IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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| RICHARD WALKER LANE,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-12427<br>Trial Court No. 4FA-14-03115 CR<br><br>MEMORANDUM OPINION<br><br>No. 6826 — September 25, 2019 |

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Bethany Harbison, Judge.

Appearances: Josie W. Garton, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Coats, Senior Judge,[*] and Mannheimer, Senior Judge.[*]

Judge MANNHEIMER, writing for the Court.
Judge COATS, concurring.

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

In the spring of 2014, following several years of physical abuse, Laura Lane obtained a domestic violence protective order against her husband, Richard Walker Lane. This protective order barred Richard from physically contacting Laura, and it also barred Richard from approaching within 500 feet of their house (where Laura continued to reside).

On August 24, 2014, while this protective order was in effect, Richard approached and entered the house through the back door, and he then contacted Laura. According to the State's evidence, Richard demanded that Laura unlock her smart phone so that Richard could see who she had been communicating with. When Laura refused to unlock her phone, Richard began a series of assaults upon Laura — assaults that included threatening Laura with knives and choking her to the point where she began to lose consciousness. While he was attacking Laura, Richard declared several times that he was going to kill her.

Based on this incident, Richard Lane was convicted of first-degree burglary, second-degree assault, and violating a domestic violence protective order.

In this appeal, Lane contends that his conviction for burglary is legally improper. Specifically, Lane argues that the Alaska Legislature did not intend for the burglary statute to apply to situations where (1) a defendant's entry into a building is unlawful because a restraining order prohibits the defendant from approaching or entering the building, and where (2) the defendant enters the building with the intention of engaging in additional conduct that is prohibited by the same restraining order. For the reasons explained in this opinion, we reject Lane's proposed reading of the burglary statute, and we uphold his conviction for burglary.

Lane also argues that, if we uphold his burglary conviction, it was improper for the superior court to separately convict him of violating the protective order by

contacting Laura. Lane contends that, under the double jeopardy clause, this crime should have merged with his burglary conviction.

As we explain in this opinion, Lane's argument is inconsistent with our supreme court's decision in *Mead v. State*, 489 P.2d 738 (Alaska 1971). We therefore uphold Lane's separate convictions for burglary and violating the protective order.

Lane additionally argues that the trial prosecutor committed plain error toward the end of his rebuttal summation, when the prosecutor referred to Lane's history of domestic violence and then asked the jurors to "show him [*i.e.*, Lane], through your verdicts, a message ... that behavior like that is not going to be tolerated in our community." For the reasons explained here, we conclude that the prosecutor's remarks did not constitute plain error.

Finally, Lane argues that his sentence is excessive. We conclude that Lane's sentence is not clearly mistaken.

*Why we uphold Lane's conviction for burglary*

The crime of burglary consists of (1) unlawfully entering a building (2) with the intent of committing a crime inside the building.[1] In Lane's case, the prosecutor argued that Lane entered the house with the intention of committing a crime — either the crime of assaulting Laura, or at least the crime of contacting Laura in violation of the protective order.[2]

With regard to the element of unlawful entry, the prosecutor presented two arguments as to why Lane's entry into the house was unlawful: first, because Laura did

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[1] AS 11.46.310(a).

[2] AS 11.56.740(a).

not give Lane permission to enter the house, and alternatively, because (regardless of whether Laura invited Lane into the house) the protective order prohibited Lane from approaching within 500 feet of the house.

When the jury found Lane guilty of burglary, the jurors did not specify the basis for their conclusion that Lane's entry into the house was unlawful. Thus, it is possible that the jurors adopted the prosecutor's second theory: that Laura might have invited Lane into the house, but that Lane's entry into the house remained unlawful because of the 500-foot provision of the protective order.

In this appeal, Lane argues that the Alaska legislature did not intend for the burglary statute to apply to a situation where both the unlawfulness of the defendant's entry into a building and the unlawfulness of the defendant's intended conduct inside the building rest on different provisions of the same restraining order.

Lane concedes that, on its face, the burglary statute seemingly covers this type of situation. But Lane contends that the legislative history of AS 11.56.740 (the statute that makes it a crime for a person to violate a domestic violence protective order) shows that the legislature intended for defendants in this situation to be convicted only of first-degree criminal trespass, not burglary.

However, Lane does not argue that the legislature ever affirmatively declared that such defendants should be convicted of trespass only. Rather, Lane only argues that the legislature *never expressly considered* the full effect of their decision to make it a crime to violate a protective order.

