IN THE COURT OF APPEALS OF THE STATE OF ALASKA

NICHOLAS K. HUFF, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-12412 & A-12421 Trial Court Nos. 3VA-13-00047 CR & 3VA-13-00074 CR MEMORANDUM OPINION No. 6797 — June 12, 2019

Appeal from the Superior Court, Third Judicial District, Valdez, Eric Smith, Judge.

Appearances: Sharon Barr, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Mannheimer, Senior Judge.[*]

Judge MANNHEIMER.

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

One day in April 2013, Nicholas Huff lay in wait outside his ex-girlfriend's apartment. Huff was wearing dark clothes, he had a bandana across his face, and he was armed with a handgun.

When Huff's ex-girlfriend, R.O., arrived home from work, Huff approached her car with the gun in his hand. Huff cursed at R.O., he fired a shot through her driver's side window, and he grabbed the steering wheel. Huff then pushed R.O. into the passenger's seat and got into the driver's seat. When R.O. fought back, Huff subdued her by striking her in the face and chest with the handgun.

Huff told R.O. that they were going to die together. He drove her to his parents' house (where he lived), and he dragged her inside by her hair. Inside the house, Huff threatened R.O. with a shotgun. When R.O. ran from the house, Huff chased and caught her, and brought her back to the house, where he again threatened her with a firearm.

After about two hours, R.O. managed to escape from Huff. She drove to an apartment building and, with the assistance of a stranger, she contacted the police. In the meantime, Huff used his Skype account to record and send a series of short messages to R.O. In these messages, Huff apologized to R.O. for assaulting and kidnapping her, and he declared that he would kill himself rather than go to jail.

When the police arrived at Huff's parents' house to arrest him, Huff refused to come outside. At one point, while the officers negotiated with Huff from outside the house, Huff fired what he called a "warning shot" — a gunshot that passed over the officers' heads. After about an hour, Huff ran out of the house and into the street, where he collapsed from a self-inflicted gunshot wound. Huff was taken to the hospital, and he survived his wound.

Based on these events, Huff was convicted of first-degree stalking, kidnapping, attempted murder, and various counts of felony assault — including two counts of third-degree assault for firing the gunshot over the police officers' heads.

Huff now appeals these convictions. Huff argues that the superior court should have suppressed some of the evidence that the police obtained from his mobile phone, and he also argues that the evidence was legally insufficient to support his convictions for assaulting the two police officers.

With respect to Huff's suppression argument, we agree with Huff that the evidence from his mobile phone should have been suppressed, but we conclude that the admission of this evidence was harmless error. With respect to Huff's assault convictions, we conclude that the evidence was sufficient to support these convictions.

Huff also challenges one aspect of his probation conditions: a condition that requires him to take any psychotropic medications "prescribed by a licensed medical practitioner and as directed by [his] probation officer". We have previously held that this kind of probation condition requires strict scrutiny, and that it must incorporate procedural safeguards.[1] We therefore direct the superior court to modify the condition as explained in this opinion.

The seizure of Huff's internet browsing history from his mobile phone

As we have explained, Huff was taken to the hospital for treatment of his self-inflicted gunshot wound. Hospital staff later found Huff's mobile phone in the snow outside the hospital. The police applied for, and obtained, a warrant to search the

[1] *See Kozevnikoff v. State*, 433 P.3d 546, 547-48 (Alaska App. 2018).

contents of Huff's mobile phone for evidence relating to his kidnapping and assault of R.O.

This warrant authorized the police to search Huff's phone for text messages that Huff sent to R.O., for Huff's call history pertaining to R.O., and for communications that Huff sent to R.O. via Facebook and Skype. Huff concedes that these aspects of the warrant were supported by probable cause.

But the warrant also authorized the police to search all the other data contained in Huff's mobile phone, including deleted data and backup files. In effect, the court granted the police a general warrant to search for anything and everything in Huff's phone.

The search warrant application failed to establish probable cause for a search of this scope. Although the search warrant affidavit is lengthy, it consists primarily of a recitation of the events in this case — Huff's kidnapping of R.O., Huff's various assaults on R.O. and on the police officers, and Huff's eventual capture.

The affidavit contains two short paragraphs that describe how the hospital staff found Huff's mobile phone and turned it over to the police. And, finally, there is a single paragraph that explains *how* the contents of Huff's mobile phone might be related to any of the events in this case:

> 15. During an interview with Sgt. King, R.O. stated that she had been receiving text messages from Huff [over] the last few days (in violation of [a pre-existing] protective order) and that the text messages were getting more and more bizarre in nature.

We agree with Huff that, while this affidavit might support a search of Huff's mobile phone for messages involving R.O., the affidavit does not establish probable cause for a search of all the data in the phone. We therefore conclude that the

superior court committed error when it allowed the State to introduce evidence of Huff's internet browsing.

