IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TIMOTHY B. BEDWELL, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11891 Trial Court No. 4FA-12-2343 CR MEMORANDUM OPINION No. 6632 — May 16, 2018

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Bethany Harbison, Judge.

Appearances: Jane B. Martinez, Law Office of Jane B. Martinez, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Tamara E. DeLucia, 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 WOLLENBERG.

Timothy B. Bedwell was charged with sexually abusing his long-term girlfriend's three daughters, L.M., K.M., and C.M., from approximately 2003 to 2010. A jury found Bedwell guilty of thirty-four counts — one count of first-degree sexual assault, ten counts of first-degree sexual abuse of a minor, eighteen counts of second-

degree sexual abuse of a minor, one count of second-degree assault, three counts of first-degree harassment, and one count of second-degree indecent exposure. Bedwell was acquitted of nine counts.

Bedwell now appeals, raising several claims of error.

The trial court's failure to instruct the jury on factual unanimity was error, but the error was harmless beyond a reasonable doubt

Although the charges against Bedwell covered conduct that occurred between 2003 and 2010, Bedwell was not charged until 2012, after K.M. told her mother about the abuse.

At trial, L.M. testified that Bedwell began to abuse her in 2003, when she was approximately twelve years old, and continued to do so until late 2009. K.M. testified that Bedwell began forcing her to touch him in 2003, when she was approximately eight years old. Around 2004, Bedwell began touching K.M., which occurred repeatedly until late 2009. C.M. testified to a single act of abuse when she was nine or ten years old.

Due to the delayed report and the repeated nature and length of the alleged abuse, L.M. and K.M. were unable to identify the dates of the individual acts of sexual conduct. Therefore, each count involving the abuse of L.M. and K.M. covered a period of time (from four months to two years), rather than a specific date.

Given the scope of the charges and the nature of the testimony, Bedwell argues that the trial court erred in failing to instruct the jury that it needed to be unanimous as to the specific act that formed the basis for its verdict on each charged offense.

The right to jury unanimity in a criminal case is grounded in a defendant's right to due process.[1] The right to jury unanimity has two components: first, all jurors must return a unanimous verdict as to a given offense, and second, all jurors must agree on the specific illegal act constituting the offense.[2] Thus, when the State presents evidence that the defendant committed multiple discrete acts, each of which could potentially form the basis for a single charged count, the trial court must instruct the jury on the need for factual unanimity.[3]

Following the close of testimony, the parties discussed jury instructions. Bedwell's attorney proposed an instruction informing the jury that a separate offense was charged in each count and that the jury was required to consider each count separately. This instruction matched Alaska Criminal Pattern Jury Instruction No. 1.35(b).

The second paragraph of this proposed instruction advised jurors that, as to each count, the jurors were required to find Bedwell guilty if they found that the State had "proved each element of the offense beyond a reasonable doubt." The instruction also advised jurors that they were required to find Bedwell not guilty if they found that the State had "not proved each element of that offense beyond a reasonable doubt." After submitting this proposed instruction, Bedwell's attorney asked to add language to the latter sentence advising the jurors that they were required to find Bedwell not guilty if they found that the State had not proved each element beyond a reasonable doubt *and they were not unanimous as to the specific act* proved.

While the State agreed with Bedwell that the jury had to be unanimous as to the specific act underlying each count, the State opposed adding the new language,

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[1] Alaska Const. art. I, § 7; *Jackson v. State*, 342 P.3d 1254, 1257 (Alaska App. 2014).

[2] *Khan v. State*, 278 P.3d 893, 897, 899 (Alaska 2012).

[3] *Jackson*, 342 P.3d at 1257; *Covington v. State*, 703 P.2d 436, 440 (Alaska App. 1985).

arguing that it made the instruction more complicated and confusing. The State asserted that the proposed instruction, without the additional language, made it "very clear" that the jury had to find Bedwell guilty on each count individually. Bedwell's attorney responded that the additional language was necessary "particularly given the problems we've had with the dates, the places."

