IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JASON NICKOLAS ACKERMAN,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11667
Trial Court No. 3AN-10-13667 CR

MEMORANDUM OPINION

No. 6773 — February 20, 2019

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Andrew Steiner, Attorney at Law, Bend, Oregon, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Diane L. Wendlandt, 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 Coats, Senior Judge.[*]

Judge ALLARD, writing for the Court.
Judge COATS, dissenting.

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Jason Nickolas Ackerman was convicted of second-degree sexual assault for engaging in sexual intercourse with a woman, A.L., who was intoxicated and passed out and therefore incapable of consenting to the sexual activity.[1]

On appeal, Ackerman contends that the trial judge committed error by refusing to allow his attorney to introduce evidence that, earlier in the evening in question, A.L. made a sexual advance toward Ackerman's girlfriend. For the reasons explained in this opinion, we conclude that the trial judge did not abuse his discretion when he refused to allow Ackerman's attorney to introduce this proposed evidence.

Ackerman also argues that the judge committed error later at Ackerman's sentencing, when the judge declined to refer Ackerman's case to the statewide three-judge sentencing panel. Ackerman sought referral to the three-judge panel on the theory that the lowest sentence within the applicable presumptive sentencing range — 5 years to serve — was manifestly unjust. For the reasons we explain here, we uphold the sentencing judge's ruling that it was not manifestly unjust to sentence Ackerman within the presumptive range.

Lastly, Ackerman challenges the conditions of his probation. Ackerman first argues that *all* of his probation conditions are invalid, because the sentencing judge did not make case-specific findings with respect to each of these probation conditions before the judge imposed them. Second, Ackerman argues that even if the sentencing judge did not need to individually specify the basis for each of the probation conditions, several of the provisions of his probation are unconstitutionally vague.

For the reasons explained in this opinion, we reject all but one of Ackerman's challenges to his probation conditions. We agree with Ackerman that a provision in one of his probation conditions is plainly unconstitutional, in that it fails to

---

[1] AS 11.41.420(a)(3)(B).

give him reasonable notice of what conduct is prohibited to him. We therefore direct the superior court to either delete this provision or amend it to make it more specific.

Factual background

On the night of November 22, 2008, a group of friends went bar-hopping in Anchorage. This group included Lindy Risinger, Mark McGarry, Ackerman, and Ackerman's girlfriend, Patricia Wakefield. Around 3:30 in the morning, after the bars closed, this group went to Risinger's residence — a two-story duplex that Risinger shared with two roommates.

One of Risinger's roommates was A.L. Risinger considered A.L. to be her best friend and "sister." A.L. had not gone bar-hopping with the others; instead, she had spent the night working. (A.L. worked as an exotic dancer at a strip club.) A.L. got home to the duplex around 4:00 a.m. (*i.e.*, about a half-hour after the other people). According to the testimony, A.L. was sober when she arrived home. After she got home, A.L. changed into a pair of pink sweatpants and t-shirt, in preparation for going to bed.

Within the next hour or so, most of the guests left, and only Risinger, McGarry, Ackerman, Wakefield, and A.L. remained at the duplex.

At some point around the time the rest of the guests left, Wakefield was with A.L. in her bedroom, which was adjacent to the upstairs living room. According to Ackerman's attorney's offer of proof in the trial court, Wakefield would have testified that Ackerman was in the room as well, and that this was when A.L. made a sexual advance toward her. (We will discuss this matter more fully later in this opinion.) While Wakefield was in the room, A.L. loaned her a pair of pajama pants, and then Wakefield went downstairs to sleep in Risinger's room. Around this same time, A.L. decided to take two or three Tylenol PM tablets in preparation for going to sleep.

After taking the Tylenol, A.L. returned to the living room. At this point, only four people — A.L., Risinger, McGarry, and Ackerman — were still awake.

According to the trial testimony, A.L. drank two or three shots of vodka. A.L. also smoked marijuana that evening. Both Risinger and McGarry testified that A.L. was visibly impaired by the combination of drugs and alcohol. McGarry described A.L. as "hammered," and he stated that A.L. was a "disaster of a drunk girl." According to the testimony, A.L. was stumbling, slurring her words, and speaking gibberish. It was uncontested at trial that Ackerman witnessed A.L.'s impairment.

Risinger became so concerned about A.L.'s impairment that she took A.L. to A.L.'s bedroom and put her to bed. Risinger continued to check on A.L. until A.L. fell asleep. Risinger testified that, when she left A.L., A.L. was wearing her sweatpants and a top, and she was lying on her bed normally — *i.e.*, lengthwise on the bed, with her head toward the headboard.

After Risinger put A.L. to bed, Risinger, McGarry, and Ackerman continued socializing in the living room for several hours. Around 8:40 a.m., Risinger and McGarry told Ackerman that they were going to the garage to smoke a cigarette. At the same time, Ackerman told Risinger and McGarry that he was going to the bathroom. This upstairs bathroom had two doors: a door opening into the hallway, and a second door leading into A.L.'s bedroom.

About fifteen minutes later, when Risinger and McGarry returned from their smoke break in the garage, Ackerman still had not emerged from the bathroom. Risinger thought that this was odd, especially since she knew that the bathroom was out of toilet paper.

Risinger decided to check again on A.L. Just as Risinger was opening the door to A.L.'s room, Ackerman emerged from the bathroom.

When Risinger looked into A.L.'s bedroom, she observed that A.L. was still passed out, but her body was in a completely different position on the bed. A.L. was now lying face down and sideways on the bed, with her legs hanging off the edge of the bed. A.L.'s sweatpants and underwear (but not her top) had been removed.