In other words, Lane contends that he should not be subject to a burglary conviction because the legislative history of AS 11.56.740 does not contain any explicit discussion of how the legislature's decision to make it a crime to violate a protective order might lead to burglary convictions in situations like Lane's — situations where (1) one provision of a protective order prohibits the defendant from entering the building,

and (2) another provision of the protective order prohibits the defendant from engaging in the particular conduct that the defendant intended to commit inside the building.

Because of the absence of any discussion of this issue in the legislative record pertaining to the enactment of AS 11.56.740, Lane asserts that the *burglary statute* — AS 11.46.300 — is "ambiguous", and that this purported ambiguity must be construed against the government.

But we find no ambiguity in the wording of the burglary statute. Moreover, there is no patent absurdity or unreasonableness in applying the burglary statute to situations like Lane's. We note that the courts of South Carolina and Washington have upheld burglary convictions in these circumstances. *See State v. Gilliland*, 741 S.E.2d 521, 525–26 (S.C. App. 2012); *State v. Sanchez*, 271 P.3d 264, 266–68 (Wash. App. 2012); and *State v. Stinton*, 89 P.3d 717, 719–721 (Wash. App. 2004). Compare the result in *State v. Wilson*, 150 P.3d 144, 151–52 (Wash. App. 2007), where the Washington court held that the defendant did *not* commit burglary — because, even though the restraining order prohibited the defendant from contacting the victim, the restraining order did not separately prohibit the defendant from entering the residence.

For these reasons, we reject Lane's interpretation of Alaska's burglary statute, and we uphold Lane's conviction for first-degree (residential) burglary.

*Why we conclude that it was proper for the superior court to separately convict Lane of burglary and of violating the protective order*

In *Mead v. State*, 489 P.2d 738 (Alaska 1971), our supreme court held that when a defendant enters a building with intent to commit a crime, and then proceeds to commit the intended crime, it is proper for the defendant to receive separate convictions for the burglary and for the ulterior crime.

Lane acknowledges the *Mead* decision, but he argues that *Mead* does not govern his case. According to Lane, it was improper for him to receive separate convictions because the unlawfulness of his entry into the house and the unlawfulness of his conduct inside the house stem from the same protective order.

We might agree with Lane if the unlawfulness of his entry into the house and the unlawfulness of his conduct inside the house were based on the *same provision* of the protective order. But that is not the case here. The prosecutor explained to the jury that the unlawfulness of Lane's entry into the house stemmed from the 500-foot provision of the protective order, and that Lane entered the house with intent to violate a separate provision of the protective order (the no-contact provision).

In these circumstances, *Mead* authorized the superior court to enter separate convictions for burglary and for Lane's target crime of contacting Laura in violation of a different provision of the protective order.

*Why we conclude that the prosecutor's summation to the jury did not constitute plain error*

Lane argues that the prosecutor at his trial committed plain error when, toward the end of his rebuttal summation, the prosecutor referred to Lane's history of domestic violence.

Most of the prosecutor's remarks during his two summations (his opening summation and his rebuttal summation) were devoted to the facts of the present case, and how the evidence presented at Lane's trial proved his guilt beyond a reasonable doubt. But toward the very end of his rebuttal summation, the prosecutor noted that Lane's acts of violence in the present case were a continuation of his pattern of violence toward

Laura, and the prosecutor asked the jury to "finally hold [Lane] accountable for the violence that he commits". The prosecutor then concluded:

> *Prosecutor*: Your verdicts are mandated by the evidence that's been presented in this case. And show him, through your verdicts, a message, again, that behavior like that is not going to be tolerated in our community. Not going to be tolerated. Thank you.

On appeal, Lane challenges the propriety of these remarks. But Lane's attorney did not object to the prosecutor's remarks, so Lane must show plain error on appeal.

Lane points out, correctly, that he was not on trial for his prior acts of violence against Laura, and that it would have been improper for the jury to convict him based on those prior acts. However, it was proper for the jury to hear about these prior acts of domestic violence. Lane's defense at trial was that Laura was lying when she accused Lane of assaulting her inside the house. Under Alaska Evidence Rule 404(b)(4), Lane's prior acts of domestic violence were admissible to prove Lane's proclivity to engage in acts of domestic violence — a proclivity that would make it more likely that Lane was guilty of the assaultive conduct with which he was charged in this case.

