IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JEREMY BIENEK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11994 Trial Court No. 3AN-11-09541 CR MEMORANDUM OPINION No. 6957 — June 30, 2021

Appeal from the Superior Court, Third Judicial District, Anchorage, Gregory A. Miller and William F. Morse, Judges.

Appearances: Doug Miller, The Law Office of Douglas S. Miller, Anchorage, under contract with the Office of Public Advocacy, 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, Wollenberg, Judge, and Mannheimer, Senior Judge.[*]

Judge WOLLENBERG.

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

Following a jury trial, Jeremy Bienek was convicted of attempted first-degree sexual assault.[1] Bienek now appeals. For the reasons explained in this decision, we affirm Bienek's conviction.

Underlying facts and trial proceedings

In August 2011, eighteen-year-old C.D. was living with her boyfriend, Jacob O'Neal, at his mother's house in Anchorage. Both O'Neal's mother, Cynthia O'Neal, and Cynthia's boyfriend, Jeremy Bienek, also lived at the residence.

On August 15, Bienek offered to give C.D. a ride to the store to get a soda. C.D. later testified that, after getting the soda, she assumed that they would return to the house, but Bienek began driving toward Kincaid Park; he told C.D. that he was going to teach her to drive. After letting C.D. drive for a couple of minutes, Bienek then drove down a dirt road, parked the car, and asked C.D. if she liked to hike.

According to C.D.'s testimony, C.D. and Bienek began walking into the woods. After they saw some trees with ribbons around them, Bienek told C.D. that the trees were marked to be cut down, and he began showing C.D. how to push down the trees. Bienek approached C.D. to show her how to push down a tree, and as he got close to C.D., he began duct-taping her hands to the tree. Bienek then placed duct tape over C.D.'s mouth, tried to unbutton C.D.'s pants, and told C.D., "I know you want me."

C.D. testified that she tried to kick Bienek and get her hands loose. Eventually, C.D. pulled hard enough to free her hands from the tree, and she removed the tape from her mouth. C.D. began yelling at Bienek, asking what was wrong with him. Bienek responded by again saying that he knew C.D. wanted him.

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[1] AS 11.41.410(a)(1) & AS 11.31.100.

C.D. testified that she told Bienek that she wanted to go home. Bienek began apologizing, and he put his arm around C.D., trying to hug her. C.D. hit Bienek in his chin with her elbow.

C.D. told Bienek that they were leaving, and C.D. began walking out of the woods. According to C.D., Bienek continued apologizing to C.D. and asked if she was going to turn him in to the police. Bienek eventually drove C.D. home.

C.D. testified that, when they finally returned home, she ran inside and told Cynthia O'Neal that Bienek had tried to rape her. Cynthia went outside to confront Bienek; she and Bienek drove away from the residence to talk.

When Jacob O'Neal returned home, he and C.D. went to stay with Jacob's grandparents that night. C.D. told Jacob's grandparents about the assault. The next day, Jacob's grandmother called the police.

C.D. met with Anchorage Police Officer Robin Nave. Nave testified that C.D. appeared timid, in shock, and perhaps embarrassed to discuss what happened. Nave and C.D. later drove to Kincaid Park. After finding tire tracks in the area where Bienek had parked, Nave followed C.D. into the woods until they found a tree with duct tape wrapped around it. A second officer found another piece of duct tape on the ground near the tree. Both officers observed bruising along C.D.'s arms that was consistent with finger marks.

When the police interviewed Bienek, he confirmed that he had offered C.D. a ride to the store and then had taken her to Kincaid Park to let her practice driving. After initially omitting that they had gone for a walk, Bienek eventually acknowledged that he and C.D. had also taken a short walk. But he denied putting duct tape on C.D. or trying to assault her. Bienek suggested that he could have inadvertently picked up a piece of duct tape from the seat of his car, but he denied intentionally bringing duct tape

into the woods. Bienek's fingerprint was later lifted from the duct tape that was found on the tree.

A grand jury indicted Bienek on one count of attempted first-degree sexual assault. At trial, Bienek's attorney argued that C.D. had fabricated her account. The jury found Bienek guilty as charged.