The trial court declined to add the requested language, concluding that it was unnecessary in light of the other jury instructions, including the indictment, which charged specific sexual acts, such as sexual contact with the "female breast" or "digital-vaginal" sexual penetration. The court instead instructed the jury consistent with Bedwell's originally proposed instruction.

But without the defense attorney's proposed additional language, or some equivalent instruction, the jury instructions failed to convey to the jury that it was required to unanimously agree on the specific act that formed the basis for its verdict on each individual count. The unanimity instruction given by the court, which was modeled on Pattern Instruction No. 1.35(b), addressed only the first component of unanimity: the need for the jury to unanimously agree that the State had proved every element of a particular charged offense.[4] It did not address the second component of unanimity: the requirement that jurors unanimously agree on the specific act that formed the basis for each verdict.[5]

(This aspect of jury unanimity — the need for *factual* unanimity — is now covered in a separate criminal pattern jury instruction, Pattern Instruction No. 1.35(f).)

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[4] *See Khan*, 278 P.3d at 899.

[5] *See Anderson v. State*, 337 P.3d 534, 537 (Alaska App. 2014) (addressing the absence of this same component of unanimity from the jury instructions).

The trial court believed that a more detailed instruction on unanimity was unnecessary, in part because of the way the charges were presented in the indictment (and by extension, in the jury instructions). But even though the indictment identified a particular *type* of sexual conduct for each count — *i.e.*, a specific type of sexual touching or sexual penetration — L.M. and K.M. often testified to many acts of touching or penetration of the specified type within each of the relevant time periods. Accordingly, a factual unanimity instruction was required, and the failure to give one was error.

Because this is an error of constitutional magnitude, we must decide whether the error was harmless beyond a reasonable doubt.[6] Specifically, we must determine whether the State has negated any reasonable possibility that, had the jury been properly instructed, the jury's verdicts would have been different.[7]

Although the trial court declined to expressly instruct the jury on factual unanimity, the parties generally agreed on this requirement. Thus, in closing argument, the prosecutor clearly informed the jurors that they had to be unanimous as to the specific act that formed the basis for their verdict on each count. The prosecutor explained:

> [A] separate offense is charged in each count, and you have to decide each count individually, and you have to have in your head — you have to all agree in your heads that [Bedwell is] guilty of this particular act. So you can't say, well — six of you say, well, I think he's guilty of assaulting her in the bedroom, and the others say, well, I think he's guilty of assaulting her in the living room. That's not good enough. You have to all agree that there was an assault in the

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[6] *Khan*, 278 P.3d at 895, 899-901; *Anderson*, 337 P.3d at 538.

[7] *Anderson*, 337 P.3d at 538, 540, *aff'd in* 372 P.3d 263, 264-65 (Alaska 2016) (holding that the proper standard for deciding whether a constitutional error is harmless beyond a reasonable doubt is the effect-on-the-jury approach).

> bedroom, or all agree that there was an assault in the living room, all right? So you all have to have the same act in mind when you find him guilty of any particular count.

Given that the prosecutor clearly recited the factual unanimity requirement, and given the prosecutor's argument that followed (which we are about to explain in some detail), we conclude that the trial court's failure to instruct the jury on the need for factual unanimity was harmless beyond a reasonable doubt.

After explaining the need for factual unanimity, the prosecutor spent the majority of her closing argument matching each charged count with a particular portion of L.M.'s or K.M.'s testimony. Although L.M. and K.M. could not recall specific dates for each alleged act of abuse, the sexual acts about which they testified were grouped together within time periods that generally corresponded to a particular year in the girls' lives and to a specific type of abuse.

As explained earlier, almost all of the counts in the indictment had a broad enough date range and a broad enough description of conduct to capture multiple discrete acts within the specified period of time. Our review of the record reveals that the prosecutor generally correlated the counts to specific conduct in three primary ways.

For some individual counts (for example, Counts XIV, XIX/XX, and XXIII), the prosecutor specifically identified in her closing argument a single act that supported that count. The State's election of a particular act for these counts cured the absence of a factual unanimity instruction.

In other instances, the prosecutor linked counts that otherwise contained overlapping charging language to testimony that a particular act of abuse occurred a certain number of times within the charged time period. This again rendered the absence of a factual unanimity instruction harmless beyond a reasonable doubt.

