

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

PHILIP S. PHILLIPS JR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12085
Trial Court No. 4AK-11-135 CR

MEMORANDUM OPINION

No. 6721 — October 17, 2018

Appeal from the Superior Court, Fourth Judicial District, Bethel,
Charles W. Ray Jr., Judge.

Appearances: Megan R. Webb, Assistant Public Defender, and
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
Ann B. Black, 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.

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

Philip S. Phillips Jr. was convicted, following a jury trial, of second-degree sexual assault for sexually penetrating T.S. while she was unconscious.¹ Several times during the prosecutor's final argument at Phillips's jury trial, the prosecutor misstated an expert witness's testimony about the DNA evidence in the case. The trial judge sustained the defense attorney's objections to each of these misstatements. However, the judge denied the defense attorney's request for a mistrial based on the prosecutor's misstatements; the judge also denied the defense attorney's request for a specific curative instruction.

Phillips contends on appeal that the judge's refusal to grant a mistrial or to issue a curative instruction was reversible error. For the reasons explained here, we conclude that the trial judge's denial of the motion for mistrial was not an abuse of discretion.

Phillips also challenges several probation conditions on appeal. The State concedes that a remand is required so that these probation conditions can be modified. This concession is well-founded.²

Background facts and prior proceedings

One evening in late 2011, T.S. and her boyfriend were at a relative's house in Chuathbaluk, a village near Aniak. Phillips, an acquaintance, was also there. At the end of a long night of drinking, T.S.'s boyfriend realized that both he and T.S. were too intoxicated to drive, so he asked Phillips to drive them home.

¹ AS 11.41.420(a)(3)(B).

² See *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess any concession of error by the State in a criminal case).

Phillips drove T.S. and her boyfriend to their home. Also at the house was T.S.'s twelve-year-old daughter and Phillips's thirteen-year-old niece, who had been invited for a sleepover. According to the girls' testimony at trial, the two girls were awake when T.S., her boyfriend, and Phillips arrived at the house between 1:00 and 2:00 a.m. The niece recalled that the boyfriend offered Phillips something to eat.

The two girls went to an upstairs bedroom. Then, around 3:00 a.m., the girls heard a thud in the living room. They decided to investigate, and they descended the stairs. Once downstairs, they saw T.S. asleep on the couch, with Phillips lying atop her, thrusting his pelvis. Both T.S. and Phillips were naked from the waist down. T.S.'s boyfriend was asleep on the living room floor.

Confronted by the two girls, Phillips rolled off of T.S. and onto the floor. He grabbed his pants, covered his genitals, and fled from the house (still naked from the waist down). The girls woke T.S. and her boyfriend and told them what they had seen. T.S. donned a pair of pajama bottoms and went back to sleep. Upon awakening, she called the Alaska State Troopers.

Later that day, DNA samples were collected from T.S., her boyfriend, and Phillips. Subsequent testing of the DNA swabs at the Alaska State Crime Detection Laboratory revealed that the boyfriend's sperm was present in T.S.'s vagina and on her labia, but the testing revealed no genetic material from Phillips on T.S., or vice versa.³

The troopers then sent a cutting of cloth from the crotch of T.S.'s pajamas to an out-of-state laboratory for further DNA testing, along with a sample of Phillips's DNA. For unknown reasons, the troopers did not send the outside laboratory a sample of the boyfriend's DNA.

³ Phillips's pubic hair combings, buccal swab, and penile swabs were obtained approximately fourteen hours after the incident.

Testing at the outside laboratory was positive for the presence of sperm and epithelial (non-sperm) cells on the cloth cutting. However, the sperm cells were too few in number to test further. The laboratory tested the non-sperm cells using Y-STR DNA testing, which tests only cells with Y chromosomes (*i.e.*, isolates the cells that come from men). This testing revealed a major and a minor component. The laboratory was able to generate a DNA profile from the major component and was able to determine definitively that the major component did not come from Phillips. However, because the laboratory was not provided with the boyfriend's DNA, it was unable to determine whether the major component came from the boyfriend.