Why we affirm the trial court's order denying Bienek's motion to dismiss

On appeal, Bienek argues that the State committed willful discovery violations, and that the superior court should have dismissed his case on account of these purported violations.

Prior to Bienek's trial, Bienek's attorney, an assistant public defender, learned that C.D. had previously gone by another last name. Based on this information, Bienek's attorney became concerned that the Public Defender Agency might have a conflict of interest in continuing to represent Bienek.

The judge ordered the prosecutor to search the State's files for any relevant information involving C.D.'s former name. Although the prosecutor did not identify any information based on C.D.'s former name, in the process of searching the State's files, the prosecutor discovered two additional items: a prior juvenile delinquency matter under C.D.'s current name, as well as a police report detailing an investigation into a recent allegation by C.D. that she had been sexually assaulted by another man. The prosecutor submitted the police report regarding the prior allegation to the court for *in camera* review, and he disclosed to Bienek's attorney the existence of C.D.'s juvenile matter.

Given these developments, and the need to resolve the Public Defender Agency's potential conflict in representing Bienek, Bienek's attorney acknowledged that

Bienek's case could not proceed to trial the following week, as previously scheduled. The attorney agreed to set Bienek's case back on the court's pretrial conference calendar.

Following the hearing, Bienek's attorney filed a motion to compel the disclosure of the juvenile file for the trial court's *in camera* review. Bienek's attorney argued that, given the State's delay in disclosing the existence of C.D.'s juvenile file, the Alaska Criminal Rule 45 speedy trial clock should run against the State while this review occurred — and that because the Rule 45 clock would expire the following week, Bienek's case should be dismissed.

Bienek's attorney also became aware of C.D.'s prior accusation of sexual assault when the judge released the police report that the prosecutor had submitted to the court under seal. The defense attorney then filed a separate motion to dismiss Bienek's case, arguing that the State had deliberately failed to disclose C.D.'s prior allegation.

At Bienek's request, the court held an evidentiary hearing to explore whether the State had violated its discovery obligations and, if so, whether it had done so willfully. Two officers from the Anchorage Police Department testified: the detective who had been responsible for investigating C.D.'s prior allegation of sexual assault, and the detective who was responsible for investigating Bienek's case.

The detective responsible for investigating the prior allegation testified that he had forwarded the case to the district attorney's office, but the district attorney's office had declined to prosecute. The detective also testified that he had entered the information regarding the prior allegation into the Anchorage Police Department's database, and that he was not involved in investigating Bienek's case.

The detective responsible for investigating Bienek's case testified that it would have been standard practice for him to search for C.D.'s name in their departmental database, but he did not remember if he did that in this case, and he had no knowledge of the prior allegation.

Ultimately, the trial court declined to definitively rule on the question of whether the State had violated its discovery obligations. Instead, the court denied Bienek's motion to dismiss because of the absence of any direct link between the late disclosure of the prior accusation evidence and the delay of the trial, which the court found had been precipitated by the Public Defender Agency's potential conflict of interest. The court noted that it had continued the trial date before the disclosure of C.D.'s prior accusation to Bienek's attorney. In short, the court found that Bienek had not suffered any cognizable prejudice because a continuance had been needed in any event, and because Bienek had received the information about C.D. prior to his case being reset for trial.

At the time, Bienek's attorney indicated that she contested the court's recollection of the procedural history of the case, and she stated her intent to file a motion for reconsideration. But the record does not show that any motion for reconsideration was ever filed, or that any of the court's factual findings were ever specifically challenged.

In his briefing on appeal, Bienek again does not challenge the trial court's factual recitation of the procedural history. Instead, Bienek focuses almost entirely on his assertion that the State was willful in its failure to earlier disclose the information about C.D.'s prior allegation and her juvenile delinquency file. He argues that the trial court erred in declining to dismiss his case.