For instance, K.M. testified that Bedwell engaged in cunnilingus with her one time in her mother's house and one time in the RV behind her mother's house. The prosecutor linked these two acts to the two counts of first-degree sexual abuse of a minor alleged to have occurred between March and August 2007 (Counts XXIX and XXX), and the jury convicted Bedwell of both counts. In another example, K.M. testified to three instances in which Bedwell rubbed his penis against her buttocks before ejaculating on her back. For these acts of sexual contact and ejaculation, the jury convicted Bedwell of three counts of second-degree sexual abuse of a minor (Counts XXXII, XXXIII, and XXXIV) and three counts of first-degree harassment (Counts XXXVIII, XXXIX, and XL). But the jury acquitted Bedwell of three additional counts of harassment for which there was no supporting testimony.

Most of the counts did not contain overlapping time periods and conduct, but rather were "representative" of a particular period of time and a particular type of abuse. For example, in Counts I, II, and III, the State charged Bedwell with first- and second-degree sexual abuse of a minor for conduct occurring between December 2003 and March 2004, when L.M. was in the sixth grade. Each count alleged a different type of conduct: Count I charged Bedwell with engaging in sexual contact with L.M.'s genitals; Count II charged Bedwell with engaging in sexual contact with L.M.'s breast; and Count III charged Bedwell with engaging in digital penetration of L.M. Although L.M. testified that Bedwell engaged in each type of conduct multiple times, the State charged only a single count for each type of conduct during that time period.

While it is theoretically possible that jurors could have individually reached different conclusions as to which specific act constituted this "representative" count, the question before us is not whether the record demonstrates that, despite the instructional

error, the jury nevertheless unanimously agreed on the specific act that occurred.[8] Rather, the question is whether there is a reasonable possibility that the absence of a factual unanimity instruction affected the jury's verdicts.[9] Or stated differently, is there a reasonable possibility that the jury would have reached different verdicts had it been properly instructed?[10]

Here, L.M. and K.M. often did not distinguish in any significant way among the acts that comprised a given representative count. They generally described a particular type of abuse that Bedwell engaged in during that period, and then explained how it happened multiple times and often, in multiple places. For instance, Count XXVI charged Bedwell with second-degree sexual abuse of a minor for forcing K.M. to touch his penis between March 2007 and August 2007. K.M. testified, "I would come downstairs to watch TV with [Bedwell], and then he would turn on porn . . . and he would take my hand and put it on his penis, inside his clothes, or he would just take his boxers off and he would have me rub him." Because K.M. remembered seeing three different pornographic movies, she believed that she had been forced to touch Bedwell's penis at least three different times. But the State only charged a single count for this conduct. K.M did not distinguish between the multiple acts alleged, and neither did Bedwell's attorney.

Bedwell argues that he did not raise a blanket defense to all the charges and instead raised specific individual defenses to some of the counts. While Bedwell generally challenged the credibility of L.M.'s and K.M.'s testimony, we agree that he also raised specific defenses. For example, Bedwell challenged Counts X-XIII, which

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[8] *Anderson*, 337 P.3d at 540.

[9] *Id.*

[10] *Id.* at 540, 543.

charged him with first- and second-degree sexual abuse of a minor for abusing L.M. between December 2006 through March 2007, while residing in the same household. Bedwell argued that he was living at another residence at that time. The jury acquitted Bedwell of these counts. Based on these acquittals and others, the jury appears to have agreed with Bedwell's defenses to certain charges.

But Bedwell did not mount separate challenges to individual acts that comprised a given representative count. Rather, he challenged each count as a whole (or groups of counts corresponding to a particular time period). Accordingly, we fail to see how the fact that Bedwell raised separate defenses to some counts constitutes a reasonable basis for concluding that the jury, if properly instructed, would not have reached the same verdicts on these representative counts.

Finally, because of the prosecutor's explanation in closing argument of the need for factual unanimity, Bedwell's case is an instance where, despite the absence of a factual unanimity instruction, it is likely that the jury actually reached unanimous agreement as to the specific act charged in each of the representative counts.

