IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ELI S. MENDENHALL, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-12255 & A-12266 Trial Court Nos. 2NO-14-487 CR & 2NO-13-922 CR MEMORANDUM OPINION No. 6595 — March 7, 2018

Appeal from the Superior Court, Second Judicial District, Nome, Timothy Dooley, Judge.

Appearances: Gavin Kentch, Law Office of Gavin Kentch, LLC, Anchorage, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge MANNHEIMER.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Eli S. Mendenhall was convicted of third-degree assault for attacking his girlfriend, Madeleine Okpealuk. Mendenhall now appeals that conviction. Mendenhall also appeals the sentence he received when, based on his commission of the current assault, the court revoked Mendenhall's probation from a 2013 case — a case in which Mendenhall was convicted of misdemeanor assault on the same victim.

Mendenhall first challenges his conviction by arguing that the trial jury convicted him under a theory that constituted a fatal variance from the theory of the case presented to the grand jury.

At grand jury, the State presented evidence that Mendenhall attacked Okpealuk by striking her in the face. But at trial, the State not only presented evidence that Mendenhall had struck Okpealuk in the face, but also evidence that, during the same attack, Mendenhall grabbed Okpealuk and bit her breast.

The trial judge instructed the jury that they might convict Mendenhall based on *either* his act of striking Okpealuk in the face *or* his act of biting her breast. On appeal, Mendenhall argues that, to the extent the jurors convicted him based on his act of biting Okpealuk's breast, this constituted a fatal variance from the theory of assault under which he was indicted.

Because of the facts of Mendenhall's case, we need not decide whether this kind of divergence between grand jury evidence and trial evidence would constitute a fatal variance. Mendenhall's jury was instructed to return a special verdict identifying which act(s) their verdict was based on. In this special verdict, Mendenhall's jury declared that they unanimously found *both* that Mendenhall struck Okpealuk in the face *and* that he bit Okpealuk's breast. Thus, Mendenhall's variance argument is moot.

Mendenhall's second challenge to his conviction is based on a portion of the prosecutor's summation to the jury.

During the defense summation, Mendenhall's attorney noted that Okpealuk had recanted her accusation that Mendenhall had assaulted her, and the defense attorney urged the jurors to give credence to that recantation. The defense attorney argued that Mendenhall had not assaulted Okpealuk in any fashion — rather, that Okpealuk was angry at Mendenhall, so she falsely reported that Mendenhall had assaulted her.

Responding to the defense attorney's argument, the prosecutor suggested some reasons why the jury might find that Okpealuk's initial report of assault was truthful, and that her later recantation was false:

> *Prosecutor*: Just a couple brief points to respond to what [the defense attorney] said ... .
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> What made [Madeleine Okpealuk] want to get [Mendenhall] in trouble? Well, if one is repeatedly abused, as ... Okpealuk has been in the past by the defendant — that part is undisputed — at some point, you might get angry. You might say, "Dang it, I'm tired of this." You might have, what I would call a moment of clarity to realize, "I'm tired of being beat up." Your mind might change down the road. But from the State's perspective, that's one quite possible [explanation of] what changed.
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> And also, I would argue, if you're at a camp where you've been abused multiple times in the past, perhaps you feel like you're under his power and control, but when you get out, [get] back to town, you feel less underneath his thumb. So that's another thing that quite possibly could have changed between 7/20 and 7/21. And this is a related point. [The defense attorney] said, "Well, [Okpealuk] didn't act scared at camp." And, again, she's been abused there repeatedly. It's the place where she goes with ... Mendenhall, and he has beat her up ... in the past several times. When she's there, I would argue, she feels like she's under his

> thumb, and, no. She's in an abusive relationship, a long-term abusive relationship. No, she's not scared. She's not acting scared in front of police officers, but the next day when she gets some space, she — from the State's point of view — has a moment of clarity. So I ask that you find him guilty.

On appeal, Mendenhall argues that the prosecutor, by repeatedly using the word "you", made an improper "golden rule" argument — urging the jurors to decide the case by putting themselves in the position of the people involved and asking themselves what kind of outcome they would desire. *See Beaumaster v. Crandall*, 576 P.2d 988, 994 (Alaska 1978); *Mallonee v. Finch*, 413 P.2d 159, 164 (Alaska 1966).

But it is clear that the prosecutor was using the word "you" in the sense of "one" — not as a form of personal address to the jurors. We therefore find no error.

Mendenhall's last claim on appeal involves the sentence he received when, based on his most recent assault on Okpealuk, the superior court revoked Mendenhall's probation from a 2013 case — a case in which Mendenhall was convicted of an earlier misdemeanor assault on Okpealuk.

Mendenhall had 210 days of suspended imprisonment remaining from that 2013 case. At Mendenhall's combined sentencing hearing, the superior court imposed the entire 210 days.

