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

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| RICHARD DALE ABRAHAMSON,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-13469<br>Trial Court No. 3AN-16-04317 CR<br><br>MEMORANDUM OPINION<br><br>No. 7061 — June 14, 2023 |

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack W. Smith, Judge.

Appearances: Shana Bachman, Attorney at Law, Las Vegas, Nevada, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

Following a jury trial, Richard Dale Abrahamson was convicted of two counts of first-degree sexual abuse of a minor and one count of exploitation of a minor for conduct that occurred while Abrahamson was babysitting S.D., a thirteen-year old

boy.[1] Abrahamson's convictions were based on evidence that Abrahamson performed fellatio on S.D. on two separate occasions, and induced him to pose for a lewd photograph.

Abrahamson raises three arguments on appeal. First, Abrahamson argues that all three of his convictions must be reversed because the trial court erred in denying his requests to represent himself at trial. Second, Abrahamson argues that his first-degree sexual abuse of a minor convictions must be reversed because the evidence was insufficient to establish that he occupied a "position of authority" in relation to S.D., and because the trial court erroneously instructed the jury as to the meaning of the term "babysitter." Third, Abrahamson challenges two of his probation conditions.

For the reasons explained in this opinion, we affirm Abrahamson's convictions, but we remand this case to the superior court with instructions to vacate one of the challenged probation conditions and to consider less-restrictive alternatives to the other.

*Background facts and proceedings*

Thirteen-year-old S.D. lived with his mother and two older brothers at a hotel. S.D. was developmentally young for his age and prone to seizures, so his mother did not feel comfortable leaving him alone.

S.D.'s mother testified at Abrahamson's trial. She told the jury that, shortly after moving in to the hotel, she met Abrahamson, who also lived there. One day, while she, S.D., and Abrahamson were watching television, she started to fall asleep. Abrahamson offered to watch S.D. so that she could take a nap. Assuming Abrahamson would take S.D. to the hotel's common room, S.D.'s mother agreed.

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[1] AS 11.41.434(a)(3)(B) and AS 11.41.455, respectively. The jury also found Abrahamson guilty of two counts of second-degree sexual abuse of a minor and two counts of third-degree sexual abuse of a minor, but these verdicts merged with the first degree-sexual abuse of a minor counts.

But S.D. told a detective that Abrahamson instead took S.D. to his own room and then gave his phone to S.D. so that S.D. could play a videogame. According to S.D., Abrahamson showed S.D. a cartoon video of a car shaped like a penis, touched S.D.'s penis with his hands and mouth, and took a photo of S.D. lying naked on the bed. S.D. later testified that Abrahamson threatened to kill him if he told anyone what happened.

The next day, S.D.'s mother needed to go to the hospital, and Abrahamson again offered to watch S.D. S.D.'s mother agreed, and Abrahamson again brought S.D. to his room. S.D. recounted that Abrahamson showed S.D. the cartoon, instructed him to undress, and touched S.D.'s penis with his hands and mouth.

Shortly after these events took place, S.D. wrote a note to his mother telling her what happened. The police conducted an interview with S.D. and recovered a digital copy of a photograph of S.D. from a device discovered in Abrahamson's room. The photograph depicted S.D. lying on a bed, naked, with an erect penis. A subsequent search of Abrahamson's devices revealed items of child erotica and child pornography on several of the devices.

Abrahamson was charged with sexual abuse and unlawful exploitation of S.D., and the Alaska Public Defender Agency was appointed to represent him. But before trial, Abrahamson asked the court to allow him to represent himself. He appeared at four representation hearings — two before one judge and two before a second judge. At these hearings, the judges explained to Abrahamson the benefits of being represented by an attorney and the dangers of self-representation. Abrahamson nevertheless persisted in asking to proceed without an attorney, and the judges engaged him in a colloquy to determine whether he was capable of representing himself. Both judges ultimately concluded that he was not and denied his request for self-representation.