Seeing this, Risinger got a "yucky feeling" that something had happened to A.L. From inside A.L.'s bedroom, Risinger locked the door that led into the hallway, and she tried to lock the door that led into the adjoining bathroom, but she was unable to because it only locked from inside the bathroom.

In the meantime, according to the testimony, Ackerman had borrowed McGarry's cell phone to call a friend to make plans to meet for breakfast at a local sports bar. (Ackerman's own cell phone was later discovered next to A.L.'s bed.) Ackerman was pacing around the living room, talking loudly to his friend.

While Ackerman was still on the phone, Risinger took McGarry into the garage and told him what she had seen. After a brief conversation (no more than five minutes, according to the testimony), Risinger and McGarry quietly went back upstairs — but Ackerman was no longer in the living room.

Unable to find Ackerman, Risinger and McGarry then went to check on A.L. in her bedroom. They had to enter through the bathroom, because Risinger had previously locked the hallway door from the inside of the bedroom.

When they got into A.L.'s room, Risinger and McGarry discovered Ackerman standing next to A.L.'s bed. Ackerman's pants were down, and he was having sex with A.L., who was lying motionless on the bed.

According to Risinger's testimony, Ackerman was holding A.L.'s legs up and penetrating A.L.'s body as she lay face-down and unmoving. McGarry also testified that A.L. was passed out, and that she was not making any sounds or any movements. A.L. testified that she had no memory of any sexual activity with Ackerman.

Risinger screamed at Ackerman and started hitting him. Ackerman then left the bedroom. Ackerman went downstairs and proceeded to wake up Wakefield. Meanwhile, Risinger followed Ackerman downstairs, and she accused him of raping A.L.

During this commotion, A.L. woke up for a brief time and came downstairs. A.L. was confused and disoriented, and she asked what was going on. Risinger did not want to tell A.L. what had happened, so she simply told A.L. to go back to her bedroom and go to sleep. A.L. went back upstairs and passed out again on her bed — where she remained until she was awakened by paramedics in response to Risinger's later 911 call.

In the meantime, Ackerman had roused Wakefield, and the two of them left the duplex. Wakefield testified that, on the way home, Ackerman initially denied that anything had happened. But after Wakefield pressed him, Ackerman told her that he had had consensual sex with A.L. When Ackerman and Wakefield got home, Ackerman washed his genitals and changed his clothes. He then told Wakefield that he wanted to go back to Risinger's duplex to apologize to both A.L. and Risinger.

Meanwhile, Risinger called the police. When A.L. was told what had happened — that Ackerman had sex with her — A.L. became hysterical and distraught. When the police responded to Risinger's report of sexual assault, officers took A.L. to be examined by a SART nurse.

The SART examination took place at approximately 11:20 a.m. — *i.e.*, approximately two and one-half to three hours after the sexual activity. The SART nurse testified that there were abrasions to A.L.'s vagina, and that these abrasions could have been caused by either consensual or non-consensual sex. The nurse also testified that, although A.L. was extremely upset, she did not appear to be intoxicated during this examination.

The police were still present at the duplex when Ackerman returned. He was immediately detained and taken to a police station, where a detective interviewed him. In his statement to the detective, Ackerman said that A.L. had been "looking at him" all night. Ackerman told the detective that he went into the upstairs bathroom because he wanted to have a phone conversation with his friend, and Risinger and McGarry were being too loud.

According to Ackerman, when he got into the bathroom, he saw that the door leading into A.L.'s bedroom was open, and he saw A.L. lying on the bed through this open door. A.L. then "waved him in," and Ackerman joined A.L. on the bed. A.L. started kissing him and grabbing him.

According to Ackerman, A.L. voluntarily removed her pants and underwear (but apparently not her top), and then Ackerman and A.L. engaged in consensual sex until they were interrupted by Risinger and McGarry. (Ackerman's version of events only involved one instance of Ackerman going into A.L.'s bedroom and did not account for the interim time period in which he borrowed McGarry's phone to call his friend.)

At trial, A.L. testified that she had no memory of having sex with Ackerman, nor even a memory of Risinger putting her to bed earlier that night. A.L. also testified that, when she woke up, she could feel pain in her vagina — although she did not know why. A.L. stated that she had never experienced vaginal pain from sex before.

During closing argument, Ackerman's attorney argued that Ackerman's statement to the police was truthful — that A.L. was not incapacitated when Ackerman had sex with her (or that, even if A.L. might have been impaired, she still seemed to be acting normally, and Ackerman could not reasonably have been aware that she was so impaired as to be incapable of granting consent). The defense attorney also relied on A.L.'s self-admitted alcohol problems, and on the fact that she had experienced alcoholic blackouts in the past. The defense called an expert witness who testified that people who experience alcoholic blackouts can sometimes function in ways that seem normal to outside observers. Based on this testimony, the defense attorney suggested that A.L. may have been experiencing this type of alcoholic blackout when she initiated sex with Ackerman, which might explain why she had no memory of inviting Ackerman to engage in sexual intercourse.

At the conclusion of the trial, the jury convicted Ackerman of sexual assault.