The determination of an appropriate remedy for a discovery violation is committed to the sound discretion of the trial court.[2] Here, the trial court found that a continuance was necessary for the Public Defender Agency to evaluate its potential

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[2] *Williams v. State*, 600 P.2d 741, 742 (Alaska 1979); *Harris v. State*, 195 P.3d 161, 180 (Alaska App. 2008).

conflict, and that the information about C.D.'s prior allegation was ultimately disclosed to Bienek before his case was reset for trial, thus eliminating any further prejudice to Bienek. Bienek does not meaningfully challenge the trial court's ruling.

We note that about a month after the trial court's ruling, the Public Defender Agency actually did withdraw from Bienek's case due to a conflict of interest. Bienek's case did not go to trial until over a year later, at which time he was represented by a different attorney.

We have previously recognized that "even when a party has willfully violated their duty of pre-trial disclosure, the trial judge should not impose a sanction that has the effect of establishing or dismissing a claim . . . unless the judge has first considered whether lesser sanctions would adequately cure the prejudice to the other party and ensure compliance with the discovery rules in the future."[3] As a result, the sanction for a mid-trial discovery violation is generally "to grant a continuance long enough to allow the defense attorney adequate time to prepare."[4] Here, where the delayed discovery was produced prior to trial, and where the court found that a continuance was needed in any event, we cannot find that the court abused its discretion in denying Bienek's motion to dismiss.[5]

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[3] *Harris*, 195 P.3d at 175 (citing *Maines v. Kenworth Alaska, Inc.*, 155 P.3d 318, 325 (Alaska 2007)); *see also Johnson v. State*, 577 P.2d 230, 234 (Alaska 1978) ("In the absence of . . . prejudice to a party [that is] likely to have a substantial effect on the outcome of the case, failure of counsel to comply with discovery orders should not be utilized as a basis for ultimate disposition of litigation.").

[4] *Des Jardins v. State*, 551 P.2d 181, 187 (Alaska 1976); *see also Jurco v. State*, 1995 WL 17220755, at *4 (Alaska App. Apr. 5, 1995) (unpublished).

[5] *Putnam v. State*, 629 P.2d 35, 44 (Alaska 1980) ("Just what sanction is appropriate in a given case is best left to the sound discretion of the trial court.").

In a single paragraph, Bienek asserts that the trial court's actions impaired his speedy trial right under Criminal Rule 45 by forcing him to choose between a speedy trial and his right to discovery. But Bienek does not address the judge's factual findings that a continuance was necessary to address the Public Defender Agency's potential conflict.[6] Thus, to the extent Bienek is raising a Rule 45 claim, we conclude it is waived due to inadequate briefing.[7]

Finally, Bienek argues that the trial court erred when it denied his request to call additional witnesses from the district attorney's office to support his claim that the State willfully violated the discovery rules. We agree with Bienek that, as a general matter, when a trial court assesses the appropriate sanction for the State's late discovery, the court should weigh the degree of culpability on the part of the State, and an evidentiary hearing may be necessary to determine what happened and why.[8] But under the circumstances of this case, the question of the State's willfulness was not material to the trial court's ruling. The court denied Bienek's motion to dismiss based solely on the absence of any prejudice to Bienek.

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[6] See Alaska Criminal Rule 45(d)(1) and (d)(2), which exclude the following periods of time from the speedy trial calculation: "[t]he period of delay resulting from other proceedings concerning the defendant, including but not limited to motions to dismiss," and "[t]he period of delay resulting from an adjournment or continuance granted at the timely request or with the consent of the defendant and the defendant's counsel." In 2019, after Bienek's case was tried, the Alaska Supreme Court modified Criminal Rule 16 to require courts to expedite defendants' motions to enforce the State's disclosure obligations under Alaska Criminal Rule 16(b), thus limiting the excludable time attributable to those motions under Criminal Rule 45(d)(1). *See* Alaska R. Crim. P. 16(d)(8)©.

[7] *See Fairview Development Inc. v. Fairbanks*, 475 P.2d 35, 36 (Alaska 1970) (noting that a single conclusory paragraph without citation to any legal authority is not adequate to properly put the issue before the court).

[8] *See Putnam*, 629 P.2d at 43.

Accordingly, we affirm the trial court's denial of Bienek's motion to dismiss.

