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

EVERETT MAURICE MCKINNON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11439
Trial Court No. 3AN-11-12783 CR

MEMORANDUM OPINION

No. 6252 — November 12, 2015

Appeal from the Superior Court, Third Judicial District, Anchorage, Gregory Miller, Judge.

Appearances: Dan S. Bair, Assistant Public Advocate, Appeals and Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Michael Sean McLaughlin, 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 ALLARD.

Everett Maurice McKinnon was convicted of second-degree theft and second-degree forgery following a jury trial. On appeal, he argues that he is entitled to

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

a new trial because the prosecutor referred to facts not in evidence during closing argument. Although we agree with McKinnon that the prosecutor's statements were improper, we do not find reversible error for the reasons explained here.

Background facts

On an afternoon in November 2011, McKinnon received a call from a long-time friend, Ed Wilson. Wilson asked McKinnon if he had a bank account, and he offered McKinnon $100 if McKinnon would drive Wilson to different banks to cash checks. McKinnon later testified that he was initially hesitant because he was planning to collect his social security disability check that afternoon, and Wilson's request "sounded weird."

McKinnon ultimately agreed to help Wilson. He went to Wilson's apartment, where he watched Wilson take out a check book and make out a check to McKinnon. Wilson asked McKinnon how to write the amount on the check, and McKinnon showed Wilson how to fill in the amount. When McKinnon saw that the amount was $900, he asked Wilson for $200 in exchange for his assistance in cashing the check rather than the $100 originally offered. Wilson said no, and McKinnon then agreed to cash the check for $100.

McKinnon went to First National Bank, where he held an account, and presented the $900 check and his identification to the teller. The check was drawn on another First National account belonging to a man named Matthew Mercier. When the teller compared the signature on the check to the signature associated with Mercier's account, she noticed that they did not match. She then asked McKinnon where he got the check, and McKinnon stated that he had worked for it. The teller testified that this made her suspicious because the memo line of the check said "rent."

Bank personnel then called Mercier, who confirmed that he had not written a check to a man named Everett McKinnon, and that his checkbook had recently been lost.

Based on this information, the teller refused to cash the check. She testified that McKinnon appeared to be in a hurry and demanded that she return his identification. When the teller delayed further, McKinnon quickly left the bank, leaving his identification behind. The bank manager called the police.

Police officers stopped McKinnon on foot a few blocks from the bank. McKinnon was arrested and charged with second-degree theft[1] and second-degree forgery.[2]

Prior proceedings

McKinnon's one-day jury trial focused on whether he acted with the culpable mental states required for theft and forgery — that is, whether he acted in reckless disregard of the fact that the check was stolen and whether he knowingly uttered a forged instrument with intent to defraud.[3]

At trial, McKinnon testified in his own defense, asserting that, up until the bank teller responded so strangely, he believed that the check belonged to Wilson. He testified that he did not look at the check closely other than to notice the $900 amount and he therefore never realized that the check did not belong to Wilson. McKinnon also testified that he suffered from various intellectual disabilities from a snowmachine accident and that he received social security disability because of his cognitive

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[1] AS 11.46.130(a)(7).

[2] AS 11.46.505(a)(1). The State also charged McKinnon with third-degree theft, but the State dropped that charge prior to trial.

[3] AS 11.46.190 and AS 11.46.510 (respectively).

limitations. Lastly, McKinnon testified that he had no reason to suspect that the check was stolen or forged because Wilson was a trusted friend of thirteen years.

In response, the State argued that McKinnon was a knowing participant in a plot to cash a stolen check and that his testimony was not credible. The State argued that McKinnon's testimony was not credible and that his actions, including fleeing the bank without his identification, indicated consciousness of guilt. The State also emphasized McKinnon's own prior convictions for crimes of dishonesty.

The jury convicted McKinnon of both second-degree theft and second-degree forgery. This appeal followed.

McKinnon's claim that he is entitled to a new trial based on prosecutorial misconduct

On appeal, McKinnon argues that the prosecutor committed prosecutorial misconduct when the prosecutor referred to facts not in evidence during his rebuttal closing argument. McKinnon concedes that his defense attorney never objected to the challenged portion of the prosecutor's argument, and that he must therefore show that the superior court's failure to take corrective action *sua sponte* was plain error.[4]

Before we address McKinnon's claim, some additional factual background is necessary. Ed Wilson, the friend who paid McKinnon to cash the check, had two prior felony convictions, both drug related. At trial, the prosecutor tried to introduce these prior drug felonies during his cross-examination of McKinnon. The defense attorney objected based on lack of foundation, and the superior court directed the prosecutor to establish first whether McKinnon was aware of Wilson's felony convictions.

