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

IVAN BOLDEN,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12341
Trial Court No. 4FA-14-02281 CR

MEMORANDUM OPINION

No. 6790 — April 17, 2019

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Michael P. McConahy, Judge.

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Elizabeth T. Burke, 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 WOLLENBERG.

Following a jury trial, Ivan Bolden was convicted of one count of third-degree assault under a recidivist theory — *i.e.*, that he committed a fourth-degree assault, after having been convicted of two prior fourth-degree assaults within the preceding ten

years.[1] The State alleged that Bolden committed the new assault by biting his wife, Tupaaranq "Rosie" Brower Bolden, on the face.

Bolden raises several claims of prosecutorial misconduct based on questions or remarks that the prosecutor made during trial and closing arguments. Because Bolden did not object to these statements in the trial court, he must show plain error. We have examined these claims of error, and while some of the statements were improper, we conclude that they do not amount to plain error.

Bolden also argues that the trial court unconstitutionally limited his cross-examination of Rosie Bolden as to her employment and income. Bolden's sole support for these questions was his general assertion that assault victims sometimes qualify for compensation through the Violent Crimes Compensation Board. Based on this limited proffer, we conclude that the trial court did not abuse its discretion by limiting Bolden's cross-examination on these topics.

Underlying facts

In July 2014, Fairbanks Police Officer Nathan Werner was on duty at Golden Heart Park, when he observed a man and a woman engaged in an argument. Werner could hear the woman telling the man to leave her alone, but the man persisted in following the woman and trying to talk with her. As Werner approached them to see what was happening, the man, later identified as Bolden, fled. Werner chased after Bolden and eventually placed him in the patrol car.

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[1] AS 11.41.220(a)(5).

Werner then spoke with the woman, whom he identified as Rosie Bolden.[2] Rosie Bolden reported that earlier that day, Bolden held her down, strangled her, and then bit her face. Werner observed bruising to the left side and bottom of her neck, and bruising on her right cheek that appeared to be a bite mark. She was crying and trembling. Werner offered to get her medical attention, but she declined.

Werner then spoke with Bolden. Bolden stated that his wife sometimes injured herself to get him arrested, and he also suggested that her injuries could have been caused by someone else. Bolden showed Werner a small cut on the inside of his lip, and he said that Rosie Bolden had assaulted him.

Based on his investigation, Werner placed Bolden under arrest for assault. A grand jury subsequently indicted Bolden on one count of second-degree assault for the act of strangulation and one count of recidivist third-degree assault for the act of biting Rosie Bolden's face (based on his two prior qualifying convictions).[3]

Bolden proceeded to a jury trial. The jury convicted Bolden of third-degree assault, but the jury was unable to reach a verdict on the second-degree assault charge. The State later dismissed this charge.

Bolden's claim regarding the prosecutor's questioning of Officer Werner

During his direct examination of Officer Werner, the prosecutor asked Werner if he had previously interviewed criminal suspects. Werner stated that he had

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[2] During trial and on appeal, the parties referred to Tupaaranq "Rosie" Brower Bolden using the last name of "Brower." But during her testimony, Rosie Bolden indicated that she used the last name "Bolden," and accordingly, we use "Bolden" in this opinion.

[3] AS 11.41.210(a)(1) and AS 11.41.220(a)(5), respectively. The State also charged Bolden with one count of interfering with a report of a crime involving domestic violence, AS 11.56.745, based on the events earlier in the day. But the State dismissed this charge based on the lack of evidence at trial.

conducted hundreds of interviews. The prosecutor then asked, "Based on this, in your experience, do suspects that you interview always tell you the truth, the whole truth, and nothing but the truth?" Werner responded, "No, not always."

On appeal, Bolden asserts that the prosecutor's question (and Werner's response) regarding whether suspects always tell the truth improperly inferred that Werner did not believe Bolden's story.

We have repeatedly disapproved of testimony in which a witness acts as a "human polygraph" — offering a personal opinion about the credibility of another witness's prior statements or testimony.[4] We have expressed particular concern when the testifying witness is a police officer, because "jurors may surmise that the police are privy to more facts than have been presented in court, or [jurors] may be improperly swayed by the opinion of a witness who is presented as an experienced criminal investigator."[5]

Although Werner did not directly state his opinion that Bolden was lying, and instead said only that suspects in general do not always tell the truth, the prosecutor's questioning had the same practical effect. After the prosecutor questioned Werner as to whether suspects always tell the truth, the prosecutor proceeded to directly question the officer about Bolden's statement — in particular, Bolden's explanation for his wife's injuries. The only apparent relevance of the prosecutor's prefatory questioning was to insinuate that Bolden had fabricated the version of events that followed.

