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.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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| SCOTT T. McINTYRE,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-12263<br>Trial Court No. 3AN-13-2677 CR<br><br>MEMORANDUM OPINION<br><br>No. 6602 — March 14, 2018 |

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael R. Spaan, Judge.

Appearances: Rex Lamont Butler, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

Scott T. McIntyre appeals his conviction for second-degree sexual abuse of a minor (engaging in sexual penetration with a 13- to 15-year-old who is at least four

years younger than oneself).[1] For the reasons explained in this opinion, we reject McIntyre's claims of error, and we affirm his conviction.

*McIntyre's claim that his statements to the police should have been suppressed under Miranda v. Arizona*

McIntyre first argues that the superior court should have suppressed all of the statements that he made to two police detectives during an hour-long interview that took place in his living room several months after the offense. McIntyre contends that he was in custody during this interview — and that, because he was not advised of his rights under *Miranda v. Arizona*,[2] his statements to the detectives should have been suppressed.

The superior court held an evidentiary hearing to investigate this matter. At this hearing, the court heard the testimony of one of the detectives who conducted the interview, as well as the testimony of McIntyre himself. In addition, the parties provided the court with a transcript and an audio recording of the interview.

Based on this evidence, and applying the test for *Miranda* custody established by the Alaska Supreme Court in *Hunter v. State*,[3] the superior court concluded that McIntyre was not in custody during the interview at his home. The superior court's analysis was consistent with the law in this area, and the record supports the superior court's ruling.

McIntyre contends that we should at least direct the superior court to reconsider the *Miranda* issue, because (according to McIntyre) the superior court failed

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[1] AS 11.41.436(a)(1).

[2] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[3] 590 P.2d 888, 895 (Alaska 1979).

to explicitly resolve two factual issues that were necessary to deciding his suppression claim. He notes that, under Alaska Criminal Rule 12(d), "where factual issues are involved in determining a motion to suppress evidence, the court [must] state its essential findings on the record." McIntyre therefore contends that this Court must remand his case to the superior court for reconsideration, so that the court can explicitly resolve these two factual issues. *See Long v. State*, 837 P.2d 737, 742 (Alaska App. 1992).

The first factual issue that McIntyre claims must be resolved is McIntyre's assertion that he subjectively felt coerced during his interview with the detectives. But the superior court was not required to explicitly resolve this issue, because the test for *Miranda* custody does not hinge on a suspect's subjective mental reaction to the questioning. Rather, the test is an objective one: how a reasonable person would have perceived the situation.[4]

McIntyre also notes that the superior court failed to explicitly address the significance of an incident that occurred during his police interview. The interview took place in McIntyre's living room. McIntyre and the two detectives were sitting on an L-shaped couch. At one point during the discussion, McIntyre wanted to show the detectives something in his bedroom, so he began to rise from the couch.

Here is how the exchange between Detective Cunningham and McIntyre is rendered in the transcript:

> *Det. Cunningham*: [The girl has] picked you out of a photo lineup as the person she had sex ...
>
> *McIntyre*: It sounds like ...
>
> *Cunningham*: ... with.

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[4] *State v. Smith*, 38 P.3d 1149, 1151 (Alaska 2002); *Edwards v. State*, 842 P.2d 1281, 1284 (Alaska App. 1992).

*McIntyre*: ... she's been here, and it sounds ...

*Cunningham*: She has ...

*McIntyre*: ... and it sounds like she's met me, ...

*Cunningham*: ... she has your sweatshirt. I mean, I ...

*McIntyre*: Have you seen my room?

*Cunningham*: No, I haven't.

*McIntyre*: (Chuckles) Okay.

*Cunningham*: No, no, no; sit down. I — I don't need to see your room, Scott, okay?

*McIntyre*: (Sighs)

*Cunningham*: I need to figure out what happened that night, from the time [the two girls] showed up at your door.

*McIntyre*: (Sighs)

On appeal, McIntyre argues that the superior court violated Criminal Rule 12(d) by failing to explicitly address this incident when the court issued its decision on McIntyre's suppression motion. But Rule 12(d) requires a trial court to make all essential *findings of fact* when the court resolves a suppression motion — and here, there was no factual dispute to be resolved.

The exchange between McIntyre and Detective Cunningham is rendered in the transcript, and Detective Cunningham acknowledged and described this exchange when he testified at the evidentiary hearing. The only open question was a legal one:

how did this exchange affect the assessment of whether McIntyre was in custody for *Miranda* purposes?

