

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

ALFRED MCKINLEY JR.,

Appellant,

v.

CITY AND BOROUGH OF JUNEAU,

Appellee.

Court of Appeals No. A-12822  
Trial Court No. 1JU-16-00922 CR

MEMORANDUM OPINION

No. 6921 — February 3, 2021

Appeal from the District Court, First Judicial District, Juneau,  
Thomas G. Nave, Judge.

Appearances: Nicholas A. Polasky, Attorney at Law, Juneau,  
for the Appellant. Teresa Bowen, Assistant Municipal Attorney,  
and Robert H. Palmer III, Municipal Attorney, Juneau, for the  
Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison,  
Judges.

Judge WOLLENBERG.

Following a jury trial, Alfred McKinley Jr. was convicted of misdemeanor assault for attacking a man on a street in downtown Juneau.<sup>1</sup> The victim, T.O., testified

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<sup>1</sup> City and Borough of Juneau Code (CBJ) 42.10.010(a)(1) (recklessly causing any  
(continued...))

that McKinley slammed him into the ground, punched him, and then held him down while McKinley's girlfriend, L.K., repeatedly kicked him in the head. McKinley admitted to knocking T.O. to the ground, but he denied that he continued to punch or attack him.

There were two eyewitnesses who corroborated portions of T.O.'s testimony. One eyewitness testified to seeing McKinley take T.O. to the ground and punch him. A second eyewitness did not see how the fight began, but testified to seeing McKinley holding T.O. down on the ground while L.K. kicked him.

Prior to trial, the trial court granted the prosecutor's request for an order prohibiting McKinley from introducing evidence of his belief that T.O. had sexually assaulted L.K. about a month earlier. McKinley raised several theories of relevance for this evidence, but he renews only one of these theories on appeal: that the evidence was relevant to whether he acted recklessly at the time of the attack.<sup>2</sup> On this basis, McKinley argues that the trial court abused its discretion in excluding the evidence.

To prove that McKinley was guilty of the charged assault, the City and Borough of Juneau was required to establish that McKinley acted recklessly with respect to causing T.O. physical injury<sup>3</sup> — *i.e.*, that McKinley was aware of and consciously disregarded a substantial and unjustifiable risk that T.O. would be injured as a result of

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<sup>1</sup> (...continued)  
physical injury to another person).

<sup>2</sup> See Alaska R. Evid. 404(b)(1) (providing that, while "[e]vidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person," the evidence is admissible for other non-propensity purposes, "including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

<sup>3</sup> CBJ 42.10.010(a)(1).

his conduct.<sup>4</sup> McKinley points out that the risk must be of “such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation[.]”<sup>5</sup>

McKinley first contends that the challenged evidence was relevant to the reasonableness of his actions because a jury could find that it was reasonable for him to push and trip the man who sexually assaulted his girlfriend. But McKinley was not entitled under the law to engage in vigilante justice in response to a sexual assault that allegedly took place a month prior.

McKinley next argues that the challenged evidence was relevant to whether he was “aware of and consciously disregard[ed] a substantial and unjustifiable risk” that T.O. would be injured by his conduct.<sup>6</sup> McKinley notes that the responding officer testified to McKinley’s report that he “lost it” when he saw T.O. McKinley argues that if the jurors believed that he “lost it,” they might have concluded that he was not aware that pushing and tripping the victim created a risk of injury — and that his belief that T.O. had sexually assaulted his girlfriend lent support to the notion that he “lost it.” But McKinley’s assertion that he “lost it” and then knocked T.O. down tended to show the opposite: that McKinley got angry and pushed and tripped T.O. *because* he wanted to injure him.

Even assuming that the challenged evidence was marginally relevant to proving recklessness, the evidence created a risk of unfair prejudice — specifically, that the jury would acquit McKinley based on the incorrect theory that McKinley’s conduct was justified. We therefore conclude that, under these circumstances, the trial court did

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<sup>4</sup> CBJ 42.05.010(3).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

not abuse its discretion in initially excluding this evidence as more unfairly prejudicial than probative.<sup>7</sup>

McKinley also argues that even if the court did not abuse its discretion in its initial decision to exclude evidence of the alleged sexual assault, the prosecutor opened the door to introduction of this evidence at various points in the trial. McKinley points out that on several occasions — through questioning and argument — the prosecutor improperly suggested to the jury that McKinley’s attack was unprovoked, when McKinley was otherwise prohibited by the protective order from providing an explanation for his motivation.