Thus, when Lane argues on appeal that the prosecutor's remarks constituted plain error, Lane is really arguing that, because of the prosecutor's remarks, the jurors were likely to *misuse* the evidence of Lane's prior acts of violence — not merely using this evidence to assess the likelihood that Lane engaged in the acts of violence alleged in the present case, but instead using the evidence as an *independent* ground for convicting Lane of assault, apart from whatever acts of violence Lane might have committed during the episode that was litigated in the present case.

Our plain error analysis in Lane's case is governed by the Alaska Supreme Court's decisions in *Adams v. State*, 261 P.3d 758 (Alaska 2011), *Charles v. State*, 326 P.3d 978 (Alaska 2014), and *Goldsbury v. State*, 342 P.3d 834 (Alaska 2015).

In *Adams*, the supreme court set forth the following test for plain error:

> Establishing plain error ... requires the following: (1) there must be error, and the error must not have been the result of an intelligent waiver or a tactical decision not to object; (2) the error must be obvious, meaning that it should have been apparent to any competent judge or lawyer; (3) the error must affect substantial rights, meaning that it must pertain to the fundamental fairness of the proceeding; and (4) the error must be prejudicial.

*Adams*, 261 P.3d at 773.

In *Charles*, and later in *Goldsbury*, the supreme court emphasized that when an appellate court is confronted with a claim of plain error, "instead of focusing on whether [the] error was hypothetically obvious, [the court should] ask whether the error was so prejudicial to the fairness of the proceedings that ... failure to correct it would perpetuate manifest injustice." *Goldsbury*, 342 P.3d at 837, quoting *Charles*, 261 P.3d at 987.

We reject Lane's claim of plain error for two reasons.

First, even though the prosecutor asked the jury to send a message to Lane that his violence was unacceptable, the prosecutor tempered this remark by explicitly telling the jury that such a "message" was appropriate because the State had proved its allegations against Lane. Just before the prosecutor spoke of a "message", the prosecutor asserted that a finding of guilt was "mandated by the evidence that's been presented in this case."

Our second reason for finding a lack of prejudice is that, earlier in the proceedings, Lane's trial judge perceived the problem posed by the evidence of Lane's prior assaults, and she gave two limiting instructions to the jury.

The first of these limiting instructions (Instruction B-17) discussed the problem of the prior assaults at some length:

> You have heard evidence that the defendant may have engaged in conduct prior to August 24, 2014. He is not on trial for acts that may have occurred prior to August 24, 2014.
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> If you find that the defendant engaged in this other conduct, then you may only consider this evidence for the purpose of deciding whether you believe it shows the defendant is more likely to engage in the domestic violence charged in the present case because he engaged in such conduct in the past.
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> You may consider this evidence for that purpose only. ... Do not use this evidence for any other purpose, or even talk about it for other purposes in your deliberations. It would be improper and unfair for you to do so.

The judge's second limiting instruction (Instruction B-19) reiterated the proper purpose of the evidence of Lane's prior acts of violence, and this instruction expressly told the jurors that they could not convict Lane simply because he had committed acts of violence in the past:

> If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit other offenses involving domestic violence. If you find that the defendant had this disposition, you may, but are

> not required to, infer that he was likely to commit and did commit the crimes of which he is presently accused.
>
> However, [even] if you find that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. The defendant cannot be convicted simply by showing that the defendant has committed similar acts in the past.

Thus, to the extent that the prosecutor's remarks could be read as suggesting that Lane should be convicted based on violence he committed in the past, the trial judge had already informed the jury that this would be improper. If Lane's trial attorney had objected to the prosecutor's remarks, the trial judge could properly have responded to that objection by simply reiterating these limiting instructions.

Finally, we note that the trial judge affirmatively instructed the jurors that, to the extent that the arguments of the prosecutor or the defense attorney departed from the law contained in the jury instructions, those arguments "should be disregarded".

For these reasons, we conclude that the prosecutor's challenged remarks did not give rise to the prejudice that would support a claim of plain error.