The defense attorney's attempt to introduce testimony that, earlier in the evening, A.L. made a sexual overture toward Patricia Wakefield

During a break in the jury selection process, the prosecutor filed a motion to preclude Ackerman from introducing evidence that A.L. purportedly made a sexual advance toward Ackerman's girlfriend, Patricia Wakefield, early in the evening, prior to A.L. consuming any alcohol or drugs. In response, Ackerman's attorney told the trial judge that Wakefield would testify that on the night in question, A.L. began to kiss Wakefield and tried to take her top off, and that Wakefield became upset. (We note that Ackerman had not mentioned any such incident in his statement to the police.)

The trial judge noted that this proposed evidence fell within the scope of Alaska's rape shield law, AS 12.45.045. (The rape shield statute prohibits evidence of a victim's other sexual conduct when the "relevance" of this evidence rests on the impermissible inference that, because the victim has freely engaged in sexual relations with other people, the victim is likely to have freely engaged in sexual relations with the defendant.[2])

However, the judge stated that he would defer his ruling on the admissibility of this evidence until later in the trial, when the defense attorney would be able to fully explain its potential relevance. Thus, the admissibility of this evidence remained unresolved when the prosecutor presented the State's case-in-chief.

During the prosecutor's direct examination of Risinger, the prosecutor asked her to describe what kind of drunk A.L. was. Risinger replied that A.L. was a "disaster" when she was drinking. The prosecutor then asked:

Prosecutor: Is she a flirtatious drunk?

Risinger: No.

---

[2] *See Napoka v. State*, 996 P.2d 106, 108 (Alaska App. 2000).

Prosecutor: On November 22nd or 23rd, 2008, that whole night, did you ever see her flirting with any of the men or women at the party?

Risinger: Not that I seen, no.

Prosecutor: Okay. And any sort of casual touching?

Risinger: No.

Prosecutor: Did you see her kiss anyone?

Risinger: No.

Later, when Mark McGarry took the stand, the prosecutor asked him similar questions about A.L.'s drunkenness that night:

Prosecutor: Was she acting flirtatious?

McGarry: No. In my opinion, no.

Prosecutor: Okay. And was she — did she ever touch you or Mr. Ackerman?

McGarry: Not of — anywhere that I know of. I didn't see anything.

Prosecutor: Did she say anything to you that gave you an impression that she was flirting with you?

McGarry: No.

Prosecutor: What about with anyone else?

McGarry: No.

Shortly after McGarry finished his testimony, Ackerman's attorney again raised the issue of A.L.'s purported sexual advance toward Wakefield. The defense attorney made an offer of proof that A.L. had engaged in a sexual overture toward Wakefield on the night in question. However, the defense attorney's offer of proof was worded in a way that described what *he* thought had happened that night, rather than a description of what Wakefield was ready to testify to:

> *Defense Attorney*: I'll make an offer of proof ... that Ms. Wakefield, [A.L.], and Mr. Ackerman were actually in the bedroom of [A.L.]; that [A.L.] became sexually aggressive. She began to kiss on — or attempt to kiss on Patricia Wakefield. She attempted to take her top off. She wanted to have a threesome between Ms. Wakefield, [A.L.], and Mr. Ackerman.
>
> Ms. Wakefield became distraught. She began to cry. She decided that it was not a good thing to do. Then she said, "I'm going to bed." And at that point is when she left that room and went to bed.

Later that day, the defense attorney made a second offer of proof — this one framed in terms of what Wakefield would say if she were called to testify about this matter:

> *Defense Attorney*: Ms. Wakefield's going to simply testify to — and again, I'd make the offer of proof — that ... she'll say, "I was there; I was in the room with [A.L.], I was in the room with Mr. Ackerman, he was on the bed. [A.L.] was being very flirtatious, she was being aggressively flirtatious; she was wanting to touch my breasts and take off my top. And I knew this wasn't going to be a good situation; my boyfriend was right here in the room; and what was that going to lead into; I didn't like where this was going, it made me very uncomfortable."

The defense attorney argued that this proposed testimony was relevant to demonstrate A.L.'s sexual behavior that night — to demonstrate that A.L. was interested in sexual activity with Wakefield, perhaps with Ackerman as a voyeur or as a direct participant. The defense attorney also argued that, given the testimony that the prosecutor had elicited from Risinger and McGarry (testimony that A.L. had not been acting flirtatiously that evening), Wakefield's proposed testimony was now additionally relevant to rebut Risinger's and McGarry's testimony on this subject.

The prosecutor reiterated his position that Wakefield's testimony was barred by the rape shield statute, and he also argued that the proposed testimony was unfairly prejudicial because it depicted A.L. as bisexual — an issue that neither party had voir dired the jury on.

After hearing the defense attorney's offers of proof and the attorneys' competing arguments, the trial judge ruled that Wakefield could testify to counter the insinuation from Risinger's and McGarry's testimony that A.L. had not acted flirtatiously that night, but that Wakefield could not go into detail regarding what that flirtation involved. The trial court ruled that A.L.'s flirtation with Wakefield was seemingly barred by the rape shield statute, and that, in any event, the alleged incident between A.L. and Wakefield was not particularly relevant to the contested issue in the case (*i.e.*, whether A.L. had been incapacitated when Ackerman engaged in sex with her several hours later).

The judge also concluded, in the alternative, that even if Wakefield's proposed testimony was relevant, its potential for prejudice outweighed its probative value. The judge indicated, in particular, that he was concerned that some of the jurors might potentially decide the case based on strong feelings about same-sex sexual intimacy, and he was concerned that there had been no opportunity to voir dire on this subject.

Accordingly, the judge precluded the defense attorney from questioning either A.L. or Wakefield about the details of this alleged incident.

