IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ALPER R. JOHNSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11772 Trial Court No. 1JU-09-640 CI MEMORANDUM OPINION No. 6517 — August 23, 2017

Appeal from the Superior Court, First Judicial District, Juneau, Louis J. Menendez, Judge.

Appearances: Olena Kalytiak Davis, Attorney at Law, Anchorage, for the Appellant. June Stein, 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.

Alper R. Johnson was convicted of second-degree sexual assault and third-degree assault of L.S. This Court affirmed his convictions on direct appeal.[1] Afterwards,

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

[1] *Johnson v. State*, 2010 WL 1006560 (Alaska App. Mar. 17, 2010) (unpublished).

Johnson applied for post-conviction relief, alleging that his trial attorney was ineffective because she had not objected to two comments the prosecutor made during his closing argument. Johnson also alleged that he was entitled to a new trial based on newly discovered evidence. The superior court dismissed Johnson's application, finding that it failed to state a *prima facie* case.

Johnson now appeals, claiming that the judge erred when he dismissed the application. For the reasons stated herein, we affirm the superior court's ruling.

Background facts and proceedings

We derive the following account of Johnson's trial from this Court's decision on direct appeal.[2]

On the morning of February 17, 2007, a postal worker was delivering mail in Juneau when he encountered a frantic woman, L.S., who said that she had been raped. L.S. then ran away. The postal worker called the police.

L.S. knocked on the door of a stranger's house. The police found L.S. lying in the entryway of the house, in a semi-fetal position. She implored the police, "Don't make me go outside; don't make me go outside." L.S. was taken by ambulance to a hospital, where she recounted what had happened to her.

According to L.S.'s testimony at Johnson's trial, she and friends spent the evening socializing at local bars. After L.S. left the last bar, she encountered Johnson at the home of a friend. Johnson was an acquaintance of L.S. She later went with Johnson and others to another home, where she eventually went to sleep.

L.S. testified that she woke up because "[Johnson] had his hand around [her] neck [and was] holding [her] down," making it difficult for her to breathe or speak.

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[2] *Id.* at *1-2.

His penis was inside her vagina. She scratched Johnson on the face and neck, and eventually Johnson rolled off of her. L.S. quickly dressed and left the house.

Later that day, the police contacted Johnson. They photographed scratches on Johnson's face, behind his ear, and down his neck. During a videotaped interview, Johnson denied L.S.'s accusations. He claimed that his injuries had occurred when he had wrestled with his friends earlier. He stated that he had last been at the house in question a long time ago, and that he had spent the prior evening driving around Juneau with a cousin.

Test results revealed that Johnson's DNA was consistent with the sperm found in L.S.'s body.

At trial, Johnson abandoned his initial alibi and, through counsel, claimed that L.S. had consented to sexual intercourse with him. Johnson did not take the stand. Several people who were present at the house that night testified as defense witnesses. One witness testified that L.S. was "all over" Johnson, and that, at one point in the evening, she danced in front of Johnson and the other men in a sexually provocative manner. Another defense witness testified that L.S. and Johnson were "hanging on each other." This witness also testified that L.S. and Johnson entered a bedroom together, and that they then came out of the room and sat together on a couch.

The jury rejected Johnson's consent defense to sexual assault and returned guilty verdicts. We affirmed Johnson's conviction on direct appeal.

Johnson subsequently filed a petition for post-conviction relief. The State moved to dismiss Johnson's petition for failure to state a *prima facie* case, and Superior Court Judge Louis J. Menendez granted the State's motion. This appeal followed.

Why we affirm the superior court's ruling that Johnson's trial attorney was not ineffective

Two of the issues that Johnson raised in his direct appeal involved comments that the prosecutor made during final argument regarding the in-court behavior of a defense witness and the in-court behavior of Johnson himself. Johnson again raised these issues in his petition for post-conviction relief.

With regard to the prosecutor's comment about the defense witness, the prosecutor argued that the witness and Johnson were "buddies" — that they "obviously [knew] each other pretty well."[3] The prosecutor based his comment on the fact that, after testifying, the witness paused at the defense table to wish Johnson good luck.

