

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

RONALD BUKHER KATCHATAG,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13148
Trial Court No. 2UT-16-00093 CR

MEMORANDUM OPINION

No. 6930 — March 24, 2021

Appeal from the Superior Court, Second Judicial District,
Nome, Romano DiBenedetto, Judge.

Appearances: Jane B. Martinez, Law Office of Jane B. Martinez, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. RuthAnne Beach, Assistant Attorney General, Office of Criminal Appeals, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge ALLARD.

Ronald Bukher Katchatag appeals his conviction for first-degree sexual assault.¹ He argues that the superior court erred when it excluded evidence of an

¹ AS 11.41.410(a)(1).

allegedly false report of sexual assault that the victim made against a different person three years after the incident that gave rise to this case. For the reasons explained here, we affirm the superior court's exclusion of this evidence.

Katchatag also appeals the imposition of a probation condition that requires him to submit to plethysmograph assessments. The State concedes error on this claim, and we conclude that this concession is well-founded.

Factual background

Katchatag and the victim, A.E., were part of a small group drinking whiskey in the early morning hours of August 7, 2013 in Unalakleet. A.E. testified at trial that, as the other members of the group were leaving, Katchatag offered her another drink, which she stayed behind to take. She further testified that, after she finished her drink, Katchatag picked her up, carried her inside an abandoned building, and sexually assaulted her.

A.E. testified that, after Katchatag ejaculated, she told him she needed to vomit. Katchatag got off A.E., and she fled the building, partially unclothed and barefoot. A.E. immediately reported to a friend that Katchatag had raped her. A witness saw Katchatag leave the abandoned building a short while later, wearing A.E.'s Hello Kitty sweatpants.

A.E. reported the sexual assault to troopers and was taken to Nome for a Sexual Assault Response Team (SART) exam. The SART exam revealed abrasions and lacerations on A.E.'s external genitals, bruising on her cervix, and bruises on her upper thigh. A swab of A.E.'s vagina contained sperm that matched Katchatag's DNA profile.

During an interview with troopers, Katchatag admitted that he spent time with A.E. on the day of the assault, but he denied having sex with her. At trial, Katchatag testified that he had sex with A.E. but that it was consensual. His attorney

argued that A.E. had lied about the sexual assault because she did not want people to know that she had cheated on her boyfriend.

The jury convicted Katchatag of first-degree sexual assault.

Proceedings involving A.E.'s 2016 sexual assault allegation against M.E.

Before trial, Katchatag moved to admit two instances of alleged sexual contact between A.E. and another man, M.E.²

The first instance allegedly occurred on the same night as the incident involving A.E. and Katchatag, and was offered to explain some of A.E.'s injuries.³ The trial court admitted this evidence.

The second instance occurred three years later, and A.E. reported it to the police as a sexual assault. (The incident with Katchatag happened in 2013, but Katchatag did not go to trial until 2017. The sexual encounter between A.E. and M.E. that was reported to the police as a sexual assault occurred in 2016.) Katchatag alleged that the 2016 incident was a false report, and he sought to introduce evidence of the sexual encounter, including M.E.'s statement that the sex was consensual, to impugn A.E.'s credibility.

In support of his motion, Katchatag presented a 2016 police report in which A.E., M.E., and M.E.'s son gave their versions of what had occurred. A.E. told the police that she had been drinking heavily and was visiting M.E.'s son's house when she blacked out. She stated that she woke up naked in a bedroom with M.E. on top of her and having sex with her. She told M.E. to stop, which he did.

² Because of the nature of the allegations, we use initials to refer to the person involved in the two disputed instances of sexual contact. We also note that M.E. is not related to A.E.

³ At trial, A.E. denied seeing or having sex with M.E. on that night.

In contrast to A.E.’s version of events, M.E. reported that he and A.E. had consensual sex in the bedroom and that she “flipp[ed] out” and started yelling after they had returned to the living room and were “hanging out.”

When initially questioned by the police, M.E.’s son denied that M.E. and A.E. had sex. However, he later told the police that he walked in on A.E. and M.E. having sex and he “did not hear her say stop or scream[] for help.”

The 2016 case was apparently never prosecuted, although there is nothing in the record indicating why it was not prosecuted.

At a pretrial hearing in Katchatag’s case, Katchatag argued that evidence of the 2016 sexual assault complaint against M.E. was admissible to attack A.E.’s credibility and to show that A.E. had falsely accused another man of sexual assault.