Our independent review of C.D.'s confidential records

As we noted earlier, Bienek's attorney filed a motion to compel the production of C.D.'s juvenile file from the Division of Juvenile Justice for an *in camera* review. At the same time, Bienek's attorney also moved to compel the production of C.D.'s Office of Children's Services (OCS) records as well as her mental health records, to the extent any such records existed.

The trial court ordered the State to produce C.D.'s juvenile and OCS records for an *in camera* review. Following this *in camera* review, the court disclosed thirteen pages of records to the parties. However, the court withheld the remaining records, finding that they were "not relevant to the instant case nor likely to lead to the discovery of admissible evidence."

The court also initially ordered "a written listing of any mental health . . . treatment received by C.D., and any documents associated with such treatment." But later — at the same time the court disclosed limited portions of C.D.'s OCS and juvenile records — the court withdrew the portion of its earlier order requiring disclosure of C.D.'s past mental health treatment. The court issued this withdrawal without prejudice for Bienek's new attorney to renew the request after reviewing this Court's then-recent decision in *N.G. v. Superior Court*.[9]

(In *N.G.*, this Court addressed the question of whether a criminal defendant is entitled to an *in camera* review of a witness's mental health records upon a sufficiently strong showing, or whether a witness's psychotherapy records are absolutely

[9] *N.G. v. Superior Court*, 291 P.3d 328 (Alaska App. 2012).

privileged.[10] We acknowledged that a majority of courts that had considered the issue had concluded that a defendant is entitled to an *in camera* review under certain circumstances, but we declined to decide the issue or establish a governing standard because of the deficiency of the defendant's offer of proof.[11])

Bienek's new attorney never renewed his request for C.D.'s mental health records, even though the OCS and juvenile records that were disclosed — several OCS protective services reports and juvenile treatment court reports — contained substantial information about C.D.'s mental health and history, and revealed that C.D. had been previously hospitalized at the Alaska Psychiatric Institute and was at one point receiving weekly mental health counseling at Fairbanks Counseling and Adoption.

On appeal, Bienek challenges the trial court's failure to disclose more records from C.D.'s juvenile and OCS files. After independently reviewing the undisclosed records and comparing them to the thirteen pages that the trial court disclosed, we have identified portions of three additional documents that are pertinent and should not have been withheld as "not relevant." These documents contain more specific information about psychiatric symptoms that C.D. suffered in the past — in particular, symptoms that might reflect on C.D.'s ability to accurately perceive events.

But these documents were all prepared by third parties who performed psychiatric evaluations of C.D. and were therefore likely privileged, aside from the fact that they are contained within C.D.'s juvenile records.[12] The only documents that the

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[10] *Id.* at 336-40.

[11] *Id.*

[12] Alaska R. Evid. 504(b) (providing that "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional conditions (continued...)

trial court released to Bienek from C.D.'s juvenile and OCS files were protective services reports by OCS and juvenile treatment court reports. As we noted earlier, the court withdrew its order for an accounting of C.D.'s past mental health treatment without prejudice to Bienek's new attorney's renewing the request after the superior court and the parties had reviewed this Court's decision in *N.G. v. Superior Court*. But despite the fact that the documents released to Bienek's new attorney disclosed C.D.'s prior admission to the Alaska Psychiatric Institute as well as her prior diagnoses of mental illness, Bienek's attorney did not move for production of C.D.'s records from the Alaska Psychiatric Institute or any other mental health records.

Indeed, even after this first set of documents was disclosed, Bienek's attorney ultimately did not run a defense that hinged on C.D.'s misperception or misunderstanding of the events at issue in this case. Rather, defense counsel argued that C.D. had totally fabricated her account. That is, Bienek's defense hinged on challenging C.D.'s *honesty* rather than challenging her ability to accurately perceive.

Under these circumstances, we conclude that Bienek's attorney waived further disclosure of C.D.'s mental health records. If Bienek wishes to challenge the competence of his attorney's decision, he must pursue this claim in a post-conviction relief proceeding.