With regard to the prosecutor's comment about Johnson's courtroom behavior, the prosecutor commented that Johnson had "scowled" at the victim while Johnson's attorney was cross-examining her.[4]

On direct appeal, Johnson conceded that his trial attorney had not objected to either of the prosecutor's comments, but Johnson argued that these comments constituted plain error because they were "based upon factual assertions that [were] not in evidence."[5]

This Court held that the prosecutor's comments were not plain error,[6] but the wording of our decision makes it clear that we did not view the prosecutor's comments as error at all:

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[3] *Id.*

[4] *Id.* at *4.

[5] *Id.* at *3.

[6] *Id.* at *3.

> [A] witness's conduct in court *is* evidence, in the sense that it is proper for the trier of fact to take account of the manner in which a witness gives their testimony when the trier of fact assesses the credibility of that testimony or the weight to be given it. As noted by Dean Wigmore in his treatise on the law of evidence:
>
> > The conduct of [a] witness ... is ... admissible [evidence] when [it is] exhibited in the courtroom and on the stand, even though no formal offer of [this evidence is] required. ... [A] witness' demeanor ... is always assumed to be in evidence.
>
> It therefore follows that a trial judge does not commit plain error when the judge allows an attorney to comment on a witness's in-court conduct, at least when that conduct occurred in front of the jurors, so that the jurors can independently assess the accuracy of the attorney's characterization.[7]

In his application for post-conviction relief, Johnson alleged that his trial attorney was ineffective because she did not object to the prosecutor's comments.

Under *Risher v. State*, a defendant who claims ineffective assistance of counsel must prove two things: first, that his attorney acted incompetently (*i.e.*, that the attorney failed to meet the minimum standard of performance required of criminal law practitioners); and second, that the attorney's incompetence prejudiced the defendant (*i.e.*, that there is at least a reasonable possibility that the result at the defendant's trial would have been different but for the attorney's incompetence).[8]

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[7] *Id.* at *4 (internal citation omitted).

[8] *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974).

Our decision in Johnson's direct appeal effectively forecloses Johnson's present claim that his trial attorney was incompetent for failing to object to the prosecutor's comments. Because this Court declared that the prosecutor's comments were not error,[9] it follows that Johnson's trial attorney was not incompetent when she failed to object to those comments.

For this reason, we agree with the superior court that Johnson's petition for post-conviction relief failed to state a *prima facie* case of attorney incompetence.

Why we affirm the superior court's denial of a new trial based on claims of newly discovered evidence

About three years after Johnson's trial, L.S. was involved in two incidents where L.S. allegedly falsely accused men of committing violent crimes against her. Relying on the police reports generated from those incidents, Johnson argued that these false accusations tended to prove that L.S. lied when she testified at Johnson's trial. Johnson therefore claimed that he was entitled to a new trial based on this new evidence.

In *Mooney v. State*, this Court held that after-acquired evidence can justify a new trial if the defendant can prove that the newly discovered evidence is not "merely cumulative or impeaching" — that is, if the defendant can prove that the newly discovered evidence "undermines the government's case in a new and significant way."[10] At the initial pleading stage, therefore, the defendant must provide an explanation of how this standard would be met in his case if his factual assertions about the newly discovered evidence were ultimately proven true.[11]

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[9] *Johnson*, 2010 WL 1006560, at *4.

[10] 167 P.3d 81, 91 (Alaska App. 2007); *see also Salinas v. State*, 373 P.2d 512, 514 (Alaska 1962).

[11] *See LaBrake v. State,* 152 P.3d 474, 481-82 (Alaska App. 2007).

The superior court dismissed Johnson's newly discovered evidence claims because Johnson's petition for post-conviction relief failed to offer any case-specific analysis of the new evidence. The court noted that Johnson's petition contained no discussion of how the new evidence "directly relate[d] to [the] material issues" in Johnson's case. We agree that Johnson's pleadings provided no explanation of why, given the evidence presented at Johnson's trial and the way the case was litigated, the new evidence was not "merely cumulative or impeaching."

The evidence at Johnson's trial included not only L.S.'s trial testimony, but also DNA found inside L.S.'s body that matched Johnson's genetic profile, scratches on Johnson's face and neck, and Johnson's initial alibi defense, which he abandoned at trial in favor of a consent-based defense.

Considering all of the evidence presented at Johnson's trial, we agree with the superior court that Johnson's pleadings fail to set forth a *prima facie* case that this new evidence would have significantly altered the jury's assessment of Johnson's case. The superior court therefore properly dismissed these claims at the initial pleading stage.

Conclusion

We AFFIRM the judgment of the superior court.