

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SAMUEL EARL WISE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11850
Trial Court No. 3HO-11-39 CR

MEMORANDUM OPINION

No. 6650 — July 5, 2018

Appeal from the Superior Court, Third Judicial District, Homer,
Charles T. Huguelet, Judge.

Appearances: Rex Lamont Butler, Attorney at Law, Anchorage,
for the Appellant. Eric A. Ringsmuth, Assistant Attorney
General, Office of Criminal Appeals, Anchorage, and Craig W.
Richards, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK, writing for the court.
Judge MANNHEIMER, concurring.

Twenty-six-year-old Samuel Earl Wise was indicted on twenty counts of
sexual abuse or sexual assault of his three younger female cousins J.W., K.L., and F.L.

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

Superior Court Judge Charles T. Huguelet dismissed the charges involving J.W. The judge also dismissed two other charges due to a lack of jurisdiction. After a jury returned guilty verdicts on the remaining charges, Wise stood convicted of first-degree sexual assault of K.L. and F.L.

Wise's sexual abuse of each cousin took place over a period of years at his extended family's two adjoining residences in Homer. Before trial, Wise opposed the introduction of evidence of any abuse of his cousins by him that predated the charged events.

The judge excluded all evidence of Wise's abuse of J.W. as too remote in time. But the judge did not exclude evidence of Wise's long-term sexual abuse of K.L. and F.L. Wise appeals the judge's decision not to exclude this evidence, arguing it was inadmissible evidence of prior bad acts. We agree with the judge that this evidence had case-specific relevance to explain the behavior of Wise and his victims at the time of the charged crimes. Accordingly, admission of this evidence was authorized by Alaska Evidence Rule 404(b)(1).

Wise also appeals the judge's denial of his motion to try the charge involving F.L. separately. Since Wise's conduct toward F.L. and K.L. would have been cross-admissible in separate trials had the judge granted a severance, the judge did not abuse his discretion in denying separate trials.

Next, Wise appeals the judge's denial of his motion to dismiss the indictment. He argues that the prosecutor's oral instruction to the grand jury about its role was error, because the instruction precluded nullification. He also argues that evidence presented to the grand jury in support of the counts that the judge later dismissed prejudiced the grand jury against Wise. We conclude that Wise failed to preserve these points for appeal.

Finally, Wise raises five other claims on appeal: that the judge should have dismissed a count that mislabeled “sexual penetration” as “sexual contact”; that the prosecutor improperly commented on Wise’s decision not to testify; that a jury instruction did not adequately identify the time period of the charged crimes; that no factual unanimity instruction was given to the jury; and that the judge should have granted Wise’s motion for a judgment of acquittal. We conclude that these arguments are without merit.

Accordingly, we affirm Wise’s convictions.

Background facts

Wise grew up in his mother’s house in Homer. One of his younger cousins, J.W., lived in a house on an adjoining parcel. His other younger cousins, K.L. and F.L., were sisters who lived in Anchorage. K.L. and F.L. visited the family in Homer periodically, and during these times, each girl would spend time with Wise.

K.L. was the oldest of the three cousins, and four years younger than Wise. She testified that Wise sexually abused her from the time that she was four years old until she turned twelve. Wise would touch her breasts, digitally penetrate her vagina, and would direct her to touch his penis. Sometimes this would occur when the two played “truth or dare.” Wise also employed strategies such as giving her candy to induce her compliance. K.L. testified that Wise would not take “no” for an answer.

In April of 2005, when K.L. was fifteen years old, she went to Homer to babysit younger cousins while their grandmother was in the hospital. Wise asked K.L. to show him her breasts and K.L. refused. Wise then pulled her tank top down and began touching her breasts. K.L. resisted, but Wise put his mouth to her breasts. He then forced K.L. onto a couch, removed her pants, and inserted his fingers into her

vagina. K.L. testified that she did not report this assault because she was afraid no one would believe her.

F.L. was the youngest of the three cousins, and six and a half years younger than Wise. According to F.L., from the time that she was eight years old until she turned thirteen, Wise would occasionally touch her crotch through her clothing. When he once tried to touch her under her clothing, she became frightened and fled the room.

In June of 2008, F.L. visited her relatives in Homer to celebrate her sixteenth birthday. At one point during this visit, the two were in Wise's bedroom, where he was showing her a video game. Wise pushed F.L. onto his bed, subdued her, and penetrated her vagina with his penis.

F.L. returned to Anchorage because of this incident, but she did not report the sexual assault to family members or to the authorities. She testified at trial that Wise told her that if she reported him she would not be believed, because he was a family favorite.