For all these reasons, we conclude that the trial court's error in failing to give a factual unanimity instruction was harmless beyond a reasonable doubt.

Counts XVIII-XX, XXI & XXII, and XXXII-XXXIV do not merge

In the alternative, Bedwell argues that the double jeopardy clause of the Alaska Constitution requires his convictions on Counts XVIII-XX, Counts XXI and XXII, and Counts XXXII-XXXIV to merge because the language in the indictment and corresponding jury instructions covers the same type of conduct over identical time periods.[11] This argument is premised on the assumption that, due to the absence of a

[11] Alaska Const. art. I, § 9; *Johnson v. State*, 328 P.3d 77 (Alaska 2014).

factual unanimity instruction, the jurors never reached unanimous agreement as to the specific act that formed the basis for their verdict on each count. As we explained in the previous section, however, the prosecutor's closing argument, which specifically advised jurors of the need for factual unanimity, calls this assumption into doubt.

Even if we accept this premise, however, we disagree with Bedwell that these three sets of counts must merge. In closing argument, the prosecutor generally differentiated the counts from one another by identifying the specific conduct satisfying each charge and eliminating any ambiguity that may have been created from the charging language alone.

The prosecutor clearly differentiated the second-degree sexual abuse of a minor charge in Count XVIII from Counts XIX and XX, two counts that later merged because they were based on the same conduct. According to the prosecutor, Count XVIII was based on Bedwell's act of digitally penetrating L.M. in the downstairs living room of her home while Counts XIX and XX were based on a separate incident in which Bedwell, while intoxicated, digitally penetrated L.M. in her room. Accordingly, we reject Bedwell's argument that these counts merge.

The prosecutor also specifically correlated Counts XXXII through XXXIV — three counts of second-degree sexual abuse of a minor between March 2007 and August 2007 — with K.M.'s testimony about Bedwell's three separate acts of rubbing his penis on her buttocks before ejaculating on her back. These counts were therefore also based on factually distinct episodes and do not merge.

Counts XXI and XXII — two charges of second-degree sexual abuse of a minor between March 2003 and March 2004 — were the least clearly delineated of the three sets of counts challenged by Bedwell. Under one possible reading of the prosecutor's closing argument, Count XXI refers to the first time that Bedwell took K.M.'s hand and placed it on his penis, after they came home from riding in Bedwell's

truck. Under this reading, Count XXI refers to a specific incident, and the next count — Count XXII — is a representative count: it represents the "multiple" *other* later times when Bedwell placed K.M.'s hand on his penis. (K.M. testified that "every time" after the first time, when she and Bedwell were in her mother's bedroom together, Bedwell would engage in this conduct.)

Another plausible reading, one advocated by the State, is that each of the two counts is a representative count. This is potentially a more problematic reading since the jury could theoretically have convicted Bedwell in each count for identical conduct.

Regardless of how one interprets the closing argument on these counts, however, we conclude that there is no reasonable possibility that the jury convicted Bedwell twice for identical conduct. First, K.M. testified that Bedwell forced her to touch his penis "every day." Second, the unanimity instruction that the court gave advised the jurors that they must "decide each count separately" and not let the "verdict on one count . . . control [the] verdict on any other count." Bedwell's attorney repeated this instruction in closing argument, explaining: "The Court has instructed you that you will have to look at each charge on its own, each charge as an individual charge, and that in each charge, you need to look at each element of each charge."

We therefore reject Bedwell's argument that Counts XXI and XII must merge.

The trial court did not abuse its discretion in denying Bedwell's motion for a mistrial

After the State rested its case-in-chief, the defense called Bedwell's daughter, Cara Bedwell, to testify. During the course of cross-examining Cara, the prosecutor mentioned several times that Bedwell was incarcerated.

The first reference occurred after the prosecutor asked Cara how often she spoke with her father's lawyers and investigator, to which Cara responded "every day." The prosecutor then asked, "Have you been out to the jail to visit your father?" Cara responded that she had.