Because Bienek may pursue post-conviction relief based on his attorney's handling of this matter, we will place the additional documents we have identified under

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[12] (...continued)
. . . between or among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family"); *cf. M.R.S. v. State*, 897 P.2d 63, 67-68 (Alaska 1995) (holding that strong policy considerations weigh in favor of classifying court-ordered psychiatric evaluations ordered in the context of a prior juvenile proceeding as privileged).

seal for later review by the superior court. The superior court must ensure that C.D.'s interests are represented in any future litigation on this issue.[13]

Why we uphold the trial court's decision to preclude evidence of C.D.'s prior sexual assault allegation

Prior to trial, Bienek's attorney filed a motion seeking to introduce evidence of C.D.'s prior allegation of sexual assault under *Morgan v. State*.[14] Bienek argued that C.D.'s prior report was knowingly false and that, given the fact that it was made shortly before the allegation in this case, the admission of this evidence was critical to evaluating her credibility.

The superior court denied Bienek's motion after a hearing, and Bienek now appeals this ruling.

In *Morgan*, we held that in a sexual assault prosecution, a defendant may seek to introduce evidence of a complaining witness's prior knowingly false accusation of sexual misconduct in order to challenge the witness's credibility with respect to the current accusation.[15] To do so, the defendant must first convince the trial judge, by a preponderance of the evidence, that (1) the complaining witness made another accusation of sexual assault, (2) this accusation was factually untrue, and (3) the complaining

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[13] *Cf. Spencer v. State*, 642 P.2d 1371, 1376 n.3 (Alaska App. 1982) (requiring "witnesses themselves [to] invoke their privilege").

[14] *Morgan v. State*, 54 P.3d 332 (Alaska App. 2002).

[15] *Id.* at 333; *see also Covington v. State*, 703 P.2d 436, 441-42 (Alaska App. 1985).

witness knew that the accusation was untrue.[16] We will not disturb the trial court's findings on these issues unless the findings are clearly erroneous.[17]

In Bienek's case, the trial court held a *Morgan* hearing to determine whether C.D.'s previous sexual assault allegation constituted a knowingly false report. Three people testified: C.D., C.D.'s mother, and Anchorage Police Detective John Vandervalk, the detective who investigated the prior allegation.

C.D. testified that she moved to Anchorage in the spring of 2011 at age eighteen to establish a relationship with her mother. Soon after moving to Anchorage, C.D. met J.K.

C.D.'s mother testified that, one day, after C.D. returned home from spending time with J.K., C.D.'s mother asked C.D. whether she and J.K. had been sexually active. C.D. initially denied that anything had happened, but she then began crying — and she told her mother that she (her mother) would not believe her.

C.D.'s mother asked C.D. if she had been raped, and C.D. nodded her head. C.D. later testified that she told her mother that J.K. had sexually assaulted her. C.D.'s mother then called the police.

After the report to the police, C.D. underwent a sexual assault examination and then met with Detective Vandervalk to discuss the assault. C.D. testified that she told Vandervalk that J.K. had sexually assaulted her in the laundry room of J.K.'s apartment complex. C.D. reported that she told J.K. she did not want to have sex, but J.K. held her down and had sex with her.

C.D.'s mother testified that, in the days and weeks following her report to the police, she began doubting that the sexual intercourse between C.D. and J.K. had

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[16] *Morgan*, 54 P.3d at 333.

[17] *Id.* at 340.

been non-consensual. Finally, C.D.'s mother gave C.D. an ultimatum: either C.D. would take a lie detector test, or her mother would no longer support her. C.D. subsequently moved out of her mother's house.

Shortly after moving out, C.D. sent her mother a text message saying that her mother "should have let [C.D.] talk," that she was not raped, and that she did not "wanna hear anym[ore]." C.D. testified that she sent this message because she was tired of having her mother accuse her of being a liar, and she wanted to make her mother angry. C.D. also stated that, at the time she texted her mother, she (C.D.) did not believe it was rape because she did not "fight back." C.D. testified, however, that she had "constantly said no" and that, while she did not "know what to call it[,] . . . all I know is that I did not want to have sex with [J.K.]"