Later, when Wakefield took the stand, the defense attorney asked her the same question that the prosecutor had asked Risinger and McGarry: whether A.L. had been flirtatious on the night in question. Wakefield answered, "Yes, she was."

At this point, the defense attorney renewed his request to elicit testimony that A.L. had been flirtatious with Wakefield. Consistent with his prior ruling, the judge did not allow the defense attorney to elicit this testimony.

During closing argument, the defense attorney referred to Wakefield's testimony about A.L. being "flirtatious" as corroboration of Ackerman's statement to the police that A.L. had been "looking at him all night."

Why we conclude that the exclusion of Wakefield's proposed testimony does not constitute reversible error

On appeal, Ackerman argues that the trial judge erred by excluding Wakefield's testimony about A.L.'s alleged sexual overture toward her.

Alaska's rape shield law, AS 12.45.045, limits the admissibility of evidence of a person's sexual activity on other occasions. Under the statute, this evidence is not admissible if it is offered for the impermissible purpose of suggesting that, because the person has freely engaged in sexual relations with other people, the person is likely to have freely engaged in sexual relations with the defendant.[3]

Here, Ackerman argues that Wakefield's proposed testimony was offered for a different, non-prohibited reason. According to Ackerman, because he was sitting in the bedroom with Wakefield and A.L. at the time when A.L. allegedly made the sexual overture to Wakefield, one might reasonably infer that A.L. wanted Ackerman to participate in some way in her sexual interaction with Wakefield (at least as an observer). And based on this reasoning, Ackerman argues that Wakefield's testimony would have supported Ackerman's own statement that A.L. beckoned to him in a sexual way when, several hours later, Ackerman was using the bathroom adjacent to her bedroom.

---

[3] *See Napoka v. State*, 996 P.2d 106, 108 (Alaska App. 2000).

But even assuming that A.L. overtly initiated sexual contact with Wakefield earlier in the evening, the judge could reasonably conclude that the relevance of this evidence largely rested on the very inference that the rape shield statute forbids — the argument that if someone is sexually interested in one person, then they are likely sexually interested in another person as well.[4] In other words, the judge could reasonably conclude that this evidence said little or nothing about A.L.'s willingness to engage in consensual sexual activity with Ackerman several hours later, long after Wakefield had gone to bed. The judge could also reasonably conclude that the evidence was not particularly relevant to the contested issue in the case — *i.e.*, whether A.L. had been incapacitated when Ackerman engaged in sex with her several hours after the alleged flirtation with Wakefield.[5] Lastly, the judge could reasonably be concerned about the potential for unfair prejudice to the State, given the fact that the prosecutor had not been on notice that he might need to address the jurors' attitudes toward bisexuality during voir dire.

On appeal, Ackerman contends that Wakefield's proposed testimony was admissible and not barred by the rape shield statute because this testimony "[would have]

---

[4] *See Kvasnikoff v. State*, 674 P.2d 302, 306 (Alaska App. 1983) ("Until recently, female victims of heterosexual rape suffered under a rule of relevancy which reflected the view that a woman who consented to sex with one individual was more likely to have consented to sex with another. This rule was finally rejected [in the rape shield law], when it was realized that such reasoning was 'more a creature of ... male fantasy ... than one of logical inference.'") (quoting *People v. Blackburn*, 56 Cal.App. 3d 685, 128 Cal.Rptr. 864, 867 (Cal. App. 1983)), quoted in *Napoka*, 996 P.2d at 108-09; *Jager v. State*, 748 P.2d 1172, 1175 (Alaska App. 1988) (stating that the overall purpose of the rape shield statute is to "guard[] against hasty and ill-considered admission of evidence that is only marginally relevant or truly irrelevant").

[5] Under Alaska law, a person is "incapacitated" if the person is "temporarily incapable of appraising the nature of the person's own conduct or physically unable to express unwillingness to act." AS 11.41.470(2).

shown that A.L. was comfortable engaging in sexual activity ... while Ackerman looked on" and therefore would have provided support for Ackerman's assertion to the police that A.L. initiated a sexual encounter with him several hours later (after she had become so intoxicated that she required help getting to bed). But the trial judge could reasonably conclude that this marginal relevance was outweighed by the potential for unfair prejudice under Alaska Evidence Rule 403.

Indeed, the record in this case demonstrates that there was good reason for the trial judge to be concerned that the defense attorney would use Wakefield's proposed testimony to argue precisely the type of inference prohibited by the rape shield statute. Both during the presentation of the evidence and during his closing argument, Ackerman's attorney spent a significant amount of time denigrating A.L.'s character — portraying her as a sexually promiscuous woman who had no sense of personal responsibility. There were repeated references to A.L.'s employment as an exotic dancer, her prior breast augmentation surgery, the skimpiness of her thong underwear, the possibility that she might have a sexually transmitted disease, and the fact that she had recently had sex with someone other than her boyfriend.

(Contrary to the dissent's assumption, we are not making a judgment on whether these pieces of evidence should have been admitted or whether objections to these arguments should have been made. Instead, we are merely noting that the record is replete with examples where the defense attorney attacked A.L.'s character in a manner that would reasonably give rise to a concern that he intended to use the Wakefield testimony to make precisely the type of arguments that the rape shield law was intended to prevent.)

Ackerman also argues that Wakefield's proposed testimony was relevant to rebut the testimony elicited from Risinger and McGarry that A.L. was not a flirtatious drunk, and that she had not been flirting with anyone at the party.

