

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, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JERRY ANDREW ACTIVE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12397
Trial Court No. 3AN-13-05742 CR

MEMORANDUM OPINION

No. 6906 — November 4, 2020

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

Appearances: Douglas O. Moody, Assistant Public Defender,
and Samantha Cherot, Public Defender, Anchorage, for the
Appellant. Diane L. Wendlandt, Assistant Attorney General,
Office of Criminal Appeals, Anchorage, and Clyde “Ed”
Sniffen Jr., Acting Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Mannheimer,
Senior Judge.*

Judge MANNHEIMER.

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

On the evening of May 25, 2013, Jerry Andrew Active broke into an Anchorage apartment where an extended family lived: a married couple, their two young children, two of the husband’s grandparents, and one of the husband’s great-grandparents. The married couple was away from the apartment, having gone to see a movie, but the older relatives and one of the couple’s young children (their daughter) were in the apartment when Active broke in.

While Active was inside the victims’ apartment, he murdered the husband’s grandparents, after sexually assaulting the grandmother. Active also sexually assaulted the husband’s great-grandmother and the couple’s young daughter.

For this conduct, Active was convicted of first-degree burglary, two counts of first-degree murder, multiple counts of sexual assault, and one count of first-degree sexual abuse of a minor. Active has appealed these convictions, and his appeal is now before us a second time.¹

At this point in the litigation, Active has one remaining claim: He asserts that the trial judge committed error by allowing the prosecutor to elicit testimony from a police officer that Active refused to give his name after he was arrested.

There is considerable case law from around the country suggesting that the Fifth Amendment to the United States Constitution does *not* prohibit the government from commenting on an arrestee’s failure to give their name, since a person’s name (standing alone) is generally not incriminating.² But Active argues that the reasoning

¹ For our first decision in this case, see *Active v. State*, unpublished, 2019 WL 6896683 (Alaska App. 2019). In our first decision, we rejected all of Active’s claims on appeal, but the Alaska Supreme Court later directed us to reconsider one of Active’s arguments (the one discussed in this opinion).

² See *Hiibel v. District Court of Humboldt County, Nevada*, 542 U.S. 177, 189–191; 124 S.Ct. 2451, 2460–61; 159 L.Ed.2d 292 (2004); *People v. Hall*, 245 Cal.Rptr. 458, 462 (continued...)

of these cases is not convincing. Active further argues that, regardless of federal law, any comment on an arrestee's failure to give their name is prohibited by Article I, Section 9 of Alaska's constitution, as interpreted by our supreme court in *Adams v. State*, 261 P.3d 758 (Alaska 2011).

We conclude that we need not resolve this constitutional question because, under the facts of Active's case, any error was harmless. We therefore affirm Active's convictions.

Underlying facts

As we have already explained, the crimes in this case occurred in an Anchorage apartment where an extended family lived: a married couple, their two young children, two of the husband's grandparents, and one of the husband's great-grandparents. The married couple was away from the apartment because they had gone to see a movie.

When the married couple returned from seeing the movie, they discovered that they could not get into their apartment, even though they had their key: the door was double-latched from the inside. The husband yelled to his family members inside, but there was no answer. He finally had to break a window with his hands to gain entrance.

² (...continued)
(Cal. App. 1988); *State v. Baca*, 804 P.2d 1089, 1095 (N.M. App. 1990); *Commonwealth v. Reed*, 19 A.3d 1163, 1168 (Pa. App. 2011); *Massie v. State*, 744 S.W.2d 314, 317 (Tex. Crim. App. 1988).

When the couple climbed into the apartment through the broken window, they found the husband's grandparents lying dead in the living room. The husband went to call 911, while the wife tried to get into their bedroom.

The door to the couple's bedroom was closed — and, when the wife tried to open the door, she found that the door was barricaded from inside; she had to force it open. Inside the room, the wife found Jerry Active in the room with the couple's two-year-old daughter. The two-year-old was on the bed. Active was wearing a hooded sweater, but he was naked from the waist down.

Active went up to the wife and started punching her, so that he could get past her into the living room. Active succeeded in getting past the wife, but when he got into the living room, he stopped to put on his boxer shorts. At this point, both the husband and the wife began struggling with Active, trying to restrain him. When the husband demanded to know if Active was the one who had killed his grandparents, Active responded, "You have to kill me first."

Even though both the husband and the wife were struggling to keep Active inside the apartment, Active was able to force his way out the front door — still wearing only his hooded sweater and his boxer shorts. The husband and wife continued to struggle with Active after he got outside the apartment; they tried to hold onto him and his clothing while Active punched the husband. To facilitate his escape, Active slipped out of his sweater — leaving himself naked except for his boxer shorts. At this point, both the husband and the wife observed a large tattoo on Active's back.