The non-sperm cells in the minor component were of insufficient quantity to generate a full DNA profile. The testing showed only that these cells came from one or more men who were not the man from the major component. Phillips therefore could not be excluded or included as a source of the minor component.

At trial, Phillips's defense was that the evidence showed that T.S.'s boyfriend, not Phillips, had sex with T.S., and the girls were mistaken when they thought they saw Phillips (rather than the boyfriend) on top of T.S. Phillips did not present any witnesses in support of this defense. Instead, he relied on his attorney's cross-examination of the girls and his attorney's cross-examination of the forensic experts.

Prior to final arguments, the judge read preliminary instructions to the jury. As part of these preliminary instructions, the judge instructed the jury that, if the judge sustained an objection to a question or an answer to a question during trial, the jury must disregard the question or the answer. The judge also instructed the jury to disregard arguments of counsel that varied from the evidence presented at trial.

During his closing argument, the prosecutor did not refer to the DNA evidence. Instead, he relied on the girls' direct observations and the circumstantial evidence of Phillips's guilt. In contrast, Phillips's defense attorney attacked the girls'

credibility and emphasized the DNA evidence. He pointed out that the state crime laboratory had found T.S.'s boyfriend's DNA on T.S.'s genitalia, but it had not found Phillips's DNA on T.S. or T.S.'s DNA on Phillips. The defense attorney also disparaged the reliability of the out-of-state laboratory's findings. The defense attorney concluded his argument by stating that "[t]he science is very clear. Philip Phillips was excluded [by the DNA testing]. That's what the scientists say[.]"

(We note that this was not an entirely accurate description of the forensic evidence. As we have just explained, Phillips was excluded as the source of the sperm cells found on T.S.'s genitalia, but he could not be definitively excluded as a potential contributor to the minor component of the non-sperm cells found on the crotch of T.S.'s pajama pants because that minor component did not yield any full DNA profiles.)

The prosecutor then proceeded to address the DNA evidence in his rebuttal argument. The prosecutor acknowledged up front that the DNA evidence "isn't great" for the State. But the prosecutor argued that the DNA was also not as exculpatory as the defense attorney had claimed. In the course of this argument, the prosecutor misstated aspects of the forensic evidence at least three different times. Phillips's defense attorney objected to these misstatements, and the trial judge sustained the defense attorney's objections in front of the jury.

After the prosecutor finished his rebuttal, the defense attorney asked the judge for a mistrial. In the alternative, the defense attorney asked the judge to issue an additional curative jury instruction that would emphasize that the prosecutor had misstated the record.

The judge denied the motion for mistrial and declined to issue the requested curative instruction, finding that it was unnecessary because the jury had already heard the judge sustain each of the defense attorney's objections to the misstatements.

The jury convicted Phillips of second-degree sexual assault (sexual penetration of an incapacitated victim). Phillips now appeals, arguing that the judge erred when he denied the requested curative instruction and the motion for mistrial.

Why we conclude that Phillips has failed to show reversible error

This Court reviews a trial court’s denial of a request for a mistrial or for a curative instruction for abuse of discretion.⁴ “We reverse the trial court only when, after reviewing the whole record, we are left with a definite and firm conviction that the trial court erred in its ruling.”⁵ This standard of review is based on the premise that a trial judge is in a better position than an appellate court to gauge any prejudicial effect of improper evidence or argument in the larger context of the trial.⁶

On appeal, Phillips identifies three misstatements the prosecutor made. But our review of the record convinces us that the prosecutor’s misstatements about the DNA evidence are not as egregious or as material as Phillips claims.

First, the prosecutor erroneously referred to the “entire stain” found on the crotch of T.S.’s pajama pants as “spermatozoa.” This was incorrect. The stain was a mixture of sperm and epithelial cells (non-sperm cells). Moreover, only the epithelial cells yielded DNA of sufficient quantity to be tested.