For these reasons, we conclude that no remand is necessary.

*McIntyre's claim that the trial judge committed error by allowing the prosecutor to introduce a video recording of the victim's interview at a child advocacy center*

McIntyre's final point on appeal arises from the fact that, at trial, the prosecutor played a video recording of the victim's interview at Alaska CARES (a child advocacy center).

The prosecutor offered this recorded interview under Alaska Evidence Rule 801(d)(3), which creates a hearsay exception for certain recorded pre-trial statements of child crime victims if the child is available to be cross-examined at trial. [5]

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[5] Here is the text of Alaska Evidence Rule 801(d)(3):

*Recorded Statement by Child Victims of Crime*. [An out-of-court statement is not hearsay if] the statement is a recorded statement by the victim of a crime who is less than 16 years of age and

(A) the recording was made before the proceeding;

(B) the victim is available for cross-examination;

(C) the prosecutor and any attorney representing the defendant were not present when the statement was taken;

(D) the recording is on videotape or other format that records both the visual and aural components of the statement;

(E) each person who participated in the taking of the statement is identified on the recording;

(F) the taking of the statement as a whole was conducted in a manner that would avoid undue influence of the victim;

(G) the defense has been provided a reasonable opportunity to view the recording (continued...)

When the prosecutor offered this evidence, McIntyre's attorney asked the trial judge, "What is the purpose of playing [the recorded statement] if you think the witness is going to come in and testify [at trial]?" The defense attorney's question led to the following colloquy:

> *The Court*: So your objection is [that] it's duplicative, or ...
>
> *Defense Attorney*: Yes. I'm objecting under [Evidence Rule] 403. I mean, the fact that one evidence rule allows something, ... it's still subject to a [Rule] 403 analysis.
>
> *The Court*: Of course it is. And I will find [that the offered evidence] is not unfairly prejudicial, and [I will] allow it. So your objection's noted.
>
> *Defense Attorney*: Okay.

Following this ruling, the prosecutor played the video recording of the Alaska CARES interview of the victim.

As can be seen from the above-quoted portion of the trial transcript, McIntyre's attorney did *not* argue that this video failed to meet the foundational criteria for admissibility under Evidence Rule 801(d)(3). Rather, the defense attorney's only objection was that the video was cumulative, and that the trial judge should therefore exercise his discretion under Evidence Rule 403 to exclude the video.

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[5] (...continued)
before the proceeding; and

(H) the court has had an opportunity to view the recording and determine that it is sufficiently reliable and trustworthy and that the interests of justice are best served by admitting the recording into evidence.

But now, on appeal, relying on this Court's decision in *Augustine v. State*,[6] McIntyre argues for the first time that the trial judge should have excluded the video because (according to McIntyre) the prosecutor failed to establish two of the foundational requirements for admissibility set forth in Evidence Rule 801(d)(3). McIntyre cannot raise these objections for the first time on appeal.

Hearsay evidence is admissible unless the other party objects to it.[7] This means that, in the absence of a proper objection, a trial judge does not commit plain error by admitting hearsay evidence.[8] And in this case, McIntyre's attorney never raised a hearsay objection to the evidence. That is, the defense attorney never argued that the challenged evidence was inadmissible because it failed to satisfy the foundational requirements of Evidence Rule 801(d)(3).

Rather, the defense attorney conceded that the evidence was admissible under Rule 801(d)(3), but he asked the trial judge to exercise his discretion to exclude the evidence under Rule 403 because it was purportedly cumulative.

In *Augustine*, this Court held that when the government proposes to introduce a child's out-of-court statement under Evidence Rule 801(d)(3), and if the defendant objects to this evidence and offers articulable reasons for believing that the foundational requirements of Rule 801(d)(3) have not been met, the trial judge cannot admit the evidence until the judge has affirmatively determined that all of the foundational requirements of Rule 801(d)(3) have been met. *Augustine*, 355 P.3d at 581, 585.

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[6] 355 P.3d 573 (Alaska App. 2015).

[7] *Rusenstrom v. Rusenstrom*, 981 P.2d 558, 560-61 (Alaska 1999); *Christian v. State*, 276 P.3d 479, 489 (Alaska App. 2012).

[8] *Burton v. State*, 180 P.3d 964, 970 (Alaska App. 2008).

But McIntyre's attorney raised no such objection in the trial court, and McIntyre is not allowed to use this appeal to raise new foundational objections to the evidence. Accordingly, we reject this claim of error.

*Conclusion*

The judgement of the superior court is AFFIRMED.