We agree that the prosecutor's questions to Risinger and McGarry made Wakefield's proposed testimony more relevant than it might otherwise have been. But the trial judge allowed Wakefield to testify that A.L. was being flirtatious that night; the court only barred the defense attorney from eliciting the further information that A.L. had made a sexual overture to Wakefield herself.[6]

We acknowledge, as the dissent points out, that allowing Wakefield to testify to the specific details of the flirtation would have further enhanced her credibility in making this claim. But we note that the specific details would not have impeached McGarry's or Risinger's testimony that they did not see A.L. acting flirtatiously, because it was undisputed that neither of them were in the room when this alleged flirtation occurred.

It is also questionable how helpful the specific details would have actually been to the defense. Had Wakefield testified in accordance with the offer of proof, the jury would have learned that the flirtatiousness being spoken about had been directed at *Wakefield*, not Ackerman. Instead, because Wakefield was not permitted to specify that A.L.'s flirtatiousness was directed at her, the defense attorney was able to suggest during closing argument that A.L.'s flirtatiousness had been directed at Ackerman, and that it corroborated Ackerman's own statement to the police that A.L. had been "looking at him" all night.

Given all of these circumstances, and based on our review of the record in this case, we conclude that the trial judge did not abuse his discretion when he excluded

---

[6] *Cf. Lamont v. State*, 934 P.2d 774, 781 (Alaska App. 1997) (cautioning that the doctrine of curative admissibility "is one dangerously prone to overuse" and noting that the trial judge has discretion to determine which evidence neutralizes the false or misleading evidence).

the proposed testimony about A.L's. sexual overture toward Wakefield while Ackerman was in the room.

Our resolution of this issue also resolves Ackerman's related argument that the trial judge's exclusion of this evidence violated Ackerman's constitutional right to present a defense. When a judge excludes evidence through a proper application of the rules of evidence, this does not violate a defendant's right to present a defense.[7] We therefore find no violation of Ackerman's constitutional rights.

Why we uphold the superior court's denial of Ackerman's request for referral to the statewide three-judge sentencing panel

As a first felony offender convicted of second-degree sexual assault, Ackerman was subject to a presumptive sentencing range of 5 to 15 years' imprisonment.[8] Ackerman's attorney argued that, given the facts of Ackerman's case, even the 5-year minimum term of imprisonment within this presumptive range would be manifestly unjust — and, on this basis, the defense attorney asked the superior court to refer Ackerman's case to the statewide three-judge sentencing panel.[9]

---

[7] *See Jager*, 748 P.2d at 1177 ("When properly applied, the rape shield statute will not encroach on the confrontation clause, because there is no right to confront and cross-examine on irrelevant issues. ... Because the trial court properly concluded that the proposed evidence was irrelevant, Jager's sixth amendment rights were not violated."); *Larson v. State*, 656 P.2d 571, 575 (Alaska App. 1982) ("Alaska Rule of Evidence 403, when properly applied, does not violate a defendant's constitutional right to confront the witnesses against him and present evidence in his own behalf.").

[8] *See* AS 12.55.125(i)(3)(A). In addition, the superior court was required to impose at least 3 years of suspended time and 10 years of probation. *See* AS 12.55.125(o).

[9] *See* AS 12.55.165.

The superior court declined to refer Ackerman's case to the three-judge panel — and, on appeal, Ackerman asserts that this was error.

In support of his request for a referral to the three-judge panel, Ackerman's attorney submitted a sex offender evaluation of Ackerman that was conducted by Dr. Bruce Smith. In this evaluation, Dr. Smith concluded that Ackerman's "risk of recidivism appear[ed] low," and that Ackerman was "likely amenable to treatment." However, Dr. Smith also reported that Ackerman continued to deny any wrongdoing, and Dr. Smith indicated that Ackerman would not benefit from treatment unless he accepted responsibility for his actions.

(Later, during Ackerman's allocution at the sentencing hearing, he took responsibility for his actions, and he apologized to A.L.)

The sentencing judge found that Ackerman "[did] not have a history of this conduct" — neither prior convictions nor a history of unprosecuted sex offenses. Further, the judge acknowledged Dr. Smith's "very positive evaluation" of Ackerman. Based on that evaluation, the judge found that Ackerman's prospects for rehabilitation were good, and that he had a "low to moderate risk of reoffending" — although the judge agreed with Dr. Smith that "Ackerman's own assessment and insight into his actions that night is [still] lacking."

However, the judge declined to refer Ackerman's case to the three-judge panel. During the judge's sentencing remarks, he explicitly rejected Ackerman's version of events — a version in which A.L. beckoned to Ackerman and initiated sexual intercourse with him. The judge stated, "There is no doubt ... in my mind [that this] was a sexual assault in the plainest of terms," and that Ackerman "took advantage of a vulnerable person."

The judge also concluded that the sentencing goals of general deterrence and reaffirmation of community norms called for at least the minimum sentence within

the presumptive range — and that the imposition of such a sentence did not constitute manifest injustice.

The judge then sentenced Ackerman to 8 years with 3 years suspended — *i.e.*, 5 years to serve, the minimum active term of imprisonment within the presumptive range. The judge also sentenced Ackerman to 10 years of probation, with various conditions.

In this appeal, Ackerman argues that the superior court erred in refusing to refer his case to the three-judge panel. Ackerman notes that the sentencing judge found that Ackerman had good potential for rehabilitation and that he had no prior history of sex offenses. Ackerman then relies on this Court's decision in *Collins v. State*, where we declared that these two factors would justify a downward departure from the applicable presumptive range of sentences in a sexual assault case.[10] Ackerman argues that, because of the *Collins* decision, the sentencing judge in his case was mistaken when he concluded that there was no basis for referring Ackerman's case to the three-judge panel.