But even though the testimony was improper, we conclude that it did not prejudice the fairness of Bolden's trial. The prosecutor's questioning was brief, and as noted earlier, it was indirect. The jury could already infer that Werner did not believe

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[4] *See Kim v. State*, 390 P.3d 1207, 1209 & n.4 (Alaska App. 2017) (collecting cases).

[5] *Id.* at 1209 (quoting *Sakeagak v. State*, 952 P.2d 278, 282 (Alaska App. 1998)).

Bolden's explanation for his wife's injuries because, after interviewing both parties, Werner decided to arrest Bolden.

We therefore conclude that Werner's testimony did not constitute plain error requiring reversal of Bolden's conviction.[6]

Bolden's claims based on the prosecutor's closing arguments

Bolden argues that the prosecutor made several improper arguments that urged the jury to convict him based on factors other than the evidence presented at trial. Bolden's first claim focuses on the final few sentences of the prosecutor's rebuttal, during which the prosecutor said to the jury:

> Go back to that jury room and hold that man accountable for what he did. What he did. Such a verdict is mandated by the evidence in this case, and it's the mechanism for keeping victims like Ms. Brower [Bolden] safe from abusers like him.

Bolden challenges two portions of this paragraph — first, the prosecutor's request that jurors "hold [Bolden] accountable for what he did," and second, the prosecutor's assertion that a guilty verdict was "the mechanism for keeping victims like Ms. Brower [Bolden] safe from abusers like him."

Bolden argues that the prosecutor's request that the jury "hold [Bolden] accountable for what he did" improperly encouraged the jury to "base its decision on the punishment Mr. Bolden deserved" rather than the evidence in the case. But directly following this statement imploring jurors to hold Bolden "accountable," the prosecutor asserted that a guilty verdict was "mandated by the evidence in the case." Given this qualification, we find no plain error.

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[6] *See Adams v. State*, 261 P.3d 758, 774 (Alaska 2011).

The final sentence of this argument is more problematic. Bolden argues that the final phrase — that a guilty verdict was "the mechanism for keeping victims like Ms. Brower [Bolden] safe" — improperly invited the jury to base its decision on protecting Rosie Bolden, rather than on the evidence of Bolden's guilt, and was designed to appeal to the jury's emotions. We agree that this statement was improper.

It is well settled that the arguments of the parties must be limited to the evidence presented at trial and the inferences that may fairly be drawn therefrom.[7] A prosecutor may not express a personal belief about the evidence, make appeals calculated to inflame the passions and prejudices of the jury, or advance arguments based on the consequences of the verdict or on issues other than the guilt or innocence of the accused.[8] In particular, "[a] prosecutor should not argue for a conviction based on alleged future harms that might occur if the defendant is not convicted, nor should a prosecutor urge a jury to convict in order to send a message."[9] Here, the jurors could have inferred from the prosecutor's argument that they should convict Bolden to prevent him from assaulting his wife again in the future, rather than reach a verdict based solely on the evidence.

However, we conclude that any error was harmless because it was an isolated statement in an otherwise accurate explanation of the law in the case, and thus unlikely to lead the jury to decide the case on improper factors. Again, we note that, within the challenged sentence, the prosecutor specifically argued that a guilty verdict was "mandated by the evidence."

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[7] *See Patterson v. State*, 747 P.2d 535, 538 (Alaska App. 1987) (approvingly discussing *A.B.A. Standard for Criminal Justice* § 3-5.8 (2d ed. 1982)).

[8] *Id.*

[9] *Hess v. State*, 382 P.3d 1183, 1185 (Alaska App. 2016), *rev'd on other grounds*, 435 P.3d 876 (Alaska 2018).

We also note that during the initial portion of the prosecutor's closing argument, the prosecutor explained the elements of both charged offenses. With respect to the third-degree assault charge (the charge on which the jury found Bolden guilty), the prosecutor reminded the jury of Rosie Bolden's testimony that Bolden bit her and caused her pain. The prosecutor expressly told the jury that it was up to them to decide which party to believe.

Bolden identifies one additional series of statements in the prosecutor's rebuttal that he argues improperly encouraged the jury to convict him out of concern for Rosie Bolden's future safety. Here is what the prosecutor said:

> The law protects everyone, ladies and gentlemen, from the President of the United States to someone who's homeless and living at the Fairbanks Rescue Mission. Nobody, nobody, nobody has to be a victim of domestic violence. Nobody has to be bullied repeatedly like that man does to her, where he's arrested for assaulting her on May 22nd, he's in jail, and when he gets out, six days later, assaults her again.

