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

ESTATE OF JIM FERGUSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12138 Trial Court No. 3AN-13-05592 CR MEMORANDUM OPINION No. 6800 — June 19, 2019

Appeal from the Superior Court, Third Judicial District, Anchorage, Kevin M. Saxby and Michael R. Spaan, Judges.

Appearances: Marilyn J. Kamm, Attorney at Law, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

Jim Ferguson was convicted by a jury of two counts of second-degree sexual abuse of a minor, after he forced an eight-year-old girl to put her hand on his

penis and then placed his hand on her vagina. Ferguson died in prison in 2016, and his estate now appears before the Court as the appellant.[1]

Ferguson raises several claims on appeal. The first relates to the indictment, which he argues should have been dismissed by the superior court. The other claims relate to his trial. Ferguson argues that it was plain error for the superior court to admit into evidence a recording of a police interview in which he admitted to having sexual contact with the victim and one of her friends; that the superior court improperly permitted a police officer to give expert testimony; and that his trial attorney provided ineffective assistance of counsel by eliciting the officer's improper testimony.

For the reasons discussed in this opinion, we reject Ferguson's claims, and we affirm his convictions.

Factual and procedural background

In May 2013, Betty Moen called the police to report that her stepdaughter, M.M., had disclosed inappropriate behavior by Jim Ferguson. M.M. told Moen that she had been staying overnight at the home of Ferguson's great-granddaughter, K.H., when this happened.

Detective Leonard Torres was assigned to the case. He interviewed M.M. and K.H. at Alaska CARES in Anchorage. M.M. was ten years old at the time of the interviews. While K.H. did not disclose any abuse, M.M. gave a detailed account of sexual abuse by Ferguson.

In the interview, M.M. first described an incident that took place during a sleepover at K.H.'s house when she was eight years old. At the time, Ferguson resided

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[1] *See State v. Carlin*, 249 P.3d 752, 754 (Alaska 2011) (concluding that if a criminal defendant dies after filing an appeal, the defendant's estate may continue to pursue the appeal).

in the same house as K.H. and several other members of their family. M.M. reported that Ferguson called her into his room, grabbed her hand, and made her touch his penis. Ferguson then reached out and placed his hand on M.M.'s vagina both over and under her clothes. According to M.M., Ferguson then told her that he would hurt M.M. and her family if she told anyone about this.

After the Alaska CARES interview, Torres invited Ferguson to speak with him at the Anchorage Police Department. During the interview, Ferguson said that M.M. and K.H. often engaged in sexual behavior when they were around him. He described several instances in which he said that he had sexual contact with the girls that they had initiated, including a time the girls used his hands to rub their vaginas while he was sitting on a recliner.

The State impaneled a grand jury and presented the testimony of four witnesses: M.M.'s stepmother, Betty Moen, Detective Torres, M.M., and K.H.'s mother, Candace Ferguson. The grand jury indicted Ferguson on four counts of sexual abuse of a minor in the second degree: Counts I and II for engaging in sexual contact with M.M. when he called her into his room in 2013 (M.M.'s hand to Ferguson's penis and Ferguson's hand to M.M.'s vagina), and Counts III and IV for conduct he admitted to in his interview with Torres (touching M.M.'s and K.H.'s vaginas when he was sitting on his recliner).[2]

Prior to trial, Ferguson filed a motion to dismiss the four counts of the indictment, arguing that the indictment was based on "inadmissible and improper evidence," and that there was insufficient evidence to support Counts III and IV, specifically. The superior court dismissed Counts III and IV but declined to dismiss

[2] AS 11.41.436(a)(2).

Counts I and II. The case proceeded to a jury trial, and the jury returned guilty verdicts for both counts of second-degree sexual abuse of a minor.

Ferguson now appeals.

Ferguson's claims regarding the indictment

Ferguson argues that the superior court should have dismissed Counts I and II of the indictment for two reasons. First, Ferguson argues that the court applied an incorrect test to determine whether to dismiss the indictment after the prosecutor incorrectly instructed the grand jury regarding "first complaint" evidence. Second, Ferguson argues that Detective Torres offered an opinion of Ferguson's credibility and made inflammatory and prejudicial statements before the grand jury.

(a) Moen's grand jury testimony regarding statements by M.M.