Recently, in *State v. Seigle*, we engaged in a detailed discussion of our decision in *Collins*, as well as the subsequent reaction to *Collins* by our supreme court and by the legislature.[11] In *Seigle*, we held that *Collins* was controlling law for a small group of cases: cases like Ackerman's, where the defendant was sentenced within the narrow time period beginning when this Court decided *Collins* and ending on July 1, 2013, when the legislature amended the sentencing statutes to overturn the result in *Collins*.

---

[10] *Collins v. State*, 287 P.3d 791, 794-96 (Alaska App. 2012).

[11] *State v. Seigle*, 394 P.3d 627, 630-35 (Alaska App. 2017).

Thus, to the extent that Ackerman's sentencing judge believed that *Collins* was not controlling authority in Ackerman's case, he was wrong.

But as we have explained, the sentencing judge also expressly concluded that, given the totality of circumstances in Ackerman's case, the 5-year minimum term of imprisonment (the low end of the applicable presumptive range) was not manifestly unjust. This was the ultimate issue to be decided. As we explained in *Seigle*, our decision in *Collins* "did not alter the analysis that a sentencing judge is required to conduct when a defendant seeks referral to the three-judge panel on the ground that a sentence within the presumptive range would be manifestly unjust":

> When a defendant asserts that a sentence within the applicable presumptive range would result in manifest injustice, the sentencing judge is required to employ the *Chaney* criteria to assess the *totality* of the circumstances of the defendant's case, and to then determine whether all sentences within the applicable presumptive range (as adjusted for any statutory aggravators and mitigators that the court has found) would be "obviously unfair."[12]

Therefore, to the extent that the judge mistakenly concluded that *Collins* did not apply to Ackerman's case, this mistake was immaterial, given the judge's express finding that the 5-year minimum term was not manifestly unjust.

We have carefully reviewed the record in this case, and conclude that the sentencing judge's decision is supported by the record and is not clearly mistaken.[13] We therefore affirm the judge's denial of Ackerman's request for referral to the three-judge panel.

---

[12] *Seigle*, 394 P.3d at 635 (emphasis in original).

[13] *See Bossie v. State*, 835 P.2d 1257, 1259 (Alaska App. 1992) (a court's decision whether to refer a case to the three-judge panel will not be reversed unless it is clearly mistaken).

Why we uphold all but one of Ackerman's probation conditions

Ackerman's final claims on appeal concern his probation conditions.

First, Ackerman challenges *all* of his probation conditions on the ground that the sentencing judge imposed these conditions without making individualized findings that each condition was legitimately related either to Ackerman's rehabilitation or to the protection of the public.[14]

But Ackerman did not object to any of these probation conditions at sentencing, and he does not argue that any of these probation conditions are so obviously irrelevant to the goals of rehabilitation and protection of the public as to constitute plain error. Ackerman is therefore barred from challenging these probation conditions in this appeal.[15]

Ackerman raises alternative, individual challenges to the provisions of Special Probation Condition 7 and Special Probation Condition 13. Ackerman argues that several provisions of these two probation conditions are plainly unconstitutionally vague, in that they fail to give him reasonable notice of what conduct is prohibited to him.

With one exception, we conclude that the provisions of Special Conditions 7 and 13 are not so vague as to be plainly unconstitutional. That one exception is the provision of Special Condition 13 that prohibits Ackerman from entering an establishment whose primary business is the sale of "sexually explicit material." We held in

---

[14] *See Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977).

[15] *See State v. Ranstead*, 421 P.3d 15, 21-23 (Alaska 2018) (holding that, except in instances of plain error, a defendant is barred from challenging a condition of probation on appeal if the defendant did not object to the condition in the trial court).

Diorec v. State that, in this context, the phrase "sexually explicit material" fails to provide constitutionally adequate notice of what conduct is prohibited.[16]

The State concedes that, under our decision in *Diorec*, this provision of Special Condition 13 is unconstitutionally vague. We therefore direct the superior court to revise this condition of Ackerman's probation — either by deleting the challenged provision, or by amending it to make it more specific.

Because this provision of Ackerman's probation potentially infringes on his First Amendment rights, if the superior court chooses to impose a more specific amended provision, the court must apply special scrutiny to the amended provision and "affirmatively consider and have good reason for rejecting any less restrictive alternatives which might be available."[17]

Conclusion

With the exception of the provision of Special Condition 13 that we have just discussed, Ackerman's conviction and sentence are AFFIRMED.

---

[16] *Diorec v. State*, 295 P.3d 409, 417 (Alaska App. 2013).

[17] *Smith v. State*, 349 P.3d 1087, 1094 (Alaska App. 2015).

Senior Judge COATS, dissenting.

Jason Nickolas Ackerman was convicted of sexual assault in the second degree on the theory that he had sexual intercourse with a woman, A.L., who he knew was passed out and therefore was incapable of consent. Ackerman defended on the ground that A.L. was awake and initiated the sexual contact. A jury found Ackerman guilty as charged.

On appeal, Ackerman contends that the superior court erred in refusing to allow him to admit evidence that, earlier in the evening of the alleged offense, A.L. had made sexual advances toward Ackerman's girlfriend, Patricia Wakefield, while Wakefield, A.L., and Ackerman were alone in A.L.'s bedroom. I conclude that the superior court erred in refusing to admit this evidence, and that we should therefore reverse Ackerman's conviction.