The prosecutor opposed admission of the 2016 incident, arguing that Katchatag had failed to meet the threshold requirement of showing that the 2016 sexual assault allegation was “knowingly false.”⁴ The superior court agreed and denied Katchatag’s motion with respect to the 2016 incident.

At trial, Katchatag renewed his motion to admit evidence of A.E.’s 2016 sexual assault complaint against M.E. The superior court again denied the request, emphasizing that Katchatag bore the burden of proving the threshold question of falsity.

This appeal followed.

The governing law

In 1985, this Court ruled in *Covington v. State* that a defendant charged with sexual assault may introduce evidence that the complaining witness made prior false accusations of sexual assault only if, as a foundational matter, the defendant established

⁴ See *Morgan v. State*, 54 P.3d 332, 333 (Alaska App. 2002).

the falsity of the prior accusations, “as, for example, where the charges had somehow been disproved or where the witness had conceded their falsity.”⁵

Seventeen years later, in *Morgan v. State*, we clarified what we said in *Covington*.⁶ The trial judge in *Morgan* had interpreted *Covington* to mean that evidence of a prior false complaint could be introduced only if the complaining witness conceded under oath that the accusation was false, or if a court had formally adjudicated the accusation to be false.⁷ We concluded that “this [was] too narrow a reading of *Covington*.”⁸ We held instead that this evidence should be admitted if, as a foundational matter, the defendant convinced the trial judge by a preponderance of the evidence that the complaining witness had made a knowingly false complaint of sexual assault.⁹

Thus, under *Morgan*, “a defendant must convince the trial judge by a preponderance of the evidence (1) that the complaining witness made another accusation of sexual assault, (2) that this accusation was actually untrue, and (3) that the complaining witness knew that the accusation was untrue.”¹⁰ The defendant can prove these elements “through *voir dire* examination of the complaining witness or through presentation of extrinsic evidence — *i.e.*, documentary evidence or the testimony of

⁵ *Covington v. State*, 703 P.2d 436, 442 (Alaska App. 1985), *abrogated on other grounds by Anderson v. State*, 337 P.3d 534, 536-37 (Alaska App. 2014).

⁶ *Morgan*, 54 P.3d at 333.

⁷ *Id.* at 333-34.

⁸ *Id.* at 337.

⁹ *Id.* at 339-40.

¹⁰ *Id.* at 333.

witnesses having knowledge of the prior accusation.”¹¹ This foundational evidence should be presented outside the presence of the jury.¹²

Our resolution of Katchatag’s claim

On appeal, Katchatag argues that the superior court placed too high a burden on him to disprove the 2016 sexual assault allegation. Katchatag points to various statements by the superior court that suggested the court would only find the threshold question of “knowing falsity” if Katchatag could produce evidence such as a recantation by the complaining witness, contradictory physical evidence, an acquittal at trial, or a grand jury’s finding of “no true bill.”

We agree with Katchatag that the superior court’s statements suggest that it may have been placing too high a burden on Katchatag. In its remarks, the superior court relied heavily on *Johnson v. State*, a pre-*Morgan* case.¹³ In *Johnson*, we held that the trial court did not err in precluding the defense attorney from questioning the complaining witness *in camera* regarding a prior claim of sexual assault because the defense attorney had not put forward any “colorable ground” to believe that the complaining witness would recant the prior claim.¹⁴ But, as we clarified in *Morgan*, “recantations and prior adjudications” are only *examples* of how the falsity of a prior accusation might be proved.¹⁵ The “true issue” is “whether the prior accusation was

¹¹ *Id.*

¹² *Id.*

¹³ *Johnson v. State*, 889 P.2d 1076 (Alaska App. 1995).

¹⁴ *Id.* at 1078-79.

¹⁵ *Morgan*, 54 P.3d at 338.

actually and knowingly false.”¹⁶ And as we explained in *Morgan*, “a defendant is entitled to rely on normal evidentiary methods — the presentation of witnesses, documents, and physical evidence — to prove this point to the trial judge at the foundational hearing.”¹⁷

But, although there was a hearing held on Katchatag’s motion, Katchatag’s attorney did not seek to present any witnesses or to do anything other than rely on the police report that he attached to his motion in order to meet his burden under *Morgan*. On appeal, Katchatag argues that the superior court should not have precluded the evidence of the 2016 sexual assault complaint without first hearing testimony from M.E. and M.E.’s son so that the court could judge their credibility for itself.

We agree that, had Katchatag’s attorney requested an evidentiary hearing, one should have been granted. But Katchatag’s attorney never requested an evidentiary hearing, choosing instead to rely solely on the police report to meet his burden. Indeed, there is nothing in the record to show that Katchatag’s attorney had ever spoken with M.E.’s son, let alone placed him under subpoena for a foundational evidentiary hearing under *Morgan*.