In this instance, it is not clear that the prosecutor was improperly arguing that the jury should convict Bolden to protect Rosie Bolden from future harm. Rather, this argument appears to have been a direct response to the defense attorney's cross-examination of Rosie Bolden, in which the attorney elicited evidence that she was homeless, jobless, and living in a shelter. The prosecutor was arguing that the jury should not alter its consideration of the evidence based on her socioeconomic status. In context, the prosecutor's comments are not obviously improper.

Bolden's final claim regarding the closing arguments is that the prosecutor impermissibly "testified" to medical evidence not in the record. This claim is based on a portion of the prosecutor's argument in which he stated that it is possible to strangle a person to death without leaving any marks and "[i]t doesn't take a lot of pressure to

break [a] hyoid bone." The prosecutor made these statements in response to the defense attorney's argument that there was insufficient evidence of injury or bruising on Rosie Bolden's neck to demonstrate that she had been strangled.

As we emphasized earlier, closing arguments must be limited to the evidence presented at trial and the inferences that may reasonably be drawn from the evidence.[10] As Bolden points out, there was no medical testimony presented at his trial that would support the prosecutor's conclusory statement that a person could be strangled to death without leaving any marks on the victim's neck, or describing the pressure necessary to break a person's hyoid bone. Because this statement was not supported by any evidence at trial, it was improper.

However, Bolden was not convicted on the strangulation charge. Thus, even if the State's comment was improper, Bolden cannot demonstrate that it was prejudicial.

Other challenged comments

Bolden argues that two isolated remarks by the prosecutor during trial were denigrating to the defense attorney, and require reversal of his conviction. In the first instance cited by Bolden, the prosecutor resumed his direct examination of one of the police officers following a defense objection and sidebar discussion by stating, "So again, before I was interrupted . . . ." In the second instance cited by Bolden, the prosecutor stated on re-direct examination of a witness that the defense attorney had gone "to great lengths" during cross-examination to discuss the witness's police interview. Bolden argues that these comments — "before I was interrupted" and "went to great

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[10] *Patterson*, 747 P.2d at 538 (citing *A.B.A. Standard for Criminal Justice* § 3-5.8).

lengths" — constituted improper attacks on the defense attorney that were "clearly intended to demean" the attorney.

These isolated comments were not obvious errors that required the judge to *sua sponte* intervene and take further action in the absence of an objection. Moreover, without a further record on this claim, we cannot say that these remarks had the pervasive impact that Bolden asks us to ascribe to them. We therefore decline to find plain error.

Bolden's claim that the trial court impermissibly limited his cross-examination of Rosie Bolden

During cross-examination of Rosie Bolden, Bolden's attorney began asking her about her employment status. Initially, Rosie Bolden refused to answer, but upon questioning by the trial judge, she stated that she cared for her family's children. She would not say, however, whether she was paid for her work.

At this point, the judge asked Bolden's attorney to explain the relevancy of this line of questioning. Bolden's attorney responded that "sometimes in these assault cases, . . . people can qualify for financial aid through the Victims Compensation Act, and I just want to put that out . . . ." The judge found that Bolden's proposed questioning was "tangential at best." The judge instructed Bolden's attorney to move on, which he did without objection.

On appeal, Bolden argues that the court improperly limited his cross-examination of his wife regarding her employment and income because her financial interest in the case was relevant to show bias — specifically, her motive to lie to obtain compensation through the Violent Crimes Compensation Board. Bolden concedes that the record does not show whether she did, in fact, receive compensation, but Bolden

asserts that he is not required to prove what the intended cross-examination would have yielded.

We agree with the trial court that Bolden's proposed questioning was "tangential at best." Bolden offered no more than a general assertion that assault victims can sometimes receive compensation through the Violent Crimes Compensation Board. Bolden did not offer any evidence to indicate that his wife had applied for compensation, or was even aware that she could apply for compensation, and that the possibility of obtaining compensation provided her with a motive to lie. (We note too that it is not clear, nor did Bolden attempt to establish, that his wife even qualified for compensation given that she declined medical attention. There is also no indication in the record that she needed medical attention at any point thereafter.[11])

We conclude that the trial court did not abuse its discretion by limiting Bolden's cross-examination into Rosie Bolden's employment and income status.[12]

Conclusion

We AFFIRM the judgment of the superior court.

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[11] *See* AS 18.67.101; AS 18.67.110(a).

[12] *See Wilson v. State*, 680 P.2d 1173, 1178 (Alaska App. 1984).