*Why we uphold Lane's sentence*

Lane was convicted of two class B felonies — second-degree assault and first-degree burglary — as well as the class A misdemeanor offense of violating a protective order. For each of the two felonies, Lane faced a presumptive sentencing range of 1 to 3 years in prison, with a maximum of 10 years' imprisonment.[3] Lane was

[3] *See* AS 11.41.210(b) (designating second-degree assault as a class B felony), (continued...)

subject to the maximum sentence because he conceded two aggravating factors — that his crimes were committed against his spouse, and against someone with whom he had a sexual relationship. [4]

For these three crimes, the superior court sentenced Lane to a composite sentence of 8 years' imprisonment (12 years with 4 years suspended). On appeal, Lane contends that this composite sentence is excessive.

Lane's first argument concerns the superior court's conclusion that Lane was a "worst offender" for purposes of his conviction for violating a protective order, and the court's concomitant decision to sentence Lane to the maximum term — 1 year to serve — for this misdemeanor. [5] Lane contends that the superior court erred when it found him to be a worst offender, and thus the court erred in imposing the 1-year maximum sentence.

We believe that the record supports the superior court's finding; but in any event, Lane's contention is moot. We have repeatedly held that when a defendant receives a composite sentence for two or more criminal convictions, our task is to assess whether the defendant's combined sentence is clearly mistaken, given the whole of the defendant's conduct and history. [6] And in our assessment of the combined sentence, we

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[3] (...continued)
AS 11.46.300(b) (designating first-degree burglary as a class B felony), and former AS 12.55.125(d)(1) (version of 2014) (prescribing the normal penalty for first felony offenders convicted of a non-sexual class B felony).

[4] AS 12.55.155(c)(18)(A) and (c)(18)(D), respectively.

[5] *See* AS 11.56.740(b) (version of 2014) (designating this offense as a class A misdemeanor), and AS 12.55.135(a)(1) (version of 2014) (prescribing the penalty for a class A misdemeanor).

[6] *See*, *e.g.*, *Tipikin v. Anchorage*, 65 P.3d 899, 902 (Alaska App. 2003); *Brown v. State*, (continued...)

do not require that a specific sentence for a particular offense be individually justifiable as if that one crime were considered in isolation. [7]

Thus, the issue that Lane raises — whether the superior court could properly find that he was a "worst offender" for purposes of his individual conviction for violating a protective order — is moot. The question is whether Lane's composite sentence for his three crimes is clearly mistaken.

Lane's next challenge involves the two aggravating factors that he conceded (both of them dealing with cases of domestic violence), and the superior court's conclusion that these two aggravators were applicable to Lane's crime of burglary. Lane notes that his entry into the residence was illegal because the entry was prohibited by a provision of the domestic violence protective order obtained by his wife Laura. Thus, Lane argues, his conviction for burglary already inherently included the notion of domestic violence. Based on this reasoning, Lane contends that, under the facts of his case, his act of burglary was not rendered any more serious by the fact that the victim of the burglary was his spouse.

But again, Lane's contention is moot. Even though the superior court declared that the two aggravating factors were relevant to Lane's burglary conviction, the court did not use those aggravators to increase Lane's sentence above the applicable 1- to 3-year presumptive sentencing range. Rather, Lane received a sentence within the middle of that presumptive range: 3 years with 1 year suspended. The court was

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[6] (...continued)
12 P.3d 201, 210 (Alaska App. 2000); *Comegys v. State*, 747 P.2d 554, 558–59 (Alaska App. 1987).

[7] *See Waters v. State*, 483 P.2d 199, 202 (Alaska 1971); *Tipikin*, 65 P.3d at 902; *Jones v. State*, 765 P.2d 107, 109 (Alaska App. 1988); *Comegys*, 747 P.2d at 558–59.

authorized to impose this sentence even if no aggravators applied. Thus, Lane's argument is moot.

Finally, Lane argues that the superior court was clearly mistaken when it sentenced Lane to a composite term of 8 years to serve (12 years with 4 years suspended).

As the sentencing judge noted, when Lane committed the burglary and assault in this case, he already had a 15-year record of assaultive behavior — most of it aimed at women. And Lane's assault in the present case was not his first assault against his wife Laura. Lane first attacked Laura three years earlier, in 2011, when she told Lane that she intended to seek a divorce. One year later, in 2012, Lane again assaulted Laura after she again told him that she wanted a divorce. Lane also assaulted Laura in December 2013, February 2014, and March 2014. After this last assault, Laura obtained the protective order that figures in the present case.

In Lane's pre-sentence report, the probation officer informed the court that Lane's scores on the Ontario Domestic Assault Risk Assessment placed him in the highest-risk category for future assaultive conduct. The probation officer also noted that Lane — who was 40 years old at the time — could no longer be considered a youthful offender, and the probation officer concluded that Lane's prospects for rehabilitation were therefore more doubtful.