The matter proceeded to a jury trial. With regard to the two counts of first-degree sexual abuse of a minor, the State's theory of the case was that Abrahamson engaged in fellatio with S.D. at a time when Abrahamson occupied a position of

authority over S.D — specifically, that Abrahamson was S.D.'s babysitter at the time of the offenses. With regard to the unlawful exploitation of a minor count, the State argued that Abrahamson induced S.D. to pose for a lewd photograph.

At the close of the State's case, Abrahamson filed a written motion for a judgment of acquittal on the first-degree sexual abuse of a minor allegations. In his motion, Abrahamson claimed that the State had presented insufficient evidence to establish that he occupied a position of authority over S.D. The court ultimately denied this motion.

Before the closing arguments, Abrahamson proposed two jury instructions defining "babysitter." The court rejected both of the proposals and instead provided its own definition to the jury.

The jury found Abrahamson guilty of all charges. This appeal followed.

*Abrahamson's requests for self-representation*

Criminal defendants have a constitutional right to represent themselves at trial if they "clearly and unequivocally" declare their desire to proceed without an attorney,[2] and "voluntarily and intelligently elect[] to do so."[3] However, this right is not absolute. The Alaska Supreme Court has explained that a defendant's right to self-representation may be restricted in narrow circumstances in order to prevent a subversion of the judicial process.[4]

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[2] *Johnson v. State*, 188 P.3d 700, 703 (Alaska App. 2008) (citing *Gladden v. State*, 110 P.3d 1006, 1009 (Alaska App. 2005), *McIntire v. State*, 42 P.3d 558, 560-61 (Alaska App. 2002), *Evans v. State*, 822 P.2d 1370, 1374 (Alaska App. 1991), *Burks v. State*, 748 P.2d 1178, 1182 n.1 (Alaska App. 1988) (Coats, J., dissenting), and *James v. State*, 730 P.2d 811, 814 n.1 (Alaska App. 1987)).

[3] *Falcone v. State*, 227 P.3d 469, 472 (Alaska App. 2010) (quoting *Faretta v. California*, 422 U.S. 806, 807 (1975)).

[4] *McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974); *Falcone*, 227 P.3d at 472.

In Alaska, three factors guide a judge's decision regarding a defendant's request for self-representation: (1) whether the defendant understands what they are giving up by declining the assistance of counsel, (2) whether the defendant is capable of presenting their case in a rational and coherent manner, and (3) whether the defendant is willing and able to act with at least a modicum of courtroom decorum.[5]

Both of the trial court judges who considered Abrahamson's request for self-representation acknowledged and applied these factors, and each judge conducted two representation hearings. Ultimately, they determined, *inter alia*, that Abrahamson was not able to present his case in a rational and coherent manner, and they denied Abrahamson's request for self-representation.

The record supports the finding that Abrahamson could not present his case in a rational and coherent manner, and we accordingly affirm the order denying Abrahamson's request for self-representation. Indeed, the record contains numerous statements from Abrahamson that are disorganized to the point of being incomprehensible. For example, when attempting to explain his concerns about discovery, Abrahamson made the following statements: "Exactly what I meant — due to the statutes and understanding of the Bar Association, regardless to law and situations, there are requirements under U.S. guidelines. Even under the Eleventh Amendment, my right has been violated because you're sitting here under circumstances." And when the court asked Abrahamson if he knew the rules that govern a trial, Abrahamson replied, "One is the rules of understanding and engagement in proper criminal procedure in a court of law. Also understanding that, let's see, during jury selection weighing in an acceptance of procedures." These remarks are representative of Abrahamson's speech and of his inability to communicate coherently.

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[5] *McCracken*, 518 P.2d at 91-92.

We have recognized that trial judges are "best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[6] In this case, two trial court judges conducted lengthy hearings which allowed them to listen to and observe Abrahamson in the courtroom. Based on their interactions, both judges denied Abrahamson's request for self-representation. Because the record supports the finding that Abrahamson could not present his case in a rational and coherent manner, we conclude that the court did not err by denying Abrahamson's request to represent himself.