Vandervalk testified that when he interviewed C.D., she indicated that she had not significantly physically resisted J.K. because she was afraid, but C.D. was firm in her assertion that she had not wanted to have sex, and that J.K. had forced her to do so. Vandervalk testified that C.D.'s factual account remained unchanged over time.

Following the evidentiary hearing, the superior court concluded that, although it had "grave doubts" as to whether J.K. could have been convicted of sexual assault beyond a reasonable doubt (and indeed, the State had declined to prosecute J.K. based on C.D.'s allegation), the court could not find by a preponderance of the evidence that C.D. had made a knowingly false report. In particular, the court found that it "can't see anything that was false about it, that has been proven to be false." Therefore, the court denied Bienek's motion to introduce C.D.'s prior allegation.

On appeal, Bienek argues that he met the evidentiary threshold set out in *Morgan*. But based on our review of the evidence presented at the *Morgan* hearing, the judge's findings are not clearly erroneous. Under *Morgan*, it is not sufficient for a defendant to demonstrate that the prior sexual assault allegation is arguably false or

reasonably debatable.[18] Rather, because Bienek was seeking to introduce the evidence to undermine C.D.'s general credibility, Bienek had to convince the judge by a preponderance of the evidence that C.D. knowingly made a false report of sexual assault.

Given the contradictory accounts of what occurred, and C.D.'s explanation for the text message to her mother, the trial court did not clearly err in concluding that Bienek had failed to prove that C.D. knowingly made a prior false allegation of sexual assault.

Bienek argues that analyzing whether C.D. *knew* she made a false allegation presupposes that C.D. understood the elements of sexual assault under Alaska law. Bienek argues that this approach is problematic because "C.D. was never asked what she thought the legal definition of the offense was, or whether she in fact thought that [J.K.] had committed that offense against her."

But it was Bienek's burden to establish the admissibility of C.D.'s prior accusation. Moreover, the fact that C.D. might have been under a misapprehension regarding the precise elements of what constitutes first-degree sexual assault under Alaska law does not establish that she made a knowingly false report, which is the issue critical to assessing her credibility. Indeed, C.D. did not recant her *factual* account of what occurred — that J.K. engaged in non-consensual sexual intercourse with her.

Bienek also suggests that the trial court employed the wrong burden of proof, by requiring Bienek to prove that C.D. made a knowingly false report to a government official beyond a reasonable doubt. We do not agree with this interpretation of the record. The judge expressly stated that he was applying a preponderance of the evidence standard, and he evaluated the circumstances of the case as a whole.

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[18] *Id.* at 337.

In the alternative, Bienek argues that we should overrule *Morgan*. He argues that the *Morgan* standard is "too blunt an instrument," that it sets the bar too high, and that it is inefficient. Bienek suggests that we instead adopt a two-step approach, under which (1) the defendant would be required to present only "substantial evidence" that the witness made a knowingly false accusation, and then (2) the court would weigh the probative value and danger of unfair prejudice of the evidence under Alaska Evidence Rule 403.

Bienek does not discuss any cases that have adopted this "substantial evidence" approach, nor does he explain how this standard would apply to the facts of this case.[19] Rather, Bienek simply discusses some of the scholarly debate in this area, and argues that, "doctrinally" and "practically," a more flexible standard would be preferable. He urges us to adopt the "substantial evidence" standard (or another standard proposed by one of the legal commentators he cites) and to remand his case for the trial court to apply this new standard.[20]

We recognize that some states have adopted a standard different than the one we endorsed in *Morgan*. And we acknowledge that the three-prong standard we

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[19] In *Morgan*, we characterized the rule of admissibility in Oregon as a "substantial evidence" test. *See Morgan*, 54 P.3d at 337 (discussing *State v. LeClair*, 730 P.2d 609, 613-16 (Or. App. 1986)). A closer review of *LeClair* reveals that Oregon courts actually evaluate whether there is "some" evidence that the victim made a prior false accusation before engaging in an assessment of probative value versus the risk of prejudice, confusion, embarrassment, or delay. *LeClair*, 730 P.2d at 615.