Katchatag’s attorney also never requested that M.E. testify outside the presence of the jury, even though it appears that M.E. would have been available to testify because M.E. was called as a defense witness at Katchatag’s trial. It is also not clear that M.E.’s testimony, standing alone, would have been sufficient to meet Katchatag’s burden under *Morgan*.

We have previously held that, under *Morgan*, the proponent of false accusation evidence “must present more than simply the accused person’s assertion of

¹⁶ *Id.*

¹⁷ *Id.*

innocence.”¹⁸ Thus, in *Copeland v. State*, we held that the trial court did not err in excluding evidence of an alleged false claim of sexual assault against the defendant’s son because the defendant’s offer of proof was essentially a “he said/she said” testimonial conflict about what had occurred between his son and the complaining witness.¹⁹ We acknowledged that, in his reply brief on appeal, Copeland argued that there was another witness (the son’s younger sister) who could partially corroborate the son’s denial of sexual relations.²⁰ But we discounted this corroboration because it was only partial and because the defense attorney had never mentioned the sister’s testimony at the time he asked the trial judge to allow him to introduce the son’s testimony.²¹

This case is very similar to *Copeland*. As in *Copeland*, there is a witness other than the accused (M.E.’s son) who could potentially corroborate the accused’s (M.E.’s) claim that he did not sexually assault A.E. But, as in *Copeland*, the defense attorney made no effort to bring that witness in to testify at a *Morgan* hearing regarding what he saw and heard. Instead, Katchatag’s attorney wanted the superior court to rely solely on the son’s statement in a police report. But, as the State points out, the son’s statement was ambiguous. A.E.’s claim was that she was sexually assaulted by M.E. while she was unconscious. The son’s assertion that he “did not hear her say stop or scream[] for help” is not necessarily inconsistent with that claim. And, as already mentioned, Katchatag’s attorney failed to offer anything more to contextualize that statement or to establish what the son actually saw and heard.

¹⁸ *Copeland v. State*, 70 P.3d 1118, 1124 (Alaska App. 2003).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

In sum, given the manner in which this issue was litigated, we uphold the superior court’s exclusion of A.E.’s 2016 sexual assault allegation against M.E. It was Katchatag’s burden under *Morgan* to prove, by a preponderance of the evidence, that the allegation was actually and knowingly false. We agree, based on the record currently before us, that he failed to meet this burden.

The plethysmograph probation condition

Katchatag challenges the probation condition that requires him to submit to a plethysmograph assessment. Plethysmograph testing is a procedure that “involves placing a pressure-sensitive device around a man’s penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses.”²² We have previously held that plethysmograph testing is sufficiently intrusive and demeaning as to implicate a liberty interest, and we have repeatedly vacated this condition, or remanded for application of special scrutiny.²³

On appeal, the State acknowledges that special scrutiny is required before this condition can be imposed, and the State concedes that special scrutiny was not applied here. We conclude that this concession is well-founded. Accordingly, we vacate this portion of the probation condition, and we remand this case to the superior court to

²² *Galindo v. State*, __ P.3d __, Op. No. 2690, 2021 WL 300295, at *4 (Alaska App. Jan. 29, 2021) (quoting *United States v. Weber*, 451 F.3d 552, 554 (9th Cir. 2006)).

²³ *Id.*; see also *Gardner v. State*, 2018 WL 6418086, at *4 (Alaska App. Dec. 5, 2018) (unpublished); *Luke v. State*, 2018 WL 4490908, at *4 (Alaska App. Sept. 19, 2018) (unpublished); *Daley v. State*, 2018 WL 4144978, at *1 (Alaska App. Aug. 29, 2018) (unpublished); *Giddings v. State*, 2018 WL 3301624, at *4-5 (Alaska App. July 5, 2018) (unpublished); *Kon v. State*, 2018 WL 480454, at *5 (Alaska App. Jan. 17, 2018) (unpublished).

determine whether the State still intends to pursue imposition of the plethysmograph condition, and if so, whether imposition of such a condition survives special scrutiny.²⁴

Conclusion

We VACATE the plethysmograph probation condition and REMAND this case for further proceedings on that condition as appropriate. We otherwise AFFIRM the judgment of the superior court.

²⁴ See *Galindo*, 2021 WL 300295, at *5 (questioning whether such an intrusive requirement could ever satisfy special scrutiny and noting that it is unclear whether Alaska currently employs such testing in its supervision of sex offenders).