*Abrahamson's challenge to the court's instructions defining the term "babysitter"*

Abrahamson was charged with two counts of first-degree sexual abuse of a minor.[7] To convict him of these offenses, the State was required to prove that Abrahamson occupied a position of authority over S.D. Under former AS 11.41.470(5), a "position of authority" was defined as "an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, *babysitter*, or a substantially similar position."[8] The State's theory of the case was that, at the time of the offenses, Abrahamson was S.D.'s "babysitter" because Abrahamson was "watching" S.D while his mother was unavailable.

In response, Abrahamson proposed two jury instructions defining the word "babysitter." The first proposal would have informed the jury:

> The legal meaning of "babysitter" is one who engages in duties substantially similar to a person who would temporarily care for a minor while the minor's parents are out of town, or an adult who takes a minor along on a

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[6] *Falcone*, 227 P.3d at 473 (quoting *Indiana v. Edwards*, 554 U.S. 164, 177 (2008)).

[7] AS 11.41.434(a)(3)(B).

[8] Former AS 11.41.470(5) (2016) (emphasis added).

> camping trip, or an adult who allows a minor to sleep in the adult's home overnight as the guest of the adult's own child.

The second proposal provided that:

> "Babysitter" should not be understood in its casual meaning. Babysitter in this context is one who is temporarily entrusted with the minor's care or engages in duties "substantially similar" to a person who would be temporarily entrusted with the care of a minor. "Substantially similar" does not appear to be a term of art in the criminal context; in its regular use, substantially is defined as "being largely but not wholly that which is specified." This would include a person who would temporarily care for a minor while the minor's parents are out of town, or an adult who takes a minor along on a camping trip, or an adult who allows a minor to sleep in the adult's home overnight as the guest of the adult's own child.

The trial court declined to give these instructions. Instead, the court directly quoted the definition of "position of authority" provided in former AS 11.41.470(5). The court also gave the jury a second instruction, which stated in relevant part that a "babysitter" is "one who is temporarily entrusted with the minor's care."

On appeal, Abrahamson argues that in order to be in a "position of authority," an adult must either be a professional or a quasi-professional or must have "significant responsibility for and significant control over the minor." Essentially, Abrahamson's argument is that, under Alaska law, the word "babysitter" has a specialized legal meaning when used in the context of Alaska's sexual abuse statutes and that it refers to a person who does something more than providing temporary care for a child. Abrahamson also contends that the court's instruction should have included examples of people who engage in duties that are "substantially similar" to a babysitter and that, by leaving out these examples, the court misled the jury.

But in this case, the State did not claim that Abrahamson occupied a "substantially similar position" to that of a babysitter. Instead, the State asserted that

Abrahamson *was* a babysitter. As a result, it was unnecessary for the court to provide the examples of "substantially similar" positions that Abrahamson had requested.

Additionally, the examples that Abrahamson asserts were missing from the court's instruction come from the Senate Letter of Intent that accompanied the 1990 bill containing the definition of "position of authority."[9] But this letter was never adopted as the official Letter of Legislative Intent. In fact, the official letter actually took out the very language that Abrahamson claims was missing from the court's instruction.[10] The language that was removed stated:

> Positions substantially similar to a "babysitter" include a person who is temporarily caring for a minor while the minor's parents are out of town, or an adult who takes a minor along on a camping trip, or an adult who allows a minor to sleep in the adult's home overnight as the guest of the adult's own child. [11]

As support for his claim that the court's instruction should have included examples of people who occupy a position "substantially similar" to a babysitter, Abrahamson relies primarily on *Wurthmann v. State* and *State v. Thompson*.[12] But these cases involved defendants whose alleged relationship with the victim did not fall within any of the clearly delineated examples of "positions of authority" listed in former AS 11.41.470(5). As a result, the question in those cases was whether the defendant occupied a "substantially similar position," such that they were able to unduly influence the minors. By contrast, the question in the present case is whether Abrahamson

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[9] *See* 1990 Senate Journal 2196-99 (Senate Letter of Intent for SB 355) (January 24, 1990).