After Active slipped out of his sweater, he was able to break free and escape. He went to the parking lot of a nearby church, and then the husband and wife lost sight of him.

Some of the neighbors heard this struggle. One of these neighbors was socially acquainted with Active, and this neighbor recognized Active as the man who was struggling with the husband and wife.

Another neighbor saw Active run through her backyard, jump over a gate, and dive head-first through an open window into an adjacent apartment building.

A third neighbor called 911 when he heard the struggle, and the neighbor stayed on the line as events transpired. While still on the line to the 911 dispatcher, this neighbor followed Active as he fled toward the church and then into the apartment building. When the police arrived, this neighbor directed them to the apartment building.

The police soon spotted Active: he was wearing nothing but boxer shorts and socks, and he had a tattoo on his back. At first, Active ran from the officers; then, in response to the officers' commands to lie on the ground, Active got down on his hands and knees. The officers repeatedly directed Active to lie prone on the ground, but Active yelled at the officers and remained crouched on his hands and knees. The officers then grappled with Active, immobilized him, and handcuffed him.

Anchorage Police Officer Steven Childers placed Active in the back of his patrol car, and then another officer asked the neighbor who had called 911 to come to Childers's vehicle to see if the neighbor could identify Active. This neighbor identified Active as the same man who had been fighting with the married couple outside their apartment.

Later, both the husband and the wife identified Active as the man they had found in their apartment, and with whom they had struggled until he managed to escape.

And when samples collected from Active's scrotum and hands were subjected to DNA testing, this testing revealed the presence of DNA that was consistent with the couple's two-year-old daughter.

Active's claim on appeal

Active's trial lasted fifteen days, including nine days of testimony. More than two dozen witnesses testified at Active's trial. Active's claim on appeal involves a short segment of the testimony of one of these witnesses, Officer Steven Childers.

As we have explained, after Active was subdued by the police, he was placed in the back seat of Childers's patrol car. Active and Childers conversed, and portions of their recorded conversation were played for the jury at Active's trial.

Active asked Childers, "Why am I being held in the back of this car?". Childers replied, "You're being detained for an assault." Active again asked, "Why am I in the back of this car?", and Childers again replied, "Because you're being detained for further investigation [of] an assault." At this point, Active began protesting that he had not assaulted anyone:

Active: Who did I assault? I haven't even assault[ed] anybody. ... [The] fucking faggot ... wanted to kick me out of his mother-fucking room, man. ... I would like to know why, man, these mother-fucking faggots kicked me out of the mother-fucking room, man. ...

Officer Childers: I can say you're — you're someone that we wanted to talk to [regarding] an assault.

Active: Uh-huh.

Childers: You were being completely uncooperative, not following our instructions, so —

Active: For assault? For what, man? Fucking faggot kicked me out of his mother-fucking room, man.

Childers: I don't know about that part; I wasn't there.

Active: He's a faggot. So why — so why am I being, ... ?

Just after this recording was played for the jury, the prosecutor resumed his direct examination of Officer Childers. During this renewed examination, the prosecutor elicited testimony that Active refused to divulge his name to Childers. Here is the testimony at issue:

Prosecutor: How would you rate, or how would you grade, the suspect's level of compliance with [the Anchorage police]? ... I mean, is he, you know, officer-friendly, meeting APD officer, sir, how are you doing? yes, sir; no, sir — that level, or is it nothing?

Childers: No, it's, he's generally, un — I mean, he's uncooperative. He's not complying [with] any commands. I mean, he's obviously disrespectful, as you can hear from the recordings. He just, I mean, he — he wouldn't even provide me his personal identification information, so I couldn't ID him.

Prosecutor: Okay, I'm going to stop you right there. Did you ask him his name?

Childers: I did.

Prosecutor: And did — he gave no statement, nothing?

Childers: Nothing.

In *Adams v. State*, 261 P.3d 758 (Alaska 2011), the Alaska Supreme Court affirmed that Article I, Section 9 of the Alaska Constitution prohibits the government from introducing evidence of a defendant's post-arrest silence as proof of the defendant's guilt: "An inference of guilt may not be drawn from a failure to speak or to explain when a person has been arrested." *Id.* at 765. Active contends that the above-quoted

exchange between the prosecutor and the police officer violated his constitutional right to post-arrest silence in two different ways.