Based on Lane's conduct and his record, the sentencing judge concluded that Lane had repeatedly assaulted and terrorized women during the preceding 15 years. The judge also concluded that the frequency of Lane's violence was increasing, and the level of that violence was escalating. The judge found that Lane's prospects for rehabilitation were "extremely guarded", and that Lane continued to pose a risk to Laura's safety. Based on these findings, the judge concluded that isolation was an important sentencing goal in Lane's case.

Having reviewed the record, we conclude that the sentencing judge's findings are not clearly erroneous. We further conclude that the judge's weighing of these findings was reasonable, and that Lane's composite sentence of 8 years to serve is not clearly mistaken.

*Conclusion*

The judgement of the superior court is AFFIRMED.

Judge COATS, concurring.

I write separately because I am concerned about the State's argument that, even if Laura Lane invited Richard Lane to enter their residence, Richard would still be guilty of burglary because the protective order prohibited him not only from contacting Laura but from approaching within 500 feet of their house. The State argues that Laura could not consent to having Richard enter the residence. The State contends that Richard could only obtain authorization to enter the residence by obtaining a modification of the court order. Therefore, the State contends that since Richard knew that he was violating the court order by entering the residence, and because his purpose in entering the residence was to make contact with Laura (a separate violation of the protective order), he committed burglary (as well as violating the protective order) when he entered the residence.

The crime of burglary consists of unlawfully entering a building with the intent of committing a crime inside the building.[1] Read literally, under this definition, the State's argument would mean that if Lane entered any building in violation of the protective order, with the intent to further violate the protective order inside the building, he would be guilty of burglary as well as violating the protective order.

It makes a big difference whether Lane is convicted of burglary, because violating a protective order is a class A misdemeanor, but first-degree burglary (burglary of a dwelling) is a class B felony — a much more serious offense.[2]

Lane could not be convicted of burglary if he entered any building, such as a grocery store, with the intent to violate the protective order, as explained in *State*

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[1] AS 11.46.310(a).

[2] *See* AS 11.56.740(b) and AS 11.46.300(b), respectively.

*v.Wilson*, a Washington State case.[3] In *Wilson*, the court held that violation of a protective order would not support a burglary conviction where the defendant entered a residence where he and his wife had resided because the protective order did not specify that he could not enter that residence. In that circumstance, he could only be convicted of violating the protective order.[4] This decision would seem to reasonably narrow the circumstances under which a person who is under a protective order could be convicted of burglary. A person could be convicted of burglary only if he entered a building that the court had specifically ordered him not to enter, as what happened in Lane's case.

There remains the question of whether it would be inappropriate to convict a defendant of burglary as well as violating a restraining order. As the opinion of this Court points out, the courts that have considered this issue have held that a defendant who enters a residence in violation of a protective order can be convicted of burglary if the defendant intended to commit a further violation of the protective order inside the residence. But these cases involved serious violations of the protective order, where the defendant who was subject to the protective order had a history of assaulting or harassing the person who obtained the restraining order, and where the defendant then assaulted or harassed the victim in her residence, resulting in police intervention. In other words, all of these cases involved serious violations of the law. The factual situations described in these cases are very similar to the case before us at this time.

Part of the reasoning of these cases is that the person who obtained the protective order is simply not in any position to give meaningful consent. The defendants in these cases, like Lane in this case, were in a position to intimidate the

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[3] *State v. Wilson*, 150 P.3d 144 (Wash. App. 2007).

[4] *Id.* at 148, 152.

person who had obtained the restraining order, setting up a dangerous situation. For instance, in another Washington case, *State v. Sanchez*, the court noted that "the fact that [the defendant] pressured [his former wife] to allow him to stay on the premises did not make his presence there lawful. Her consent did not change the court's order."[5] The court reasoned that its holding "removes any incentive an abuser may have to pressure the protected person to consent to his presence in violation of the order."[6]

Although I can conceive of situations where allowing a defendant to be convicted of the felony of burglary for entering a building in violation of a protective order might be excessive or unfair, that is not the case before us. I therefore agree with the opinion of the Court that Lane was properly convicted of burglary.

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[5] *State v. Sanchez*, 271 P.3d 264, 268 (Wash. App. 2012).

[6] *Id.*