentences on the various counts totaled 6½ years to serve, but the judge's arithmetic was incorrect.)

In his brief to this Court, Gregory argues that the sentencing judge failed to give proper consideration to Gregory's prospects for rehabilitation.

In his sentencing remarks, the judge remarked upon Gregory's lengthy criminal history. He noted that, when Gregory drank, he became "a dangerous person". The judge also pointed out — based on Gregory's pre-sentencing allocution — that Gregory continued to see himself as a victim rather than a perpetrator of crimes. (In his allocution, Gregory declared that the case against him was "fabricated", and he contended that all the witnesses who testified against him lied.)

The judge stated, based on Gregory's past record, that there was a good argument that Gregory could not be rehabilitated, and that he should simply be sentenced to a lengthy term of imprisonment, all to serve. And the judge expressly found that, in order to protect the public, Gregory needed to receive a sentence of longer than 5 years' imprisonment (the maximum penalty for Gregory's most serious offense).

But though the judge declared that the likelihood of Gregory's rehabilitation was "very questionable", the judge rejected the State's recommendation of 10 years to serve. Addressing Gregory, the judge told him:

> *The Court*: I don't agree with [the prosecutor and the pre-sentence investigator] that [your sentence] should be a flat-time sentence. ... I don't want you back out on the street in a few years and have you doing this again. I'd like to see you rehabilitated.

> I'm not real hopeful that you will be, but I'd like to see that [happen], and I'd like to see your thought process turn around from thinking you're the victim here, ... to taking responsibility for your actions.
>
> That's not going to happen today, clearly, but maybe it will if you have some time [to serve], and ... if you get some substance abuse treatment, and ... if you get some more anger management treatment, and ... if you get [a] mental health evaluation and are required to follow the recommendations with the probation officer.

Thus, the record shows that the sentencing judge gave careful consideration to Gregory's prospects for rehabilitation. Although the judge concluded that those prospects were not good, the judge was not willing to give up on Gregory, and the judge explicitly fashioned Gregory's sentence with the possibility of rehabilitation in mind.

In sum, we conclude that Gregory's composite sentence is not clearly mistaken, and we therefore uphold that sentence. [11]

Conclusion

The judgement of the superior court is AFFIRMED.

---

[11] *See McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974) (an appellate court is to affirm a sentencing decision unless the decision is clearly mistaken).