At the grand jury proceeding, Moen, M.M.'s stepmother, testified to details of M.M.'s report of sexual abuse by Ferguson. The prosecutor then instructed the grand jury that although Moen had testified to hearsay statements, those statements were admissible under *Greenway v. State* because Moen was the first person M.M. spoke to about the abuse by Ferguson.[3]

Ferguson moved to dismiss the indictment, arguing that Moen's testimony regarding M.M.'s report was inadmissible and appreciably affected the grand jury's deliberations. In response to Ferguson's motion, the superior court judge ruled that the prosecutor should have cautioned the grand jury that the testimony was not offered as

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[3] *Greenway v. State*, 626 P.2d 1060, 1061 (Alaska 1980) (holding that the testimony of rape victim's mother and her school counselor concerning victim's complaint of rape was admissible under special hearsay exception concerning complaints of victims in sex crimes due to the victim's young age and threats made against her).

substantive evidence of the defendant's guilt but rather to corroborate M.M.'s testimony about the abuse.[4] Applying the two-part test we adopted in *Stern v. State* for evaluating the introduction of improper evidence before the grand jury, the superior court declined to dismiss the indictment on this ground. The judge noted that M.M.'s own grand jury testimony was far more detailed than the testimony provided by Moen.[5] As a result, the court found that Moen's testimony did not appreciably affect the grand jury's decision.

When improper evidence is presented to a grand jury, a trial court applies the test outlined in *Stern* to determine whether an indictment should be dismissed. Under this test:

> The superior court first subtracts the improper evidence from the total case heard by the grand jury and determines whether the remaining evidence would be legally sufficient to support the indictment. If the remaining evidence would be legally sufficient, the court then assesses the degree to which the improper evidence might have unfairly prejudiced the grand jury's consideration of the case.[6]

We agree with the superior court that Moen's statements were unlikely to have significantly impacted the grand jury because M.M. herself testified in even greater detail to the same incident.

On appeal, Ferguson challenges the superior court's decision to apply the *Stern* test to this situation. He argues, in several conclusory sentences, that the superior court should have used a standard from our decision in *Linehan v. State* to evaluate the prejudicial effect of Moen's testimony.[7] Ferguson does not explain why he believes the

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4 *See Borchgrevink v. State*, 239 P.3d 410, 422 (Alaska 2010).

5 *See Stern v. State*, 827 P.2d 442 (Alaska App. 1992).

6 *Stern*, 827 P.2d at 445-46.

7 *See Linehan v. State*, 224 P.3d 126, 141 (Alaska App. 2010).

court should have applied this standard, given that *Linehan* did not involve a grand jury issue, or how this standard is materially different from the second prong of the *Stern* test — which requires the court to evaluate whether the improper evidence unfairly prejudiced the grand jury. We therefore reject this claim.

(b) Detective Torres's grand jury testimony

Ferguson also challenges a portion of Detective Torres's grand jury testimony during which Torres testified about the techniques he uses when he interviews someone suspected of sexual abuse of a minor. Ferguson argues that Torres offered an opinion on his credibility and made inflammatory and prejudicial statements that necessitate dismissal of the indictment.

In his testimony, Torres explained why it can be difficult to obtain information about a child sexual assault from a suspect. According to Torres, "this particular crime is probably the worst crime that a person could confess to, because . . . [w]hen it comes to sex abuse against a child, there is no real defense."

Torres said that when he conducts such an interview with the suspect, he lays blame on the children themselves, suggesting to the suspect that the children were oversexualized or seductive, or that they initiated the contact. He explained that this may cause the suspect to adopt the theme that the children are guilty and that the suspect is the victim. Torres testified that Ferguson "latched on to" this theme and repeated several times to Torres that he was not a pedophile, even though Torres had not mentioned that word.

Immediately after Torres made these statements, the prosecutor instructed the grand jury to disregard the statements. The prosecutor reminded the grand jurors that their job was to analyze whether or not there was sufficient evidence to establish the crime charged, and that they should not be swayed by emotion.

On appeal, Ferguson argues that when Detective Torres provided this testimony, he was effectively and improperly acting as a human polygraph.[8] Ferguson also argues that Torres's statements that sexual abuse of a minor is "the worst crime" and that there is "no real defense" inflamed the grand jurors such that they made their decision without considering the evidence.