Two years after Wise sexually assaulted F.L., she divulged this to K.L. K.L. and F.L. then disclosed the abuse to J.W. J.W. (who had also been abused by Wise) decided to contact the police, who interviewed all three young women. Over the course of two months, the three cousins participated in recorded telephone conversations with Wise, during which he made admissions.

Proceedings in the superior court

Following Wise's indictment on twenty counts of sexual abuse or sexual assault of his three cousins, Wise moved to dismiss numerous counts on which the statute of limitations had run. The judge dismissed those counts, which included all the counts involving J.W. The judge also dismissed two other charges for lack of jurisdiction (because Wise was a juvenile at the time of the alleged offenses). Ultimately, five counts

remained: one count of sexual assault for Wise's sexual penetration of F.L. just after she turned sixteen, two counts of sexual abuse of a minor based on Wise's sexual contact with and penetration of fifteen-year-old K.L., and two counts charging those same acts against K.L. as sexual assaults.

Wise moved to sever the sexual assault count involving F.L. from the other counts involving K.L. Wise argued that the charge based on penile penetration of F.L. was dissimilar from the other charges. The judge denied the severance motion, ruling that the evidence of Wise's abuse of each cousin would likely be cross-admissible in separate trials.

After the judge denied severance on this ground, he held an evidentiary hearing to address the admissibility of the evidence of Wise's alleged sexual abuse of J.W. as well as the evidence of Wise's abuse of K.L. that predated the charged conduct. Both K.L. and J.W. testified telephonically at the hearing. F.L. did not testify.

Following the evidentiary hearing, the judge ruled that, because Wise's alleged abuse of J.W. occurred more than ten years before she reported it, he would exclude it as too remote in time. But the judge ruled that evidence of Wise's long-term molestation of K.L. was admissible.

Just before F.L. took the stand at trial, the prosecutor questioned her outside the jury's presence regarding Wise's molestation of her that predated the 2008 charged sexual assault. As with K.L., the judge ruled that this evidence was admissible.

Wise did not take the stand at trial, but his defense was that he never sexually assaulted or abused F.L. or K.L. The jury convicted Wise of all charges. This appeal ensued.

Why we conclude that the judge properly admitted Wise’s history of sexual abuse of K.L. and F.L.

The judge ruled that Wise’s forcible assaults of fifteen-year-old K.L. and sixteen-year-old F.L. could not be fully understood without reference to Wise’s conduct when the girls were younger. We agree. Evidence Rule 404(b)(1) authorized admission of the prior bad act evidence for this non-propensity, case-specific purpose (if it survived scrutiny under Evidence Rule 403).

In *Burke v. State*, the Alaska Supreme Court recognized that a stepfather’s ongoing sexual abuse of his stepdaughter had a case-specific relevance other than proof of the defendant’s character.¹ As we later explained in *Velez v. State*, the evidence in *Burke* was relevant to explain “the entire relationship” between the stepfather and the stepdaughter, and this evidence “was necessary in order to place the alleged incident in context and explain the victim’s actions.”²

Similarly, in *Soper v. State*, another case in which a father was convicted of sexually abusing his daughter, this Court upheld the admission of evidence that, in years past, the defendant had serially abused two of his other daughters when they each reached puberty.³

We reach the same conclusion with regard to the contested evidence in Wise’s case. Wise’s case is similar to *Soper*, in that Wise’s victims constituted “a limited class of individuals having highly relevant common characteristics.”⁴ The victims were Wise’s two younger cousins, who belonged to an extended family that was centered in

¹ *Burke v. State*, 624 P.2d 1240, 1247-50 (Alaska 1980).

² *Velez v. State*, 762 P.2d 1297, 1301 (Alaska App. 1988).

³ *Soper v. State*, 731 P.2d 587, 590 (Alaska App. 1987).

⁴ *Id.*

family residences in Homer. As in *Soper*, the abuse of each cousin began at a young age, and the abuse continued for years.⁵

Wise's pattern of conduct toward his female cousins was relevant for non-propensity, case-specific purposes. For example, absent the context provided by this evidence, it might appear improbable to a jury that Wise would assume that he could rape his visiting sixteen-year-old cousin F.L. in his mother's home without fear of consequences. This evidence was also relevant to explain why the girls did not contemporaneously disclose the assaults to the adults in the family or to the authorities. We conclude that the evidence of Wise's long-term abuse of K.L. and F.L. was admissible under Rule 404(b)(1) because the evidence was offered for non-propensity, case-specific purposes.

