

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

FRANK SINKA PRINCE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11497
Trial Court No. 3AN-12-10157 CR

MEMORANDUM OPINION

No. 6351 — June 15, 2016

Appeal from the District Court, Third Judicial District,
Anchorage, Pamela Washington, Judge.

Appearances: Kevin Higgins, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. G. Michael Ebell, Assistant District Attorney, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge MANNHEIMER.

The State charged Frank Sinka Prince with fourth-degree assault for punching his former friend, Allen Attungowruk. At trial, Prince wished to present evidence that his fight with Attungowruk was not an assault, but rather a mutual combat (so that Prince would only be guilty of the lesser offense of disorderly conduct).

More specifically, Prince wished to testify that, a few days before this incident, Attungowruk had touched Prince's granddaughter in a sexual manner, and that, on the day of the incident, Attungowruk telephoned Prince and taunted him to come over to Attungowruk's house and do something about it.

Before Prince took the stand, the trial judge ruled that Prince could not mention anything about Attungowruk's having touched Prince's granddaughter in a sexual manner. The judge told Prince that he could only testify that he and Attungowruk had gotten into a dispute a few days before the incident. Then, when Prince took the stand and started to describe how Attungowruk had taunted him, the trial judge ruled that this description — *i.e.*, testimony as to what Attungowruk said to Prince just before they fought — was inadmissible hearsay.

For the reasons explained in this opinion, we conclude that the trial judge abused her discretion when she prohibited Prince from testifying that his dispute with Attungowruk arose because Attungowruk purportedly touched Prince's granddaughter in a sexual manner. And the trial judge was simply mistaken (as a matter of law) when she ruled that whatever Attungowruk might have said to Prince to taunt him into fighting was inadmissible hearsay.

These two errors, in combination, prevented Prince from meaningfully presenting his defense to the fourth-degree assault charge. We therefore reverse Prince's conviction.

Underlying facts

On September 28, 2012, Frank Prince entered the home of Allen Attungowruk. Prince punched Attungowruk once or twice — leaving Attungowruk

bleeding from his cheek and nostril. Based on this incident, Prince was charged with fourth-degree assault.

Just before Prince's trial began, his attorney told the trial judge that he intended to argue that Prince and Attungowruk engaged in mutual combat — and that, therefore, Prince was not guilty of assault, but rather was guilty of the lesser offense of disorderly conduct. *See* AS 11.61.110(a)(5), as construed in *Dawson v. State*, 264 P.3d 851 (Alaska App. 2011).

The defense attorney made the following offer of proof in support of her contention that Prince's crime was disorderly conduct, not assault:

The defense attorney stated that Prince would take the stand and testify that, a few days before this incident, Attungowruk had come to Prince's house when Prince was not home, and Attungowruk had touched Prince's granddaughter on her buttocks. At some point afterwards, Prince and Attungowruk got into a physical altercation over this, and Attungowruk won this fight.

A few days later, on the night of September 28th, Attungowruk telephoned Prince and "offered [Prince] something for his granddaughter" (*i.e.*, offered to pay for sexual access to the granddaughter). Attungowruk then began taunting Prince — challenging Prince to come over to Attungowruk's house, while at the same time declaring that Prince was too weak "to do anything about it".

Based on this offer of proof, Prince's attorney argued that the jury could reasonably conclude that the altercation between Prince and Attungowruk was a mutual combat, and that Prince's crime was therefore the lesser offense of disorderly conduct.

The trial judge agreed that the existence of a prior dispute between Prince and Attungowruk was relevant, but the judge ruled that Prince would not be allowed to tell the jury about the *reason behind* this prior dispute — *i.e.*, Attungowruk's alleged sexual touching of Prince's granddaughter, and Attungowruk's later alleged offer (during

their ensuing telephone conversation) to give Prince something for his granddaughter. The trial judge ruled that any testimony concerning Attungowruk's alleged sexual misconduct with Prince's granddaughter was too prejudicial to be admitted.

Later at the trial, Prince took the stand to explain his side of this controversy, but his testimony was limited by the trial judge's ruling.

With regard to the events that occurred a few days prior to the alleged assault, Prince testified only that there "had been a dispute" between him and Attungowruk, that this "dispute" occurred four or five days before Prince came to Attungowruk's house, and that this "dispute" escalated to a physical fight — a fight that Prince lost.

Prince then testified that, on the night of September 28th (*i.e.*, the night of the alleged assault), he received a telephone call from Attungowruk and that, during this phone call, Attungowruk "[made] fun of [him]". Prince then tried to add that Attungowruk also accused him of being "weak", but the prosecutor objected that this proposed testimony was "hearsay", and the trial judge sustained the prosecutor's objection.

Following this hearsay ruling, Prince testified that Attungowruk had "taunted" him during the telephone call, and that Prince felt "threatened" (for unexplained reasons). Then, according to Prince, Attungowruk invited Prince to come over to his house.

According to Prince's testimony, when he arrived at Attungowruk's house, the two of them "talked". But when Prince's attorney asked Prince to describe what they talked about, the record shows that Prince felt constrained by the trial judge's evidentiary rulings:

Defense Attorney: What did you say to [Attungowruk] when you walked into the room?

Prince: I don't know if I — I can't explain it right now, you know, because ...

Defense Attorney: Did you say that you were ... ?

Prince: You know, it was — it was about my family.
...

Defense Attorney: So did [Attungowruk] say anything back to you?