[10] *See* 1990 House Journal 4199-4200 (House Letter of Intent) (May 8, 1990); 1990 Senate Journal 4219-4220 (Senate adopting House Letter of Intent) (May 8, 1990).

[11] *Compare* 1990 Senate Journal 2196-99, *with* 1990 House Journal 4199-4200.

[12] *See Wurthmann v. State*, 27 P.3d 762, 766 (Alaska App. 2001); *State v. Thompson*, 435 P.3d 947, 953-54 (Alaska 2019).

occupied one of the specifically enumerated "positions of authority" set out by the statute (*i.e.*, "babysitter"), not whether he occupied a position that was "substantially similar" to an enumerated position. The cases cited by Abrahamson do not answer this question.

As a general matter, when the legislature uses a word or phrase but does not define it, a court should assume that the legislature intended the word or phrase to have its common, ordinary meaning.[13] The statutes defining Abrahamson's offense do not specifically define "babysitter," and Abrahamson does not contend that the court's definition misstated the colloquial definition of the word "babysitter." In fact, the definition provided by the court, defining a babysitter as a person "temporarily entrusted with the minor's care," was identical to a portion of one of Abrahamson's proposed instructions.

We thus conclude that the trial court did not abuse its discretion by declining to give the entirety of the instructions requested by Abrahamson.

*Abrahamson's challenge to the sufficiency of the evidence*

In a related argument, Abrahamson contends that the trial court erred by denying his motion for judgment of acquittal. According to Abrahamson, the trial court's jury instruction defined "babysitter" more broadly than the legislature intended, thus allowing the jury to convict him on evidence which was insufficient as a matter of law. But we have rejected Abrahamson's challenge to the court's instructions, and have concluded that the court did not err in explaining that a "babysitter" is someone temporarily entrusted with care of a minor.

In evaluating the sufficiency of the evidence, we view the evidence, and the inferences arising from the evidence, in the light most favorable to the verdict,

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[13] *Wells v. State*, 102 P.3d 972, 975 (Alaska App. 2004).

asking whether a reasonable fact-finder could have concluded that the State proved its case beyond a reasonable doubt.[14] Here, both S.D. and his mother testified that S.D. had been left in Abrahamson's care when the abuse occurred. S.D.'s mother also testified that, because S.D. was developmentally and intellectually young for his age — and because he suffered from seizures — she did not feel comfortable leaving him alone. She instead had agreed that Abrahamson would "take[] care" of S.D. on the days in question. Abrahamson then brought S.D. to his room on each of these occasions.

Viewing this testimony in the light most favorable to the verdict, we conclude that the evidence was sufficient to prove that, at the time of the offenses, Abrahamson was S.D.'s "babysitter."

*Abrahamson's challenges to the probation conditions*

As part of Abrahamson's sentence, the trial court imposed 15 years of probation. Among the probation conditions listed on the written judgment is a condition prohibiting Abrahamson from opening or maintaining an internet account without prior permission from his probation officer and a condition prohibiting him from possessing "a concealed weapon, a firearm, or a switchblade or gravity knife." On appeal, Abrahamson challenges both of these conditions.

As Abrahamson points out, during the sentencing hearing, the court declined to impose a prohibition on possessing concealable weapons, finding that there was no nexus between this probation condition and Abrahamson's crimes.[15] The State accordingly concedes that the condition should not have been included on the written

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[14] *Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

[15] *Edison v. State*, 709 P.2d 510, 511-12 (Alaska App. 1985) (rejecting a probation condition because it was not reasonably related to the underlying offense); *Sprague v. State*, 590 P.2d 410, 417-18 (Alaska 1979) (same).

judgment. This concession is well taken.[16] The record does not indicate that a weapon was involved in Abrahamson's offenses, and the superior court specifically declined to order this condition. We accordingly remand this case to the superior court to correct this error.