But a jury is presumed to follow limiting instructions.[9] Although Torres's remarks were clearly improper, the prosecutor promptly instructed the grand jurors to disregard the remarks and to base their decision strictly on the evidence presented to them. Accordingly, we agree with the superior court that any error was not prejudicial.

Ferguson's claims relating to his trial

(a) The recording of Ferguson's interview

Before trial, the State filed a notice of its intent to introduce character evidence under Alaska Evidence Rules 404(b)(2) and 801(d)(2). In the notice, the State explained that it intended to introduce a video recording of the interview between Torres and Ferguson, and that some of the statements in the recording would relate to "uncharged contact between [Ferguson] and K.H. or M.M."

Ferguson's attorney did not oppose the motion and did not object when the evidence was introduced at trial. The court admitted the entire interview except for one portion during which the police invited Ferguson to take a polygraph, and Ferguson said "fine." Ferguson's attorney objected to the decision to omit that portion of the interview but did not object to the admissibility of the recording as a whole.

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[8] *See Flynn v. State*, 847 P.2d 1073, 1075-76 (Alaska App. 1993).

[9] *See Dailey v. State*, 65 P.3d 891, 897 (Alaska App. 2003); *McGill v. State*, 18 P.3d 77, 80 (Alaska App. 2001).

On appeal, Ferguson argues that the video recording was inadmissible under both Alaska Evidence Rules 404(b)(2) and 801(d)(2). Because Ferguson did not object to admission of the recording at trial, this Court reviews these claims for plain error.[10]

In regard to Evidence Rule 404(b)(2), Ferguson asserts that the statements in the video were inadmissible because the conduct that Ferguson admitted to was dissimilar from the charged conduct. Evidence Rule 404(b)(2) provides that in a prosecution for a crime involving the sexual abuse of a minor, the State may generally introduce "evidence of other acts by the defendant toward the same or another child . . . if the prior offenses (i) are similar to the offense charged; and (ii) were committed upon persons similar to the prosecuting witness." When evaluating similarity, courts may examine: (1) the defendant's relationship to the victims; (2) the victims' relationship to each other; (3) the victims' ages and genders; (4) the location of the assaults; (5) the seriousness of each act; and (6) the amount of time between the charged and uncharged conduct.[11]

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

[11] *See Carpentino v. State*, 38 P.3d 547, 552-53 (Alaska App. 2002) ("[A] trial judge's determination of 'similarity' under Evidence Rule 404(b)(2) will rest on the judge's appraisal of the particular circumstances surrounding the two incidents, the judge's identification of the factors that the two incidents have in common and the factors that distinguish the two incidents, and (finally) an assessment of the relative importance of these common and distinguishing factors."); *see also Peratrovich v. State*, 903 P.2d 1071, 1073-74 (Alaska App. 1995) (concluding that the charged and uncharged sexual abuse against the same victim was sufficiently similar when the acts occurred within two years of each other); *Billy v. State*, 1995 WL 17221242, at *1 (Alaska App. Aug. 2, 1995) (unpublished) (concluding that the uncharged sexual abuse against another similar victim was sufficiently similar to the charged conduct when the acts occurred within one to two years of each other).

Here, in the recorded statements made by Ferguson, he described three specific encounters while he was living in K.H.'s home that involved M.M. and K.H. According to Ferguson, during the first encounter, M.M. approached him in his bedroom and placed her hand on his penis. He stated that at another time, both M.M. and K.H. approached him when he was sitting on a recliner, pulled his hands down, and had him rub their vaginas. Ferguson also described a third encounter with M.M. and K.H. during which the girls approached him while he was in bed and started dancing naked in front of him.

Ferguson now argues that the conduct he described in the interview was not sufficiently similar to the charged offenses to be admitted under Evidence Rule 404(b)(2). He asserts that the conduct was dissimilar because M.M. accused Ferguson of touching her vagina and forcing her to put her hand on his penis, but the conduct he admitted to in the recorded statements involved K.H. and M.M. grabbing his arm and rubbing their vaginas with his hand.

We find no plain error by the superior court. K.H. and M.M. were the same age and gender. The charged conduct and the conduct described by Ferguson both involve hand to genital contact. All of the acts occurred during the same period of time and all of the acts occurred in K.H.'s family home. There was no obvious error in admitting evidence of the other conduct under Evidence Rule 404(b)(2).