Because McKinnon testified that he was unaware that Wilson had any prior criminal convictions, the prosecutor was unable to introduce Wilson's criminal history

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[4] *Moreno v. State*, 341 P.3d 1134, 1139 (Alaska 2015).

through McKinnon. But the prosecutor indicated to the judge (outside the presence of the jury) that he still intended to introduce Wilson's prior convictions through another witness. The prosecutor stated that he believed this evidence was relevant because he did not believe it was credible that McKinnon had no knowledge of Wilson's prior felonies given that Wilson would have been incarcerated at various times during their friendship.

Despite his stated intent to introduce Wilson's prior drug convictions through another witness, the prosecutor did not follow through with this plan. The jury therefore never heard any evidence regarding Wilson's criminal history. Nevertheless, during his rebuttal closing argument, the prosecutor referred to Wilson's prior criminal history as though it *was* in evidence:

> Let's talk about that relationship between Ed Wilson and the defendant. [The defense attorney] does make a very good point about the fact that the reason you hear witnesses testify is so that you can judge not only what they say, but how they say it. When I asked Mr. — when I asked the defendant what he knew or if he knew anything about Ed Wilson's run-ins with the law, he gave the only one-word answer that he gave yesterday: no. No, and he stopped talking. He was ready for that question and he knew the answer that he had to give to best protect himself.

The defense attorney did not object to this line of argument.

On appeal, the State defends this argument as proper commentary on a witness's demeanor. We agree with the State that this was the primary thrust of the prosecutor's argument. But this does not excuse the fact that the prosecutor was asking the jury to make inferences about McKinnon's credibility based on a criminal history that was never admitted into evidence.

Under both Alaska law and the American Bar Association Criminal Justice Standards, "it is unprofessional conduct for a prosecutor to knowingly misstate the

evidence in the record, or argue inferences that the prosecutor knows have no good-faith support in the record."[5] A prosecutor's closing argument must be grounded in admissible trial evidence and the inferences that can reasonably be drawn therefrom.[6]

We therefore agree with McKinnon that the prosecutor's argument was improper. We also agree with McKinnon that because the jurors never heard any evidence about Wilson's criminal history (and therefore were unaware that it was drug-related) the jury might have assumed that Wilson's prior convictions were similar to the theft and forgery charges at issue. Indeed, an earlier statement by the prosecutor describing McKinnon as Wilson's "go-to guy" may have improperly suggested to the jurors that McKinnon and Wilson had engaged in this type of conduct before, even though there is no evidence in the current record that this was true.[7]

Why we find there was no plain error

Although we find that the prosecutor acted improperly by referring to a criminal history not in evidence, we do not find plain error in the trial court's failure to recognize the error or to intervene. The goal of plain error review is to permit appellate review of errors "involving such egregious conduct as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice."[8]

Here, the prosecutor's improper reference to Wilson's criminal history was fleeting and not a significant part of the prosecutor's overall attack on McKinnon's

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[5] *ABA Standards for Criminal Justice* § 3-6.8 (4th ed. 2015); *see also* Alaska R. Prof. Conduct 3.4(e) ("A lawyer shall not in trial allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.").

[6] *Patterson v. State*, 747 P.2d 535, 538 (Alaska App. 1987).

[7] *See Martin v. State*, 797 P.2d 1209, 1216 (Alaska App. 1990).

[8] *Adams v. State*, 261 P.3d 758, 761 (Alaska 2011).

credibility. In his closing argument and his rebuttal, the prosecutor focused primarily on McKinnon's own prior convictions for crimes of dishonesty and on the multiple ways that McKinnon's testimony and version of events was not credible. The prosecutor pointed out that McKinnon claimed to have assisted Wilson in filling out the check, but also claimed not to have noticed the name on the signature line or the fact that the check was not Wilson's. Similarly, the prosecutor pointed out that although McKinnon characterized his involvement as doing a simple favor for an old friend, McKinnon had tried to negotiate a higher "fee" when he realized that the check was for $900. Lastly, the prosecutor argued that McKinnon's behavior at the bank and his willingness to abandon his identification demonstrated consciousness of guilt.

Given the prosecutor's argument as a whole, we conclude that the prosecutor's passing reference to Wilson's criminal history, although improper, did not undermine the fundamental fairness of McKinnon's trial and was unlikely to have had any effect on the jury's deliberations. We therefore do not find plain error.

Conclusion

We AFFIRM the judgment of the superior court.