[20] *See* Jules Epstein, *True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions*, 24 Quinnipiac L. Rev. 609, 657 (2006) (advocating a "good faith" requirement if the evidence is offered for impeachment or a "some evidence" test if offered as non-character "'plan' or 'doctrine of chance' evidence").

endorsed in *Morgan* does not provide as much discretion to trial judges as the standard Bienek proposes.

But whatever the merits of Bienek's argument, we are not writing on a clean slate. In *Morgan*, we discussed at length the different approaches adopted by other courts that had previously addressed this question — from outright bans on admitting evidence of prior false accusations to admitting such evidence if the falseness of the allegation is reasonably debatable.[21] We then adopted the test that we determined struck the appropriate balance.

As the Alaska Supreme Court has recognized, a party seeking to overturn precedent "bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling."[22] Under the doctrine of stare decisis, Bienek must establish that the rule adopted in *Morgan* was "originally erroneous or is no longer sound because of changed conditions, and . . . that more good than harm would result from a departure from precedent."[23] Bienek does not discuss this standard or attempt to satisfy it.

Moreover, Bienek himself acknowledges that in the years since *Morgan* was decided, the "lack of a 'majority rule' or uniform approach has become more obvious." Indeed, Bienek cites one commentator who identified at least nineteen other states that have adopted standards as stringent, or more stringent, than the standard we

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[21] *Morgan*, 54 P.3d at 334-39.

[22] *Wassillie v. State*, 411 P.3d 595, 611 (Alaska 2018) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004)).

[23] *Id.*; *see also State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986).

adopted in *Morgan*.[24] We have independently identified five states which, relying on our decision in *Morgan*, have expressly adopted the preponderance of the evidence standard in the years since our decision.[25]

Ultimately, we are not clearly convinced that *Morgan* was originally erroneous, or that more good than harm would come from overruling it.[26] We therefore decline Bienek's invitation to overrule *Morgan*.

We wish to note, however, that *Morgan* recognized a particular exception to Alaska Evidence Rule 608, the rule that typically bars a party from attacking a witness's credibility by presenting proof of specific instances of dishonesty. That is, *Morgan* sets out a test for determining the admissibility of a prior accusation of sexual misconduct when the proponent of the evidence asserts that it is relevant to assessing the witness's general credibility. It is conceivable that evidence of a prior knowingly false allegation of sexual assault could be admissible under a different evidentiary theory.[27]

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[24] *See* Brett Erin Applegate, *Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 Lewis & Clark L. Rev. 899, 907-08 (2013).

[25] *See State v. Chambers*, 465 P.3d 1076, 1084 (Idaho 2020); *State v. Alberts*, 722 N.W.2d 402, 409-10 (Iowa 2006); *State v. Long*, 140 S.W.3d 27, 32 (Mo. 2004) (en banc); *State v. Guenther*, 854 A.2d 308, 324 (N.J. 2004); *State v. Tarrats*, 122 P.3d 581, 586 (Utah 2005).

[26] *See Thomas*, 102 P.3d at 943.

[27] *Cf. Ball v. State*, 2018 WL 1136367, at *6 (Alaska App. Feb. 28, 2018) (unpublished) (recognizing that evidence of a past accusation that fell short of the *Morgan* standard might conceivably be admissible for another purpose aside from casting doubt on the credibility of the victim); *Harrison v. State*, 2017 WL 5186308, at *4 (Alaska App. Nov. 8, 2016) (unpublished) (drawing the distinction between admission of a prior false allegation of sexual abuse, governed by *Morgan*, and questioning to establish motive or bias); *see also Kittelson v. Dretke*, 426 F.3d 306, 322 (5th Cir. 2005) (holding that it was error for the trial court to preclude the defendant from cross-examining the complaining witness about her previous (continued...)

But in this case, consistent with his defense that C.D. had fabricated her account, Bienek sought admission of the prior accusation evidence based solely on its potential to cast doubt on C.D.'s general credibility. He did not argue in the trial court (and does not argue on appeal) any additional theory of relevance.[28]

Bienek makes one more claim related to the *Morgan* issue. After the evidentiary hearing, Bienek's attorney asked the judge to listen to several recordings contained on a compact disc that the State had previously submitted to the court; this disc contained the entire police file related to the prior accusation. The next day, the judge told the parties that he could not find the disc, but he stated that he was ready to rule on the *Morgan* issue based on the knowledge he acquired from the hearing and a detailed memo by a law clerk who had listened to the recordings and transcribed the relevant portions. The judge stated that he would be willing to listen to the recordings if the disc resurfaced. Neither party objected to the judge's proposal, nor did either party take any further action in relation to the disc.