On appeal, Mendenhall argues that the superior court committed error by imposing the 210 days reflexively, without engaging in an analysis of what sentence would be proper under the *Chaney* sentencing criteria — *i.e.*, the sentencing goals now codified in AS 12.55.005. [1]

When a court revokes a defendant's probation, the court "cannot automatically reinstate all [of the defendant's] previously suspended jail time". Rather,

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[1] *See State v. Chaney*, 477 P.2d 441 (Alaska 1970).

the court must formulate a sentence based on "the defendant's background, the seriousness of the original offense, the nature of the defendant's conduct while on probation, and the seriousness of the violations that led to the revocation." *Toney v. State*, 785 P.2d 902, 903 (Alaska App. 1990). As in any other sentencing proceeding, the court must evaluate this information in light of the *Chaney* sentencing goals. *Ibid.*

In Mendenhall's case, the sentencing judge did not conduct a separate analysis of what sentence would be proper for Mendenhall's violation of his probation in the earlier assault case. But Mendenhall was sentenced for both his present felony assault and the probation revocation at a single consolidated sentencing hearing. And the record of that consolidated hearing demonstrates that the sentencing judge engaged in the required *Chaney* analysis.

At Mendenhall's sentencing hearing, the prosecutor noted that Mendenhall had 15 prior criminal convictions, including one prior felony assault conviction, and two prior convictions for assaulting the victim in this case, Madeleine Okpealuk. In addition, Mendenhall had two other assault charges involving Okpealuk that were dismissed as a result of plea negotiations.

Based on all this, the prosecutor asked the judge to sentence Mendenhall to 5 years' imprisonment with 2 years suspended for the current felony assault. In addition, the prosecutor asked the judge to impose the entire remaining 210 days' imprisonment from Mendenhall's 2013 misdemeanor assault case:

> *Prosecutor*: In that [2013] case, he has 210 days hanging over him. That [earlier case] was an assault on [the same victim,] Madeleine Blair Okpealuk, in November 2013. From the State's perspective, when you assault the same victim again, one [whom] you've assaulted many times before, ... all [the remaining] time should be imposed. [Or]

> if not all [of the] time, [then] a significant portion of ... the 210 days.

The sentencing judge acknowledged that, when he walked into the courtroom, he had initially intended to give Mendenhall "the maximum sentence possible". But the judge's decision was altered by the defense presentation at the sentencing hearing.

During that presentation, the defense attorney called Mendenhall's mother to the stand. She explained that Mendenhall had suffered a traumatic brain injury when he was 16 (as a result of a snow machine accident). Mendenhall was medivacked to Anchorage, where he spent six weeks in the hospital. He had to re-learn how to walk, speak, and eat. And since that time, according to his mother, Mendenhall has suffered mental and emotional issues: he is impulsive, he has memory problems, and he sometimes becomes irritable for no apparent reason.

In addition, the defense attorney called the executive director of the Anchorage-based Genesis Recovery Services — a residential treatment program for substance abuse disorders. The director testified that Mendenhall had been admitted into the treatment program, and that the program had a bed immediately available for Mendenhall.

After hearing this presentation, the sentencing judge stated that he had reconsidered his original intention to impose "the maximum sentence possible":

> *The Court*: The criteria we have to think about [are] what will it take to deter you, Mr. Mendenhall, from committing such a crime in the future. [And] what will it take to deter other people who understand what your sentence is. [And] do you have a possibility or a probability of rehabilitation.

Mr. Mendenhall: Oh, absolutely, Your Honor.

The Court: And also, we have to reflect the condemnation of the community. Now, you have about 19 crimes in your past, [and you are] 38 years old, so [you have been committing a crime] like every other year. But it seems to me that, first off, you should go to this [substance abuse treatment] program as soon as possible. They have a bed open now. They might not later.

And maybe, at the end of your sentence, you should repeat the program. ... That's not something I'm going to [order you] to do. [But] I do think you should have a delayed remand [now] so that you can attend this [treatment] program. I'll start out with that.

I'm going to sentence you to 4 years with 2 years suspended, but consecutive to that will be the 210 days suspended time [from the 2013 case]. That will be revoked and imposed ... .

You'll be on probation for five years. And we're going to discuss now the conditions of the probation.

The judge then asked Mendenhall when he would be able to start his treatment at the Genesis House program. When Mendenhall replied that he could leave for Anchorage on "the next flight out", the judge responded, "That's great."

The judge formally ordered Mendenhall "to enter into the Genesis program as soon as possible — as soon as you can reasonably get a flight down there." The judge also discussed with the attorneys, and with the representative from the Department of Corrections who was present, the mechanics of how Mendenhall would remand himself to custody after he finished the Genesis House treatment program. And the judge told

Mendenhall, "If it is possible [under AS 12.55.027] to get *Nygren* credit for [your stay at Genesis House], you will get *Nygren* credit for that."

This record demonstrates that the sentencing judge viewed Mendenhall's two sentences — one for his current felony assault on Okpealuk, and the other for the revocation of his probation from the earlier assault on Okpealuk — as a composite whole. This record also demonstrates that the sentencing judge was actively considering the *Chaney* criteria with regard to both sentences, and that he was attempting to formulate a composite sentence which would include a substantial amount of imprisonment but also a substantial amount of suspended time, and which would allow Mendenhall to immediately commence substance abuse treatment (before he entered prison).

We therefore conclude that the sentencing judge did not reflexively impose all 210 days of Mendenhall's suspended term of imprisonment; rather, he analyzed Mendenhall's probation revocation sentence in light of the *Chaney* criteria.

For all these reasons, the judgement of the superior court is AFFIRMED.