Ferguson also argues that the recording of his interview was inadmissible hearsay. Although Evidence Rule 801(d)(2) provides that a statement of a party-opponent is not hearsay, Ferguson argues that the recording was hearsay under this rule because "[he] did not admit to instigating any sexual misconduct when questioned by the police. He attributed all of the misconduct to the girls." Ferguson seems to believe that unless the statements of a party-opponent involve admissions to misconduct, they are not admissible under this rule.

Ferguson misunderstands Evidence Rule 801(d)(2). The fact that he did not admit in his statements that his actions were misconduct does not render the statements inadmissible. His statements about his conduct, offered by the State as evidence against him, were clearly statements of a party-opponent for purposes of Rule 801(d)(2).[12]

Additionally, Ferguson did not object to the admission of the recording at trial, and this Court has held that "hearsay evidence is admissible if there is no objection."[13]

It was not error, let alone plain error, for the superior court to admit the video recording.

(b) Trial testimony of Detective Torres

During direct examination, Torres explained his approach to interviewing a suspect in a sexual abuse investigation. He testified that his objective in such an interview is to make the suspect feel comfortable enough to talk to him "about something that is extremely serious that they've been hiding for many, many years and don't want to admit." Torres also testified that suspects often need to feel that the offenses were not their fault, and they frequently adopt one of several themes to shift blame to the victims. Ferguson did not object to this testimony.

Later, during cross-examination of Torres, Ferguson's attorney asked Torres about his interview techniques. The cross-examination questions suggested that Torres presumed that Ferguson was guilty and that he disregarded any of Ferguson's

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[12] *See* Alaska Evid. R. 801(d)(2) ("A statement is not hearsay if [t]he statement is offered against a party and is the party's own statement . . . .").

[13] *Savely v. State*, 180 P.3d 961, 962 (Alaska App. 2008).

explanations to the contrary. Ferguson's attorney also directly questioned Torres about his opinion of Ferguson's truthfulness.

The prosecutor interrupted this inquiry and expressed concern that defense counsel was asking Torres to testify about Ferguson's credibility. The trial judge agreed, and said, "[n]ow, if you would have done that, I never would have allowed it. I assume . . . he has a tactical reason to do this." The judge then spoke with defense counsel, who confirmed that the questioning was part of his trial strategy.

Defense counsel later explained his trial strategy to the jury in his closing argument. He argued that Torres was a "skilled investigator" who used "tools and techniques to get [to] an objective" and to "procure whatever statements he could to build the best case possible." He told the jury that his cross-examination of Torres was intended to demonstrate that Torres had an "unwavering" belief in Ferguson's guilt.

On appeal, Ferguson argues that it was plain error for the court to allow Torres to testify about the themes Ferguson adopted during the recorded interview and about his opinion of Ferguson's guilt. According to Ferguson, this was inappropriate expert testimony because the State did not provide an accompanying notice of expert testimony.

Because there was no objection in the trial court, this Court reviews this claim for plain error.[14] Here, the record is clear and unambiguous that Ferguson's attorney made a tactical decision not to object when he stated his line of questioning was part of his defense strategy. This precludes plain error review.[15]

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

[15] *See Moreno v. State*, 341 P.3d 1134, 1144 (Alaska 2015) (holding that evidence of a tactical decision not to object to a trial court error must be plainly obvious from the record to persuade an appellate court that a claim of error should not trigger plain error review).

Ferguson raises a second claim relating to this evidence. Ferguson argues that his trial attorney's decision to have Torres provide his personal opinions about Ferguson's truthfulness and guilt was ineffective, and he further claims that the attorney did not adequately explain these tactical decisions to the jury. Ferguson raises this issue for the first time on appeal.

In general, this Court "will not entertain claims of ineffective assistance of counsel on appeal unless the defendant has first moved for a new trial or sought post-conviction relief, supporting the claim with affidavits alleging facts which would establish a basis for relief."[16] Ferguson acknowledges that ineffective assistance of counsel claims cannot ordinarily be raised for the first time on appeal, but he argues that defense counsel's tactical decision to elicit Torres's testimony was so unreasonable that the Court does not need a more developed record to rule in his favor on his claim.

We disagree. If Ferguson wishes to pursue this claim, he may seek post-conviction relief under AS 12.72.

Conclusion

The judgment of the superior court is AFFIRMED.

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[16] *Barry v. State*, 675 P.2d 1292, 1296 (Alaska App. 1984).