Abrahamson also contends that we should vacate Special Condition of Probation No. 10, the probation condition that prohibits him from having an internet account or accessing the internet without the permission of his probation officer. He argues, as he did during the sentencing proceedings, that this condition is overly broad and that the court should instead impose a less-restrictive alternative condition.[17]

Under Alaska law, a sentencing court may impose a probation condition restricting internet access in sexual abuse cases.[18] However, all conditions of probation must be reasonably related to at least one of the constitutional principles set out in Article I, Section 12 of the Alaska Constitution — *i.e.*, protecting the public, community condemnation, the rights of victims, restitution, and reformation.[19] Here, there was a clear nexus between the probation condition and the need to protect the public. Abrahamson had child sexual exploitive material and child pornography on his electronic devices, including the cartoon video of a car shaped like a penis that he showed to S.D. The court was thus within its discretion to impose some sort of restriction on Abrahamson's internet use.

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[16] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (appellate courts must independently assess whether a concession of error is supported by the record on appeal and has legal foundation).

[17] *See State v. Ranstead*, 421 P.3d 15, 20 (Alaska 2018) (noting that a condition restricting internet access must be narrowly tailored to avoid undue restrictions on a defendant's liberty).

[18] AS 12.55.100(e)(2)(A).

[19] *Ranstead*, 421 P.3d at 20.

During the sentencing proceedings, Abrahamson proposed, as a less-restrictive alternative condition:

> The Defendant shall notify or inform [his probation officer] by the next business day of any account he opens or maintains for the Internet or other service provider. Defendant shall provide the login username and password for said account.

The State acknowledges that the sentencing court did not actively consider Abrahamson's proposed less-restrictive alternative. But it points out that the challenged condition is substantially similar to a condition that was approved in two of this Court's prior cases, *Dunder v. State* and *Diorec v. State*, and it accordingly argues that no further analysis is required.[20]

In the time since the sentencing hearing in this case, we issued an opinion in *Dalton v. State*, recognizing that probation conditions restricting access to the internet are "subject to special scrutiny" because they implicate the probationer's constitutional right to free speech.[21] In that opinion, we recognized that a ban on internet access acts as "an almost total hindrance to reentry into modern society and meaningful participation in public discourse."[22] As a result, before imposing a condition restricting

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[20] *Dunder v. State*, 2009 WL 1607917, at *1 (Alaska App. June 10, 2009) (unpublished) (upholding a probation condition that prohibited the defendant from "using or possessing Internet-capable, wireless, and electronic storage devices unless he obtain[ed] permission from his probation or parole officer"); *Diorec v. State*, 295 P.3d 409, 412, 418 (Alaska App. 2013) (upholding a probation condition that prohibited the defendant from "opening an Internet account or accessing the Internet from another person's account without the prior written permission of his probation officer").

[21] *Dalton v. State*, 477 P.3d 650, 655 (Alaska App. 2020).

[22] *Id*.

the defendant's use of the internet, "the court must affirmatively consider, and have good reason for rejecting, any less restrictive alternatives."[23]

In this case, the trial court not only failed to explain why it rejected Abrahamson's proposed alternative condition, it also failed to even mention Abrahamson's proposal during the sentencing hearing. We accordingly remand this case to the superior court so that the court may actively consider Abrahamson's proposed less-restrictive alternative probation condition in light of our opinion in *Dalton*.

*Conclusio*n

We AFFIRM Abrahamson's conviction, but we REMAND this case to the superior court with instructions to consider less-restrictive alternatives to Special Condition of Probation No. 10, and also to issue a corrected judgment that vacates the General Condition of Probation prohibiting Abrahamson from having control of a concealed weapon, firearm, switchblade, or gravity knife.

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[23] *Simants v. State*, 329 P.3d 1033, 1039 (Alaska App. 2014); *see also Dalton*, 477 P.3d at 656 (applying *Simants* to a probation condition restricting access to the internet).