Background on the superior court's decision refusing to admit Patricia Wakefield's testimony that, in Ackerman's presence, A.L. made sexual advances toward Wakefield

During a break in the jury selection process, the State filed a motion — relying on AS 12.45.045, the rape shield statute — to exclude evidence that A.L. made sexual advances toward Ackerman's girlfriend, Patricia Wakefield, earlier on the night in question. In response, the defense attorney told the court that Wakefield would testify that on the night in question, A.L. began to kiss Wakefield and tried to take her top off, and that Wakefield became upset. The court stated that this allegation was covered by the rape shield statute but that it would defer ruling on the issue until an application on its relevance was made.

Having moved to preclude Wakefield from introducing evidence of A.L.'s sexual conduct toward Wakefield, the State proceeded to introduce evidence that A.L. had not engaged in any sexual conduct that evening. During the State's direct examination of Risinger, the prosecutor asked Risinger what kind of drunk A.L. was. Risinger responded that A.L. was a "disaster" when she was drinking. The prosecutor then asked:

> *Prosecutor*: Is she a flirtatious drunk?
>
> *Risinger*: No.
>
> *Prosecutor*: On November 22nd or 23rd, 2008, that whole night, did you ever see her flirting with any of the men or women at the party?
>
> *Risinger*: Not that I seen, no.
>
> *Prosecutor*: Okay. And any sort of casual touching?
>
> *Risinger*: No.
>
> *Prosecutor*: Did you see her kiss anyone?
>
> *Risinger*: No.

The prosecutor similarly questioned McGarry, who had also testified about A.L.'s drunkenness that night:

> *Prosecutor*: Was she acting flirtatious?
>
> *McGarry*: No. In my opinion, no.
>
> *Prosecutor*: Okay. And was she — did she ever touch you or Mr. Ackerman?
>
> *McGarry*: Not of — anywhere that I know of. I didn't see anything.
>
> *Prosecutor*: Did she say anything to you that gave you an impression that she was flirting with you?
>
> *McGarry*: No.

Prosecutor: What about with anyone else?

McGarry: No.

Shortly after McGarry's testimony, the defense attorney again raised the issue of Wakefield's testimony. The defense attorney made an offer of proof that Wakefield would testify, contrary to the testimony of Risinger and McGarry, that A.L. had engaged in sexual behavior. The offer of proof was worded in a way that described what happened, not what Wakefield would testify to. Specifically, the defense attorney stated:

> I'll make an offer of proof this morning that Ms. Wakefield, [A.L.], and Mr. Ackerman were actually in the bedroom of [A.L.]; that [A.L.] became sexually aggressive. She began to kiss on — or attempt to kiss on Patricia Wakefield. She attempted to take her top off. She wanted to have a threesome between Ms. Wakefield, [A.L.], and Mr. Ackerman.
>
> Ms. Wakefield became distraught. She began to cry. She decided that it was not a good thing to do. Then she said, I'm going to bed. And at that point is when she left that room and went to bed.

Later that day, at the time the court had determined it would make a ruling, the defense attorney made a second offer of proof. Unlike the first offer of proof, this offer of proof was framed from the perspective of what Wakefield would say:

> And Ms. Wakefield's going to simply testify to — and again, I'd make the offer of proof — that not only she'll say, I was there, I was in the room with [A.L.], I was in the room with Mr. Ackerman, he was on the bed, [A.L.] was being very flirtatious, she was being aggressively flirtatious, she was wanting to touch my breasts and take off my top, and I knew this wasn't going to be a good situation; my boyfriend was right here in the room; and what was that going to lead

into; I didn't like where this was going, it made me very uncomfortable.

Ackerman's attorney argued that this testimony was relevant to show A.L.'s sexual behavior that night and that it showed that A.L. was at least interested in sexual contact with Wakefield, and perhaps with Ackerman as well, either as a voyeur or as a direct participant. Ackerman's attorney also argued that this testimony was relevant to rebut testimony that the State presented from Risinger and McGarry that A.L. had not been flirtatious that evening. The State responded that the testimony was irrelevant because there was no showing that A.L. made any advances toward Ackerman and that the evidence was only offered for an impermissible inference that A.L. was bisexual or overly sexual.

The superior court concluded that the evidence was barred by the rape shield statute and that the testimony was not particularly relevant to a contested issue in the case. The court also concluded that, in the alternative, even if the evidence was relevant, its potential for prejudice outweighed its probative value. The court indicated that it was concerned about jurors potentially deciding the case based on strong feelings against same-sex relationships.

Based on that analysis, the judge granted the State's application and precluded questions to either A.L. or Wakefield about the sexual contact.

Later, during cross-examination of Wakefield, the defense attorney asked Wakefield if A.L. was flirtatious that night. Wakefield said, "Yes, she was." But when the defense attorney asked permission from the court to ask whom she was flirtatious with, the judge did not allow him to ask that question.

In its closing argument, the State argued that there was no evidence that A.L. had exhibited any sexual behavior:

> We didn't hear any time, though, that she's a promiscuous drunk, that she's a flirty drunk, that she's a horny drunk, that she tends to engage in sex with strangers when she's drunk. And you didn't hear that in evidence because that isn't evidence. That's not the facts of this case.