However, we also conclude that the admission of this browsing evidence was harmless beyond a reasonable doubt. The browsing evidence tended to show that Huff was obsessed with R.O., and that he wanted her back. (For example, Huff's browsing history included searches for "I saw your ex with someone new" and "ex-girlfriend with tattoo", as well as a visit to "exvideos.com".) But this evidence of Huff's internet browsing played only a minimal role in the State's case. The prosecutor made just four passing references to this evidence during his closing argument to the jury.

Given the other evidence in this case — evidence that directly established Huff's criminal conduct — there is no reasonable possibility that the evidence of Huff's browsing history altered the outcome of his trial.

Huff argues that the browsing history might have altered the jury's evaluation of his culpable mental state — more specifically, that this evidence might have led the jury to conclude that Huff acted "intentionally" when he kidnapped and attempted to kill R.O. But Huff's argument on this point confuses "intentional" acts with "premeditated" acts.

While Huff's browsing history might be relevant to the question of whether Huff premeditated his crimes (*i.e.*, whether he planned them in advance), the State was not required to prove that Huff's crimes were premeditated. The State was only required to prove that Huff acted "intentionally" as that term is defined in AS 11.81.900(a)(1) —

i.e., that Huff restrained R.O. with the intent to accomplish one of the objectives listed in subsection (a)(1)(C) of the kidnapping statute,[2] and that Huff intended to kill R.O.

Having reviewed the record of Huff's trial, we conclude that Huff's browsing history could not have affected the jury's decision on these elements. We therefore hold that the admission of Huff's browsing history was harmless error.

The sufficiency of the evidence to support Huff's convictions for assaulting the two police officers

As we have explained, Huff was convicted of two counts of third-degree assault for firing a "warning shot" over the heads of the two officers who were trying to get Huff to come out of his parents' house. These charges of third-degree assault required the State to prove that Huff recklessly placed the officers "in fear of imminent serious physical injury by means of a dangerous instrument".[3]

Huff argues that no reasonable juror could have concluded (beyond a reasonable doubt) that the gunshot caused the officers to apprehend an imminent threat of serious physical injury. But Huff presents the evidence in a light favorable to himself. This Court is required to evaluate the evidence in the light most favorable to upholding the jury's verdicts.[4] Viewing the evidence presented at Huff's trial in that light, the evidence is sufficient to support Huff's convictions for third-degree assault.

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[2] Huff was indicted for kidnapping under AS 11.41.300(a)(1)(C), which forbids a person from restraining another person with intent to "inflict physical injury upon or sexually assault the restrained person or place the restrained person or a third person in apprehension that any person will be subjected to serious physical injury or sexual assault".

[3] *See* AS 11.41.220(a)(1)(A).

[4] *See*, *e.g.*, *Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

The condition of Huff's probation that requires him to take psychotropic medication

Because the evidence in this case suggested that Huff might be suffering from mental illness, the superior court imposed a probation condition that requires Huff to "take any medications prescribed by a licensed medical practitioner and as directed by [his] probation officer", and that further requires Huff to "follow the prescribed medical treatment to the satisfaction of the medical practitioner and his probation officer."

Huff's trial attorney did not object to this probation condition, but we conclude that the sentencing judge committed plain error when he imposed this condition on Huff.

We recently addressed this type of probation condition in *Kozevnikoff v. State*, 433 P.3d 546 (Alaska App. 2018). We noted that the Alaska Supreme Court has held that any compelled ingestion of medication by a psychiatric patient must be preceded by an independent judicial determination that taking the drug is in the patient's best interests, and that no less intrusive treatment will suffice.[5] Applying this principle to probationers in criminal cases, *Kozevnikoff* holds that a sentencing court must give defendants an opportunity to request a judicial hearing *before* any involuntary administration of psychotropic drugs. At this hearing, the State has the burden of presenting expert medical testimony to establish, not only that the proposed psychotropic medication is appropriate, but also that this medication is the least intrusive method of achieving the goals of probation (*i.e.*, furthering the rehabilitation of the defendant and protecting the safety of the public). *Id.* at 547-48.

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[5] *Kozevnikoff*, 433 P.3d at 547, discussing *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 249-254 (Alaska 2006).

We also recognized that the State has a legitimate interest in having this matter resolved before a defendant is released on probation. *Id.* at 548. We therefore suggested that this kind of probation condition should be drafted to authorize the sentencing court to hold a hearing near the date of the defendant's release if the circumstances at that time appeared to justify involuntary medication. *Ibid.*

Based on our holding in *Kozevnikoff*, we direct the superior court to modify Huff's condition of probation as we have described here.

Conclusion

We direct the superior court to modify the condition of probation that requires Huff to submit to involuntary psychotropic medication. With this exception, the judgement of the superior court is AFFIRMED.