Prince: Yes.

Defense Attorney: Okay. What was — what did you feel when he said those things to you? What was your understanding of what he was saying?

Prince: It got me kind of scared.

Defense Attorney: It got you scared?

Prince: Yes.

Defense Attorney: ... Was it your understanding that he wanted to fight you then?

Prince: Yes.

Defense Attorney: Okay. Did he ... say something to the effect of, "Let's fight," or something threatening?

Prosecutor: Objection, Your Honor.

Defense Attorney: Your Honor, I'm ...

The Court: Sustained.

Defense Attorney: ... introducing [Attungowruk's statement] for its effect on the listener.

The Court: Sustained.

Defense Attorney: So it was your understanding that he wanted to fight?

Prince: How do I answer?

. . .

Defense Attorney: Did you — You said you felt threatened?

Prince: Yes.

Defense Attorney: Okay. And ... did you feel that he wanted to fight?

Prince: Yes.

. . .

Defense Attorney: And did you feel ... that this was basically a mutual fight between the two of you?

Prince: Yes.

The jury rejected Prince's claim of mutual combat and found him guilty of fourth-degree assault.

Why we conclude that the trial judge's rulings deprived Prince of a fair opportunity to present his defense

As we have explained, the trial judge limited Prince's presentation of his defense in two respects. First, the trial judge prohibited Prince from testifying that his

dispute with Attungowruk arose because Attungowruk touched Prince's granddaughter in a sexual manner and expressed a continuing sexual interest in her. Second, the trial judge sustained the prosecutor's hearsay objections whenever Prince began to quote the words that Attungowruk spoke to him during the telephone conversation on the night of September 28th, and the words that Attungowruk spoke later, when Prince arrived at Attungowruk's house in response to that telephone call.

These rulings prevented Prince from giving any more than a cursory description of the events that preceded Attungowruk's telephone call to Prince on the evening of September 28th. These rulings also prevented Prince from testifying that, during this telephone call on the night of the 28th, Attungowruk taunted Prince by offering to pay for sexual access to Prince's granddaughter, and by telling Prince that he was too weak to do anything about it. Finally, when Prince described the conversation that occurred after he arrived at Attungowruk's house, the judge's rulings prohibited Prince from telling the jury what Attungowruk actually said — thus limiting Prince to vague and conclusory assertions about the content of that conversation.

When we are asked to review a trial judge's ruling that evidence should be excluded under Alaska Evidence Rule 403 because of its potential for unfair prejudice, we employ the deferential "abuse of discretion" standard of review. Under this standard, we are to affirm the judge's ruling unless we are convinced that the ruling was "clearly untenable or unreasonable".¹

In Prince's case, the trial judge apparently concluded that if the jury heard evidence that Attungowruk had engaged in sexual improprieties toward Prince's granddaughter, the jurors might decide that Attungowruk was not entitled to the full protection of the law, and they might be tempted to return a "not guilty" verdict even though the State had proved its case against Prince.

¹ *Gonzales v. State*, 691 P.2d 285, 286 (Alaska App. 1984).

This potential for unfair prejudice was undoubtedly a valid concern. But the evidence of Attungowruk’s misbehavior toward Prince’s granddaughter was not some peripheral aspect of the case. Rather, this evidence was crucial to Prince’s defense — Prince’s claim that Attungowruk taunted him and challenged him to engage in mutual combat.

Because Prince could not present this information to the jury, Prince could not meaningfully describe the background and the content of his telephone conversation with Attungowruk on the night of September 28th, nor could he meaningfully describe the conversation that later took place when he arrived at Attungowruk’s house in response to that telephone conversation. By depriving Prince of the ability to present this evidence, the trial judge substantially diluted the strength and potential credibility of Prince’s testimony.²

We therefore conclude that the trial judge abused her discretion when she concluded that this evidence’s potential for unfair prejudice outweighed its probative value. Prince should have been allowed to explain this aspect of the case to the jury.

The error of this ruling was compounded when the trial judge mistakenly sustained the prosecutor’s repeated hearsay objections to Prince’s testimony.

As we have explained, the trial judge sustained the prosecutor’s hearsay objections whenever Prince began to quote the words that Attungowruk said to him during the telephone conversation and during the ensuing conversation at Attungowruk’s house. These rulings were erroneous. As the defense attorney correctly noted at the time, Prince’s proposed testimony was not “hearsay” within the meaning of Alaska Evidence Rule 801(c) — because Prince was not offering Attungowruk’s out-of-court statements to establish the truth of what Attungowruk said (for instance, to establish that

² See *Smithart v. State*, 988 P.2d 583, 591 (Alaska 1999).

Prince was “weak”). Rather, the primary relevance of Attungowruk’s statements was *the fact that they were made*.

Prince was trying to show, through Attungowruk’s own words, that Attungowruk taunted him, belittled him, and challenged him to fight. Offered for these purposes, Attungowruk’s out-of-court statements were not hearsay, and the trial judge erred when she sustained the prosecutor’s hearsay objections to this testimony.

The trial judge’s erroneous evidentiary rulings had the net effect of materially diluting the strength and potential credibility of Prince’s testimony. Because Prince testified under these improper constraints, the jurors were much more likely to view his defense — his claim that Attungowruk challenged him to mutual combat — as vague, conclusory, and unconvincing. We therefore conclude that Prince is entitled to a new trial.

Conclusion

The judgement of the district court is REVERSED.