The second reference occurred moments later, after Cara indicated that she did not discuss the details of Bedwell's trial with him. The prosecutor asked, "So you don't — you've never talked with him when you go visit at the jail?" Cara responded that "yes, we've talked."

Finally, a few moments later, Cara herself mentioned her father's incarceration, after the prosecutor asked her when she had last lived with him. Cara responded:

> *Cara*: He came down and he lived with me for two years in California before he was sent up here.
>
> *Prosecutor*: And when was that?
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> *Cara*: He's been in jail for a year now, and it was two years before that.
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> . . . .
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> *Prosecutor*: All right. And since he's been in jail, do you still talk to him quite a lot?
>
> *Cara*: Yeah, we do.

Bedwell's attorneys did not object to any of this questioning. However, at the conclusion of Cara's testimony, Bedwell's attorney moved for a mistrial based on the references to Bedwell's incarceration.

The trial court recognized that these references were improper but found that the prosecutor had not elicited them deliberately and that, given the manner in which the information was disclosed, any prejudice could be sufficiently addressed with a

curative instruction. The court therefore denied Bedwell's request for a mistrial. Bedwell's attorney declined a curative instruction.

Bedwell now argues that the trial court erred in denying his motion for a mistrial.

A trial court is vested with broad discretion in determining whether to grant a mistrial when the jury is exposed to potentially prejudicial evidence.[12] We will only reverse a trial court's decision when, "after reviewing the whole record, we are left with a definite and firm conviction that the trial court erred in its ruling."[13]

We agree with the trial judge that the references to Bedwell's custodial status were improper. The judge recognized that exposing the jury to a defendant's custodial status poses two risks: one, the jury might tend to presume the defendant's guilt, undermining the presumption of innocence, and two, the jury might believe the defendant is dangerous.

But the judge concluded that in this case, those risks were low for several reasons. The judge noted that, given the nature and number of charges Bedwell was facing, the jurors likely assumed that Bedwell was in custody. The judge also found that the information had been revealed in a relatively "benign way," and she stated that she did not notice the jury react to the information at the time it was disclosed.

Bedwell contests the judge's conclusion that jurors would likely assume that he was incarcerated for the charges in this case. Rather, Bedwell argues that the repeated references to his custodial status likely induced the jurors to conclude that Bedwell was in jail for another crime or that he was dangerous.

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[12] *Amidon v. State*, 565 P.2d 1248, 1261 (Alaska 1977).

[13] *Roussel v. State*, 115 P.3d 581, 585 (Alaska App. 2005) (reviewing a trial judge's decision on a motion for a mistrial for abuse of discretion).

We disagree. First, we have previously acknowledged that a jury may suspect, simply from the seriousness of the charges, that the defendant is in custody.[14] We find no fault in the trial court's assessment in this regard, particularly given that the trial court is in the best position to observe the jury and the proceedings and to analyze the potential prejudice that occurred from the improper questioning.

Second, the testimony did not give the jury any reason to believe that Bedwell's incarceration was related to an offense *other* than the charges in this case.[15] The references were made in the context of the prosecutor's questioning about whether Cara was learning information from her father about this case. Cara herself volunteered the information that her father had been in custody for about a year. Jurors were already aware from L.M.'s testimony that she first spoke with the troopers about the allegations against Bedwell in the summer of 2012, a year before the August 2013 trial in this case.

We therefore conclude that the trial court did not abuse its discretion in ruling that a curative instruction was sufficient to cure any prejudice and denying Bedwell's motion for a mistrial.

Bedwell's claim regarding the entry of a conviction on Count XIX

At sentencing, the trial court merged Count XIX (second-degree sexual abuse of a minor) with Count XX (first-degree sexual assault) because the counts charged different theories of culpability based on the same conduct. This merger

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[14] *Newcomb v. State*, 800 P.2d 935, 941-42 (Alaska App. 1990) (holding that even if the jury presumed from certain security measures taken during trial that Newcomb was in custody and physically restrained, that fact alone did not deny Newcomb the right to a fair trial, given the high likelihood that jurors would believe from the seriousness of the charges that Newcomb was in custody).