Analysis

"The rape shield statute prohibits evidence of a victim's sexual conduct when the 'relevance' of this evidence rests on the impermissible inference that the victim is likely to have freely engaged in sexual relations with the defendant because the victim has freely engaged in sexual relations with other people."[1] But evidence of a victim's prior sexual conduct is admissible if it is relevant to a material issue in the case.[2]

In Ackerman's case, despite being on notice that Ackerman wanted to introduce Wakefield's testimony, the State presented the testimony of two witnesses who testified that A.L. was not "a flirtatious drunk" and that, on the evening in question, they did not see A.L. flirting with any of the men or women at the party or engaging in any sort of casual touching. Therefore, the State made A.L.'s sexual behavior an issue in the case. At the same time, the State was able to greatly limit Ackerman's ability to present evidence on this issue. Ackerman was limited to asking Wakefield if A.L. was flirtatious that night. And Wakefield responded, "yes, she was." But Ackerman was unable to expand on Wakefield's observations. Having so limited the evidence that Ackerman could present, the State, in final argument, argued that there was no evidence to support the conclusion that A.L. had acted in any sexual or flirtatious way on the evening in question.

---

[1] *Napoka v. State*, 996 P.2d 106, 108 (Alaska App. 2000).

[2] *Id.*

Thus, having made an issue of A.L.'s lack of flirtatious or sexual behavior on the evening in question, the State prevented Ackerman from presenting the evidence that contradicted the State's evidence on this question.

I accordingly conclude that, given the way that the evidence was presented in this case, the superior court erred in excluding evidence that, on the evening in question, A.L. made sexual advances toward Wakefield in Ackerman's presence.

I agree with the opinion of the Court that evidence of a person's sexual activity on other occasions is not admissible if it is offered for the impermissible purpose of suggesting that, because the person has engaged in sexual relations with other people, the person is likely to have engaged in sexual relations with the defendant. But that is not the issue in this case. In Ackerman's case we are talking about conduct that occurred within a short period of time to the alleged crime. And we are talking about sexual conduct that directly involved the defendant. And we are talking about a case where the prosecution made an important part of its case the alleged victim's lack of any kind of sexual conduct on the evening in question.

Wakefield's testimony would have supported Ackerman's theory of the case and would have shed light on A.L.'s relationship with Wakefield and with Ackerman. Without it, the jury would have had the misleading impression that there was little connection between A.L. and Ackerman. The jury might have concluded that it made no sense that A.L., who, from the evidence presented at trial, was merely acquainted with Ackerman and knew that he was in a relationship with Wakefield, would have consented to sexual activity with Ackerman. At a minimum, Wakefield's testimony would have shown that A.L. was comfortable engaging in sexual activity with Wakefield while Ackerman looked on.

Furthermore, as Ackerman argued, the evidence that A.L., while alone with Wakefield and Ackerman in her bedroom, made sexual advances toward Wakefield, had

additional relevance in this case. From the offer of proof, it appears that Wakefield thought that A.L.'s actions were also directed at Ackerman. Wakefield was apparently concerned that A.L. wanted Ackerman to participate in the sexual activity. It is unclear how convincing her testimony would have been on this point, because she was not permitted to testify. And Ackerman was unable to cross-examine A.L. about this incident. But this is evidence that the jury should have had before it to make their own evaluation. This evidence was critical to Ackerman's defense.

The opinion of the Court attempts to justify the exclusion of this testimony that was extremely relevant to Ackerman's defense by arguing that Ackerman's attorney, during the trial, "spent a significant amount of time denigrating A.L.'s character — portraying her as a sexually promiscuous woman who had no sense of personal responsibility." But assuming that the evidence to which the defense attorney referred should have been objected to and excluded is not a justification for excluding relevant testimony.

I accordingly conclude that, given the way that the evidence was presented in this case, the superior court erred in excluding the evidence that, on the evening in question, A.L. made sexual advances toward Wakefield in Ackerman's presence.

The State also argues that, because two witnesses testified that A.L. was unconscious when Ackerman was having sex with her, the State's case was overwhelming. On this record, I am unable to agree. The key witnesses in the case were intoxicated on drugs and alcohol, and it could be argued that their intoxication influenced their emotional state and their ability to observe. It could also be argued that Risinger and McGarry's testimony was influenced by their relationships with the people involved. Finally, there was evidence that when A.L. was intoxicated, she occasionally had alcoholic blackouts — times when she appeared to be functioning normally, but with no later ability to recall her actions. The police took A.L. to a facility where she was

examined by a nurse at approximately 11:20 a.m. The nurse who examined A.L. testified that A.L. was extremely emotional. The nurse also testified that A.L. did not appear to be intoxicated.

At trial, both A.L. and Risinger testified that, when intoxicated, A.L. occasionally experiences "blackouts" where she does things while she appears to be awake but does not remember her actions the next day. According to A.L.'s own testimony, A.L. was in a blackout for at least part of the evening when the alleged sexual assault occurred. A defense expert testified that a person in an alcohol-induced blackout can be coherent and functional, but later have no memory of what they did. The expert testified that a blackout was a disruption of memory. Ackerman's attorney argued in closing that A.L. was in a blackout state at the time of the alleged sexual assault, where she appeared to function normally and appeared to be fully capable of consenting to sexual activity.

In other words, this was a case where the outcome rested on the jury's evaluation of the weight of the evidence and the credibility of the witnesses. I am unable "[to] fairly say that the error did not appreciably affect the jury's verdict." *Love v. State*, 457 P.2d 622, 634 (Alaska 1969).

Accordingly, I dissent from the Court's decision affirming Ackerman's conviction.