First, Active argues that the prosecutor should not have been allowed to elicit the testimony that Active refused to give his name to the police.

Second, Active argues that the final question and answer of the quoted exchange (*Prosecutor*: “He gave no statement, nothing?” *Officer Childers*: “Nothing.”) constituted a separate violation of the constitution. According to Active, this last question and answer expanded the officer’s testimony beyond the fact that Active had refused to divulge his name — that the officer was now asserting that Active failed to make *any* statement to the police after he was arrested.

Addressing these claims in reverse order, we conclude that Active’s second claim is based on a mischaracterization of the last question and answer. True, if one reads this final exchange by itself and out of context, it might appear that the prosecutor was asking the officer whether Active made any statement whatsoever to the police. But the jury would not have interpreted the prosecutor’s question so broadly.

Just minutes before the challenged portion of Officer Childers’s testimony, the jury heard excerpts of the recorded conversation that took place between Active and Childers while Active was sitting in the back of Childers’s patrol car. In this recording, when Childers informed Active that he was being detained because the police were investigating an assault, Active responded, “Who did I assault?”, and then he expressly asserted that he had not assaulted anyone.

Thus, when the prosecutor asked Childers, “He gave no statement, nothing?”, the jurors would not have interpreted the prosecutor’s words as a suggestion that Active absolutely declined to say anything to the police. Rather, the jurors would have viewed the prosecutor’s words as a follow-up question on the same point that the

prosecutor had just been making: the point that, even though Active made self-exculpatory statements to the police, he refused to give his name.

The remaining issue is whether, under the Alaska Constitution, it was permissible for the prosecutor to elicit testimony that Active refused to give his name to the police.

As we have explained, there is judicial authority supporting the view that, under the federal constitution, the government is permitted to elicit this kind of evidence. However, there is no case law addressing this issue under the Alaska Constitution.

We do not resolve this issue here, because we conclude that, given the facts of Active's case, any error was harmless beyond a reasonable doubt.

The central theme of Active's defense at trial was that he had never been inside the victims' apartment — that he had been falsely identified as the intruder who committed the murders and sexual assaults.

In both the defense opening statement and the defense summation to the jury, Active's attorney argued that the State could not prove beyond a reasonable doubt that Active was ever inside the victims' apartment. The defense attorney suggested that when the husband and wife identified Active as the intruder, their testimony was either the result of genuine confusion or, alternatively, it was a story that they invented — either to deflect suspicion from themselves, or at least to make sure that someone paid for the crimes against their family.

But the State's evidence on this issue was overwhelming. As we have already described, the husband and wife who lived in the apartment both testified that, when they returned from seeing a movie, they found the front door double-locked from the inside; they were forced to break a window to gain entry into their home. They identified Active as the intruder they found inside the apartment. They also testified that

Active, wearing only a hooded sweater and a pair of boxer shorts, fought with them as they struggled to keep him in the apartment until the police arrived.

The couple continued to fight with Active as he forced his way out of the apartment and into the public area outside. Active escaped by slipping out of his sweater and running away, clothed only in his boxer shorts. This allowed the husband and wife to observe the tattoo on his back. The wife was also able to give a detailed description of the boxer shorts that Active was wearing.

While Active was still struggling with the husband and wife outside the apartment, a neighbor who was already acquainted with Active recognized him as the man who was fighting with the couple. Other neighbors (who did not know Active) saw a man running away in boxer shorts; one of these neighbors followed Active to a nearby apartment building. This neighbor showed the police where Active had gone, and he identified Active after the police took Active into custody.

In addition, DNA testing of samples from Active's hands and scrotum revealed the presence of DNA that was consistent with the DNA of the couple's two-year-old daughter.

Finally, the objected-to testimony of Officer Childers represented only a brief fragment of Active's trial — a few minutes of the nine days of testimony — and the prosecutor did not mention Childers's testimony when he delivered his summation to the jury.

All of this, taken in combination, convinces us that any error in the objected-to testimony was harmless beyond a reasonable doubt. Thus, even if it was error for the trial judge to allow the prosecutor to elicit this testimony, the error does not require reversal of Active's convictions.³

³ See *Chapman v. California*, 386 U.S. 18, 24; 87 S.Ct. 824, 828; 17 L.Ed.2d 705
(continued...)

Conclusion

The judgement of the superior court is AFFIRMED.

³ (...continued)
(1967), and *Love v. State*, 457 P.2d 622, 633 (Alaska 1969) (both holding that the occurrence of constitutional error requires reversal of a defendant's conviction unless the error is shown to be harmless beyond a reasonable doubt).