The severance motion

Wise argues that the judge should have granted his motion to sever the count charging him with a sexual assault of F.L. We have held that joinder of charges will rarely be prejudicial if the evidence as to each charge is cross-admissible as to the other charge.⁶ Wise's history of abuse of K.L. and F.L. would have been cross-admissible were the severance granted.⁷ Therefore, the judge did not abuse his discretion when he denied the severance motion.

⁵ *Id.* at 589.

⁶ *Pease v. State*, 54 P.3d 316, 322 (Alaska App. 2002).

⁷ Alaska Evid. R. 404(b)(2).

Wise failed to preserve his challenge to his indictment

Wise challenges the judge's denial of his motion to dismiss the indictment. Wise argues that an instruction given by the prosecutor to the grand jury failed to account for the grand jury's purported right of nullification — that is, its alleged right to decline to indict even if the evidence established probable cause that a crime had been committed.

But when the defense attorney argued the motion to dismiss to the judge, he did not object to the instruction Wise now cites. Instead, he objected to a different instruction given by the prosecutor during an initial grand jury proceeding that was superseded by a subsequent indictment. The prosecutor pointed out to the judge that the defense attorney was arguing a moot point, because “the second indictment cured any error on [my] part [during the first proceeding].” The defense attorney then responded, “I think that [the prosecutor] was correct when he said the second presentation kind of fixes any error that there might have been in the first [grand jury proceeding.]”

Wise did not object to the language that he now cites as error, and the judge made no ruling on the matter. Accordingly, Wise has failed to preserve this point for appeal.

Wise also appeals on the ground that the prosecutor presented evidence to the grand jury on fifteen counts that were later dismissed on statute of limitations or juvenile jurisdiction grounds. He argues that hearing this evidence prejudiced the grand jury against Wise, and that the judge should have dismissed the indictment for this reason.

But after the defense attorney raised this matter during his oral argument before the judge, the prosecutor argued that the defense attorney had not included the point in his written motion to dismiss the indictment. The prosecutor suggested that the defense attorney file an independent motion raising that issue. The judge agreed with the

prosecutor's suggestion. The defense attorney never filed that motion, and so the issue is not preserved for appeal.

The trial court properly amended the indictment to correct scrivener's errors

The grand jury indicted Wise on twenty counts of sexual abuse or sexual assault of J.W., K.L., and F.L. As noted, the judge later dismissed all but five of those counts. After the dismissal, the State filed an Information Replacing Indictment, renumbering the remaining five counts. The State later realized that Count III of the information (Count IX of the indictment) charging sexual abuse of a minor explicitly alleged digital vaginal penetration of K.L. by Wise, but mislabeled this sexual penetration as "sexual contact," a term that does not apply to sexual penetration. Had the State in fact been describing sexual contact rather than sexual penetration, the charge would have been a class C felony instead of a class B felony.

Three days before trial, the State filed an Amended Information Replacing Indictment that corrected this pleading deficiency. Wise requested a continuance because of this amendment. The judge denied the continuance and allowed the amendment. Wise argues that the court should have dismissed the count.

Alaska Criminal Rule 7(e) authorizes courts to amend an indictment or information at any time before a verdict if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. Here, the indictment accurately pleaded the *actus reus* of the crime of sexual penetration of a minor, asserting that Wise "engaged in sexual contact with K.L. ... to wit: digital penetration of K.L.'s ... vagina[.]"

The prosecutor explicitly told the grand jury that the conduct at issue in this count was digital penetration of the vagina. The prosecutor correctly defined sexual

penetration, quoting from the statute. Lastly, the State charged that same act, accurately labeled as sexual penetration rather than sexual contact, in a count charging the same incident as a sexual assault under AS 11.41.410(a)(1), further undermining Wise's contention that the grand jury was confused. The record thus supports the trial court's conclusion that the original label "sexual contact" was a scrivener's error and that the amended label "sexual penetration" did not charge an additional or different offense.

The judge's correction of a scrivener's error in the amended information did not prejudice Wise's substantial rights.

The prosecutor's final argument was not plain error

During his closing argument, the prosecutor commented that the evidence of Wise's guilt was uncontradicted:

And what we know, and what we've heard, ladies and gentleman, is you've heard the stories, you've heard the accounts of both of these young ladies and what happened on those days. We've heard nothing that contradicts that. We've heard nothing that indicates this did not happen. This is very significant. We've heard nothing to show this didn't happen. All the evidence shows you it did. And I want to be clear, the defense has absolutely no burden to put on any evidence, and I'm not suggesting they do, or have a requirement to prove anything. But when you consider the evidence, you've got no evidence that contradicts [K.L.'s] or [F.L.'s] accounts of the abuse that happened to them. And so when you consider all the evidence, all the evidence tells you, it did happen. It did happen as they described on each of these instances.