[15] *Cf. Martin v. State*, 797 P.2d 1209, 1216 (Alaska App. 1990) (reversing denial of mistrial based, in part, on improper testimony regarding defendant's prior criminal record).

required the court to enter a single conviction of record as well as a single sentence for these two counts.[16]

On appeal, Bedwell argues, based on the judgment, that the trial court improperly entered a conviction on Count XIX and that this conviction must be vacated. The State agrees.

But we do not read the judgment as imposing a separate conviction for Count XIX. Unlike many form judgments that we have reviewed, the first section of the judgment does not list the offenses for which Bedwell was "convicted." Rather, this section of the judgment recites the dates of Bedwell's trial and states that Bedwell was "found and adjudged GUILTY" of the thirty-four offenses that follow, including Count XIX. The judgment also indicates that Count XIX merged with Count XX.

As we explained in *Garhart v. State*, although the double jeopardy clause may ultimately require a trial court to merge two or more jury verdicts when entering judgment, the fact of merger does not preclude the State from seeking, and obtaining, a valid jury verdict on each count in the first instance.[17] Thus, despite the merger of Count XIX with Count XX, the jury's *verdict* on Count XIX is still valid, and we find no error in the judgment in this regard.[18]

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[16] *See Nicklie v. State*, 402 P.3d 424, 426 (Alaska App. 2017).

[17] *See Garhart v. State*, 147 P.3d 746, 753-54 (Alaska App. 2006).

[18] We note that the second sentence in the introductory clause of the judgment appears to be misplaced. This sentence reads, "On February 20, 2014, the defendant appeared with counsel, and was sentenced as follows[.]" This sentence is then followed by the list of thirty-four guilty verdicts. This sentence would be better placed in a later section of the judgment that deals exclusively with sentencing and enumerates the court's sentence on each count.

We vacate Special Condition of Probation No. 6

Special Condition of Probation No. 6 requires Bedwell to "comply with [the] use of prescribed medications." Bedwell argues that this condition implicates his rights to liberty and privacy. He further argues that because there is no support for this condition in the record, it cannot survive special scrutiny.

We agree with Bedwell that there is no support in the record for this condition. There is nothing to indicate that Bedwell has a history of not taking, or abusing, prescribed medications, nor is there any apparent connection between Bedwell's convictions and using prescribed medications.

The State argues that rather than vacate this condition, we should remand Bedwell's case to the trial court to determine whether the condition is necessary in light of any "justifying evidence presented by the State." The State notes that, despite arguing against several other conditions of probation at the sentencing hearing, Bedwell's attorney did not expressly object to this condition at the hearing.

But Bedwell's attorney did challenge the proposed condition prior to sentencing in a series of written objections to the presentence report. He argued that Bedwell should have the authority to decline to take medications. (He noted in particular that the Department of Corrections had been administering the wrong medications for Bedwell's diabetes, and Bedwell had chosen not to take them while in custody.)

The State acknowledged that the "medications the defendant takes are between the defendant and his medical care providers." The State maintained, however, that the purpose of the proposed probation condition was to ensure that Bedwell takes the medications "in the manner and quantity as directed by his physician" and "does not abuse them." The State also argued that maintaining Bedwell's "optimum health . . . will assist the defendant in complying with probation."

But, as we have already explained, there is no indication in the record that Bedwell has abused prescription medication. And given the constitutional implications of requiring a defendant to take medications absent a record that such medications are essential to his rehabilitation or the safety of the public, we reject the rationale offered by the State in the trial court.[19]

Moreover, Bedwell has a lengthy sentence, and it is impossible to know now what, if any, medication would be closely related to Bedwell's rehabilitation and to the protection of the public if Bedwell is released onto probation.[20]

Accordingly, we vacate Special Condition of Probation No. 6.

Conclusion

We VACATE Special Condition of Probation No. 6. With that exception, we AFFIRM the judgment of the superior court.

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[19] *See Baker v. State*, 2003 WL 21663992, at *1-2 (Alaska App. July 16, 2003) (unpublished).

[20] *See Kobuk v. State*, 1987 WL 1357149, *2 (Alaska App. June 3, 1987) (unpublished).