Second, the prosecutor erroneously stated that the major contributor to the “sperm” found on the crotch of the pajama pants was T.S.’s boyfriend. This was also incorrect because (1) the major and minor components related to the non-sperm cells,

⁴ *Snyder v. State*, 930 P.2d 1274, 1280 (Alaska 1996); *Roth v. State*, 626 P.2d 583, 585 (Alaska App. 1981) (citing *Maze v. State*, 425 P.2d 235, 239 (Alaska 1967)).

⁵ *Tritt v. State*, 173 P.3d 1017, 1019 (Alaska App. 2008).

⁶ *Roth*, 626 P.2d at 585.

and (2) the laboratory could not identify the major component as belonging to the boyfriend because it was never given the boyfriend's DNA to compare.

Third, the prosecutor stated that “[t]here were only two men in the house [and] there were two men's spermatozoa” on the crotch of the pajamas. This statement was incorrect because (1) the sperm on the pajamas could not be tested; (2) the non-sperm cells on the pajama pants yielded a major component and a minor component; and (3) the expert testified that the minor component of the non-sperm cells came from one *or more* men.

Phillips contends that these misstatements were so egregious and misleading that the trial court should have granted him a new trial or, at the very least, should have issued the additional curative instruction he requested. We disagree that the judge's handling of this situation constituted an abuse of discretion.

As already noted, Phillips's attorney objected to each one of these misstatements, and the trial judge sustained each of those objections — thereby alerting the jury that the prosecutor's statements were inaccurate. The jury had also just received an instruction from the judge explaining that when he sustained an objection, the jury should disregard that evidence. The jury was also separately instructed that the arguments of counsel, although distinctly helpful, were not evidence and the jury should therefore disregard any arguments from counsel that varied from the actual evidence. An additional curative instruction on the misstatements was not necessary under these circumstances.

In addition, when viewed within the larger context of the trial and the prosecutor's other remarks, none of the prosecutor's misstatements were as egregious or as material as Phillips claims. The prosecutor admitted that, overall, the DNA evidence was not “great” for the State. The prosecutor's primary reason for discussing the DNA evidence was to point out that the DNA evidence was not as fully exculpatory as the

defense attorney claimed in his summation. For the most part, however, the prosecutor's remarks were focused on the other evidence of sexual penetration in the case, which was strong. The prosecutor presented two eyewitnesses, one of whom was Phillips's niece, who testified to seeing Phillips on the couch naked from the waist down thrusting into T.S., who was unconscious and also naked from the waist down.

Given this larger context, we conclude that the trial judge acted within his discretion when he sustained Phillips's objections to the prosecutor's misstatements but denied Phillips's request for a mistrial or an additional curative instruction.

Why we remand the case to the superior court for revision of several conditions of probation

At sentencing, Phillips objected that Special Probation Condition No. 14, which requires him to inform "all persons with whom he has a significant relationship, or is closely affiliated, of his criminal history," was unconstitutionally vague. On appeal, the State concedes error, citing our opinion in *Smith v. State*.⁷ In that decision, we directed the trial court to clarify the vague terms "significant relationship" and "closely affiliated."⁸ We do the same here.

Phillips also argues that his judgment should be corrected to reflect oral modifications to certain other conditions of probation that the judge made during Phillips's sentencing. The State agrees with Phillips that the judge's oral pronouncements at sentencing are controlling.⁹ We accordingly direct the superior court

⁷ *Smith v. State*, 349 P.3d 1087, 1095 (Alaska App. 2015); see also *Whiting v. State*, 2014 WL 706268, at *2-3 (Alaska App. Feb. 19, 2014) (unpublished).

⁸ *Smith*, 399 P.3d at 1095.

⁹ See *Baker v. State*, 110 P.3d 996, 1002 (Alaska App. 2005).

to conform the judgment to the judge's oral modifications of these conditions of probation.

Conclusion

We REMAND this case for revision of the conditions of probation as described above, but we otherwise AFFIRM the judgment of the superior court.