Wise now argues that the prosecutor impermissibly commented on Wise's failure to testify at trial. He contends that the prosecutor's statement that Wise "has

absolutely no burden to put on any evidence ... or ... requirement to prove anything” did not remedy his implicit comment on Wise’s failure to testify.

Wise did not object or ask for relief in the trial court when the prosecutor made these remarks. He must therefore establish plain error. Wise must establish that the trial court erred and that the error (1) was obvious; (2) was not the result of intelligent waiver or a tactical decision not to object; (3) affected substantial rights; and (4) was prejudicial.⁸

In *McCracken v. State*, the Alaska Supreme Court held that a prosecutor’s comment violates the Fifth Amendment if the “language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.”⁹ While a prosecutor may, in general, refer to the evidence at trial as “uncontradicted” or “unrebutted” without violating the Fifth Amendment, a prosecutor cannot do so when the defendant is the only person capable of contradicting the evidence.¹⁰

Wise presented witnesses in his defense. The prosecutor’s remarks could plausibly be taken to mean that the witnesses presented by Wise did not succeed in impeaching the prosecution’s case. Thus, the prosecutor’s comment was not an obvious comment on Wise’s decision not to testify. Moreover, the judge instructed the jury that Wise had an absolute constitutional right not to testify and that the jury should neither discuss nor speculate about why he did not testify. And the prosecutor acknowledged that the defense had no burden to present evidence. We find no plain error.

⁸ *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

⁹ *McCracken v. State*, 431 P.2d 513, 517 (Alaska 1967).

¹⁰ See *Goldsbury v. State*, 2012 WL 2203055, at *3 (Alaska App. June 13, 2012) (unpublished) (citing *United States v. Hunt*, 412 F. Supp. 2d 1277, 1287-88 (M.D. Ga. 2005)).

Wise argues that the prosecutor's argument was improper in several other respects. But after reviewing Wise's arguments, we find no plain error.

Wise's challenges to the jury instructions

Wise argues that the jury instructions regarding the elements of each charged crime failed to specify the time period during which the offenses were allegedly committed. He argues that, without this limiting data, the jury could have convicted him for prior bad acts presented at trial rather than for the charged conduct.

Because Wise did not object to the instructions given by the judge, he must show plain error. No such error occurred.

During the prosecutor's final argument, he explicitly told the jurors that Count I pertained to Wise's sexual assault of F.L. in June of 2008. One of the jury instructions included the charging document, which stated that the sexual assault occurred on or about June 19, 2008. The jury instructions left no ambiguity about the nature or the timing of the charge against Wise for sexually assaulting F.L.

The charging document gave a longer time span for the assault on K.L. — “on or about between 2004 and April 2005.” But the charges against Wise for assaulting K.L. were tied by the evidence to a specific event, her visit to Homer in April of 2005 to babysit her young cousins while their grandmother was hospitalized. The prosecutor made reference to this circumstance during his final argument. And in discussing the evidence of other incidents of abuse, the prosecutor told the jurors, “[n]ow he's not charged for those acts, and you cannot convict him for those [prior acts].” Accordingly, any lack of precision in the jury instructions as to the timing of events did not prejudice Wise.

Wise also argues that the judge should have instructed the jury on factual unanimity. Under *Covington v. State*, when one criminal charge could encompass two

separate incidents, a factual unanimity instruction is required.¹¹ But here, only one specific incident was charged in any one count — either sexual contact with K.L.’s breast or digital penetration of her vagina, both one-time incidents occurring on a day in April of 2005. No factual unanimity instruction was required.

The court’s denial of motion for a judgment of acquittal or a new trial was not error

After his trial, Wise filed a motion for a judgment of acquittal, or in the alternative, for a new trial. He argued that if all the evidence to which Wise had earlier objected was excluded from consideration, the remaining evidence was insufficient to convict Wise. Wise renews this argument on appeal.

Even if Wise were correct that the judge improperly admitted prior bad act evidence, and even if the remaining evidence standing alone was insufficient to support the convictions, Wise would only be entitled to a new trial, not a judgment of acquittal.¹² But since we have held that the evidence was properly admitted, Wise’s argument is moot.

Conclusion

We AFFIRM the judgment of the superior court.

¹¹ *Covington v. State*, 703 P.2d 436, 440-41 (Alaska App. 1985).

¹² *See McCord v. State*, 390 P.3d 1184, 1187 (Alaska App. 2017).

Judge MANNHEIMER, concurring.

I am writing separately to address the decisions in *Burke v. State*, 624 P.2d 1240 (Alaska 1980), and *Soper v. State*, 731 P.2d 587 (Alaska App. 1987).