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[27] (...continued)
allegations of sexual abuse where the evidence supported the defendant's claim of bias — *i.e.*, that the witness "had a motive to make up such an accusation"); *Guenther*, 854 A.2d at 322 (recognizing that several jurisdictions have held that prior false accusations of sexual crimes by the accuser "may be admissible for reasons unrelated to impeachment of general credibility — to prove the accuser's habit, state of mind, motive, or common scheme"); *State v. Harris*, 989 P.2d 553, 557 (Wash. App. 1999) (stating that "[e]vidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary [separate from attacking credibility], is always relevant and admissible," subject to a Rule 403 balancing test).

[28] In fact, Bienek's defense — that no sexual conduct occurred at all — distinguished this case from the prior accusation, in which J.K. acknowledged during a recorded phone call that he and C.D. had sexual intercourse, and the questions were whether C.D. consented to the sexual intercourse and whether J.K. was reckless with respect to C.D.'s alleged lack of consent.

On appeal, Bienek argues that his due process rights were violated because the judge did not personally listen to the relevant files on the disc.[29] But the judge presided over the evidentiary hearing and heard extensive testimony from the complaining witness, C.D., as well as her mother and Detective Vandervalk. The judge personally observed the witnesses as they gave their testimony. If there was any significant information contained on the disc, Bienek's attorney could have elicited that information during the evidentiary hearing, or taken steps to supply the judge with a new disc. We therefore reject this claim.

The trial court did not commit plain error in failing to take further action in response to the juror letter

Several days after the jury rendered its verdict, the trial court received a letter from one of the jurors, alleging that she and another juror felt bullied into their verdicts and that some jurors relied on their own personal experiences and improper considerations in making their decision. The court sent a notice to the parties, attaching the letter and indicating that the court was not taking any action.

Bienek's attorney did not respond to the notice or ask the trial court to take any action. On appeal, however, Bienek argues that it was plain error for the court to fail to *sua sponte* investigate the allegations of misconduct contained in the letter.

We conclude that the trial court fulfilled its duty by sending the letter to the parties so that the parties could take action if they deemed it appropriate. Neither party took any action, and thus, Bienek has failed to preserve this issue for appeal.

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[29] Compare *Morgan v. State*, 139 P.3d 1272 (Alaska App. 2006), where the question was whether the defendant was entitled to relief because of new evidence impeaching his main accuser. This Court held that, given the importance of this new evidence, the defendant was entitled (as a matter of due process) to have his motion decided by a judge who personally observed the trial witnesses as they gave their testimony. *Id.* at 1274.

We note that at least some of the contents in the juror letter appear to be inadmissible under Alaska Evidence Rule 606(b).[30] It was therefore incumbent on Bienek's attorney, if he wished to pursue this issue, to seek further action — and to establish that further inquiry was permitted by Rule 606(b).

Conclusion

We AFFIRM the judgment of the superior court.

[30] *See* Alaska Evid. R. 606(b) (providing that "a juror may not be questioned as to any matter or statement occurring during the course of the jury's deliberations or to the effect of any matter or statement upon that or any other juror's mind or emotions," with the exception of extraneous prejudicial information or other outside influence improperly brought to bear on any juror); *see also Titus v. State*, 963 P.2d 258, 263 (Alaska 1998) (holding that only extra-record knowledge of "specific facts surrounding the alleged crime and the defendant's connection to it," and not pre-existing knowledge of a general nature, falls within the scope of the "extraneous prejudicial information" exception to Rule 606(b)); *Larson v. State*, 79 P.3d 650, 652 (Alaska App. 2003) (holding that, under Evidence Rule 606(b), a verdict cannot generally be impeached by evidence that jurors made improper remarks during deliberations).