We agree with McKinley that, at times, the prosecutor used the protective order as a sword rather than a shield, incorrectly implying that McKinley had no reason at all for attacking T.O.<sup>8</sup> This conduct appears to have had no legitimate purpose, but was instead directed at convincing the jury of a view of the facts that was not supported by the evidence: that McKinley had no motivation for the assault and was instead the sort of person who randomly attacks people in the street. Given this potential

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<sup>7</sup> See *Howard v. State*, 239 P.3d 426, 429 (Alaska App. 2010) (“When we review a trial judge’s weighing of probative value versus potential for unfair prejudice under Evidence Rule 403, we review the judge’s ruling under the ‘abuse of discretion’ standard,” and we are to affirm unless the judge’s ruling is “clearly untenable or unreasonable.”); see also *State v. Scheck*, 940 A.2d 871, 876-78 (Conn. App. 2008) (holding that the trial court did not abuse its discretion in precluding evidence that the victim of the assault by the defendant and a co-conspirator had allegedly sexually assaulted the co-conspirator’s girlfriend previously).

<sup>8</sup> For example, during cross-examination of McKinley, the prosecutor asked, “[D]id you feel it was okay to go up to a man that you’ve never met before, you did not have any anger towards, and it was okay to just go up to him on the street, put your foot behind his foot and give him a shove so he hits the ground?” McKinley responded that he could not say “because it’s been ruled out.”

misperception, the trial court arguably should have admitted the disputed evidence at that point, or taken some other action to protect against the risk of unfair prejudice.<sup>9</sup>

But even accepting all of this, we conclude that any error on the part of the judge in refusing to admit the evidence was harmless.<sup>10</sup> First, there was other evidence suggesting that McKinley's attack on T.O. was not random. For instance, T.O. testified that when McKinley and L.K. first approached him, McKinley asked L.K., "Is this the guy?" L.K. responded, "Yeah, are you going to take care of him?" In addition, T.O. acknowledged that he had interacted with L.K. before that date. And one of the eyewitnesses testified that L.K. was visibly angry and yelling at T.O. throughout the encounter, suggesting a pre-existing relationship between the parties.

Second, McKinley's claimed motivation for assaulting T.O. did not directly negate any of the elements of misdemeanor assault, and it did not support any statutory defense or lesser offense.<sup>11</sup> Indeed, as the trial court recognized, evidence that McKinley

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<sup>9</sup> See, e.g., *Lamont v. State*, 934 P.2d 774, 781-82 (Alaska App. 1997) (recognizing that the doctrine of curative admissibility permits introduction of otherwise inadmissible evidence to the extent necessary to remove any unfair prejudice from false or misleading presentation of facts). To protect against the potential for unfair prejudice, the trial court could have given a limiting instruction to the jury when admitting the evidence.

<sup>10</sup> In fact, at one point during his own testimony, McKinley himself violated the protective order.

<sup>11</sup> Cf. *Prince v. State*, 2016 WL 3369193, at \*3-4 (Alaska App. June 15, 2016) (unpublished) (holding that the court erred in prohibiting the defendant from testifying that the alleged assault victim had sexually touched the defendant's granddaughter and then taunted him into fighting, when the defendant defended against the charged assault on the ground that it constituted the lesser crime of disorderly conduct under a mutual combat theory).

had a motive to attack T.O. helped support the prosecution's case.<sup>12</sup> We therefore conclude that any error in failing to admit the evidence did not appreciably affect the jury's verdict.<sup>13</sup>

McKinley raises one more issue on appeal. During defense counsel's cross-examination of a witness, the court made disparaging comments about defense counsel's pursuit of a particular line of questioning. On appeal, McKinley argues that the court should have granted his request for a mistrial based on these inappropriate comments.

But the record shows that the court acknowledged that its comments were inappropriate and instructed the jury that defense counsel's line of questioning had not been improper and that the jury should disregard the comments made by the court. The trial court did not abuse its discretion in concluding that a curative instruction was sufficient to remedy any prejudice caused by the court's comments.<sup>14</sup>

The judgment of the district court is AFFIRMED.

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<sup>12</sup> See Alaska Criminal Pattern Jury Instruction 1.26 (providing that motive is not an element of the crime charged and that "presence of motive may tend to establish guilt" while "absence of motive may tend to establish innocence").

<sup>13</sup> See *Love v. State*, 457 P.2d 622, 631-32 (Alaska 1969).

<sup>14</sup> *Hamilton v. State*, 59 P.3d 760, 769 (Alaska App. 2002) (citing *Roth v. State*, 626 P.2d 583, 585 (Alaska App. 1981)) (recognizing that a curative instruction, if promptly given, is generally presumed to cure any unfair prejudice).