In *Burke*, the Alaska Supreme Court upheld a trial judge’s decision to admit evidence of the defendant’s other sexual abuse of the same victim. *Burke*, 624 P.2d at 1246. And in *Soper*, this Court upheld a trial judge’s decision to admit evidence that the defendant had sexually abused the victim’s sisters. *Soper*, 731 P.2d at 589-591.

Both *Burke* and *Soper* speak of this evidence as falling within an “exception” to Alaska Evidence Rule 404(b)’s ban on character evidence. But the evidence in *Burke* and *Soper* actually fell *outside* the ban on character evidence — because it was not offered for character purposes.

Burke and *Soper* were litigated and decided at a time when the pertinent rule was Evidence Rule 404(b) — what is now numbered Evidence Rule 404(b)(1). Evidence Rule 404(b)(1) prohibits evidence of a defendant’s other acts if the evidence “has no genuine purpose other than to show the defendant’s character and the consequent likelihood that the defendant acted in conformity with that character during the episode being litigated”.¹

Typically, evidence of a defendant’s other bad acts will tend to reflect poorly on the defendant’s character. But the question under Rule 404(b)(1) is whether the *only* relevance of this evidence is to prove character — because Rule 404(b)(1) does

¹ *Smithart v. State*, 946 P.2d 1264, 1270-71 (Alaska App. 1997).

not bar evidence of a person’s other acts if the evidence is introduced for any other valid purpose.²

Thus, when the government offers evidence of the defendant’s other acts, the trial judge must decide whether the evidence is being offered solely for the prohibited purpose of establishing the defendant’s character, or if, instead, the evidence truly has relevance for some other case-specific, non-character purpose — in which case, Evidence Rule 404(b)(1) does not bar the evidence (although the judge may still exclude it under Evidence Rule 403).³

The second sentence of Evidence Rule 404(b)(1) lists several non-character purposes for which the government may offer evidence of a defendant’s other acts: “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” But these are only illustrative. The true rule is that “Rule 404(b)(1) does not bar evidence of a person’s bad acts if this evidence is introduced for *any other valid purpose*” — *i.e.*, any other genuine non-character purpose.⁴

For this reason, the purposes listed in the second sentence of Rule 404(b)(1) are not “exceptions” to the prohibition codified in the rule. Rather, they are meant to illustrate the *limit* of that prohibition. They are a list of common ways in which evidence of bad acts can be offered for a purpose other than establishing character.

In *Burke* and in *Soper*, the evidence of the defendants’ prior sexual abuse of the victims was not introduced for the sole purpose of proving that the defendants characteristically engaged in the sexual abuse of young girls. Rather, the defendants’

² *Conley v. Alaska Communications Systems Holdings, Inc.*, 323 P.3d 1131, 1136 (Alaska 2014); *Beaudoin v. State*, 57 P.3d 703, 707-08 (Alaska App. 2002); *Smithart*, 946 P.2d at 1270-71.

³ *Linehan v. State*, 224 P.3d 126, 147 (Alaska App. 2010).

⁴ *Beaudoin*, 57 P.3d at 708 (emphasis added).

prior crimes had case-specific relevance to the particular crimes for which they were charged—relevance to establish the defendants’ relationships with their victims, and to provide the context for the victims’ actions (or inactions).

Because the evidence in *Burke* and *Soper* was genuinely relevant for non-character purposes, the evidence was admissible under Rule 404(b)(1) without the need for any “exception” to the rule.

I acknowledge that this issue does not arise as often as it used to — because, in 1988, the Alaska legislature enacted Evidence Rule 404(b)(2). This rule applies to prosecutions for sexual abuse of a minor, and it authorizes evidence of other instances where the defendant sexually abused the same victim or similar victims.⁵ Under Rule 404(b)(2), this evidence is admissible even though the evidence would be barred by Rule 404(b)(1) — that is, even though the sole relevance of the evidence is to establish the defendant’s character, so that the defendant’s character can be used as circumstantial evidence that the defendant acted true to character during the episode being litigated (thus tending to show that the defendant committed the charged acts of sexual abuse).⁶

But *Burke* and *Soper* remain examples of instances where a defendant’s other acts of sexual abuse did, indeed, have a case-specific relevance apart from proving the defendant’s character. In such instances, evidence of the defendant’s other acts is not prohibited by Evidence Rule 404(b)(1); the evidence is admissible unless the trial judge excludes it as unfairly prejudicial under Evidence Rule 403.

⁵ SLA 1988, ch. 66, §§ 8-9.

⁶ We discussed this point in *Bingaman v. State*, 76 P.3d 398, 404 (Alaska App. 2003).