IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MARY CHESSICA HAUGE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12684 Trial Court No. 1JU-15-00766 CR MEMORANDUM OPINION No. 6824 — September 18, 2019

Appeal from the Superior Court, First Judicial District, Juneau, Trevor Stephens, Judge.

Appearances: Ariel J. Toft, Assistant Public Advocate, and Chad Holt, Public Advocate, Anchorage, 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 WOLLENBERG.

Mary Chessica Hauge was charged with eight counts of first-degree endangering the welfare of a minor. The State alleged that Hauge left her two young daughters in the care of her husband (their father), Jonathan Hayward, knowing that he previously had sexual contact with a child and with recklessness as to whether he would

engage in sexual contact with their own two children: A.H. (seven years old at the time of reporting) and E.H. (two years old). A jury found Hauge guilty of all eight counts, and the trial court merged the counts into two convictions.

Hauge now appeals. Hauge raises two plain error challenges to her convictions. We reject these claims and affirm Hauge's convictions. Hauge also challenges one of her probation conditions. We vacate this condition and remand Hauge's case to the trial court for reconsideration of this condition.

Factual and procedural background

In 2000, Jonathan Hayward pleaded guilty to attempted second-degree sexual abuse of his minor daughter, K.H. Shortly after he was released from prison, Hayward began dating Hauge, and they eventually moved in together. At some point during this time, K.H.'s mother (Hayward's ex-wife) met Hauge and warned her about Hayward's prior assault of their daughter.

In 2006, Hauge and Hayward had their first daughter, A.H.

In 2010, a children's service specialist from the Office of Children's Services (OCS) contacted Hauge regarding A.H. The OCS specialist met with Hauge, described Hayward's history of child sexual abuse, and warned Hauge about leaving A.H. alone in his care. According to the OCS specialist, Hauge told her that Hayward had learned from his past mistakes and had stopped drinking, and that she "wasn't worried about [leaving A.H. with him]." The OCS specialist testified that she told Hauge that, if she left A.H. alone with Hayward and any abuse occurred, Hauge "would be held accountable by OCS."

In 2011, Hauge and Hayward had their second daughter, E.H.

In 2014, a babysitter took A.H. and E.H. with her to an acupuncture appointment. While the babysitter was receiving treatment, A.H. followed one of the

employees into an office, pointed to the groin area of a human model, and told the employee that her father had touched her there. The employee contacted OCS.

A.H. was interviewed at the Child Advocacy Center (CAC) in Juneau, where she disclosed numerous acts of sexual abuse by Hayward. Based on A.H.'s statements, the police obtained a warrant to search Hayward's residence. During the search, the police seized several computer and digital storage devices, on which they found still images and video recordings of child pornography and sexual acts involving both A.H. and E.H.

Hayward ultimately pleaded guilty to eight counts of first-degree sexual abuse of a minor. (Hayward also pleaded guilty to one count of unlawful exploitation of a minor and one count of possession of child pornography.)

After Hayward was convicted, the State charged Hauge with eight counts of first-degree endangering the welfare of a minor.[1] Each count alleged that Hauge — as the parent of A.H. and E.H. — left A.H. (six counts) or E.H. (two counts) with Hayward, knowing that he had previously engaged in sexual contact with a child, and that Hayward then engaged in sexual contact with A.H. or E.H.

A jury found Hauge guilty of all eight counts. The trial court merged the eights counts into two convictions — one comprising the counts involving A.H. and the other comprising the counts involving E.H.

This appeal followed.

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[1] AS 11.51.100(a)(3).

Hauge's claim that the court committed plain error in failing to preclude testimony regarding the images and video recordings of Hayward's sexual abuse

As we noted earlier, the State charged Hauge with eight separate counts of first-degree child endangerment. Each of these counts corresponded to a separate incident of sexual abuse by Hayward — and Hauge's decision to leave either A.H. or E.H. in Hayward's care on that occasion.

At Hauge's trial, Angela Worthy, a cybercrimes technician with the Anchorage Police Department, testified as to the still images and videos that she had recovered from Hayward's computer and digital storage devices; these images depicted child pornography involving both A.H. and E.H. The prosecutor explained to the court that the images and videos contained on each of the eight exhibits formed the basis of each of the eight charges against Hauge.

Before Worthy's testimony, the parties discussed how to present the photo and video evidence. In order to limit the emotional impact of this evidence, the prosecutor proposed showing the images and videos to Worthy, with Worthy then describing the acts of sexual abuse and child pornography depicted. The jury would be able to hear the audio tracks that accompanied the videos, but the jury would not directly see the videos or the photos, nor would the videos or photos be formally published to the jury (although they would be admitted as exhibits that the jury could view during deliberations if they wished).

Hauge's attorney voiced no concern with this proposal. The attorney responded, "I have no comment about anything that's been said. I have no disagreement with that. . . . I have no issues." Accordingly, Worthy testified to the images and video recordings in the manner proposed by the prosecutor.

Early in Worthy's testimony, one of the jurors passed a note to the court asking about the relevance of Worthy's testimony given the juror's understanding that Hayward had already been convicted. In response, the judge advised the jury that the State was required to prove beyond a reasonable doubt that Hayward engaged in sexual contact with A.H. on six occasions and with E.H. on two occasions. Hauge's attorney expressed no objection to the judge's response, and the juror's note did not prompt the defense attorney to take any further action.

At a later point in Worthy's testimony, the defense attorney objected to Worthy's interpretation of one of the audio recordings. But the defense counsel affirmatively reiterated that — "for obvious reasons" — he did not object to Worthy's testimony in general.

On appeal, Hauge argues that the trial court committed plain error in failing to preclude Worthy's testimony regarding the contents of the images and video recordings seized from Hayward's residence. In particular, Hauge argues that, given the highly inflammatory nature of the evidence, it should have been obvious to the judge that any probative value of the evidence was outweighed by its prejudicial effect.

But given the way the State charged this case — as eight separate counts — some or all of these images had direct relevance to two essential elements of the offenses charged.[2]

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[2] We express no opinion as to whether Hauge was properly charged with eight separate counts in this case. As the State notes, Hauge did not object to the State's charging decision in the trial court, and she does not raise this issue as a matter of plain error on appeal. Thus, neither party has briefed the question of whether the State may properly charge a person with a separate act of child endangerment for each episode of sexual contact by the abuser, or whether the State is limited to charging a single act of child endangerment in response to the abuser's entire course of conduct against a victim.

As to each count of child endangerment, the State had to prove beyond a reasonable doubt that Hauge was the parent of A.H. or E.H., each of whom was under sixteen years old, and that Hauge left A.H. or E.H. with Hayward, knowing that he had previously had sexual contact with a child.[3] The State also had to prove beyond a reasonable doubt that Hauge was reckless as to whether Hayward would engage in sexual contact with A.H. or E.H. while in his care, and that Hayward engaged in sexual contact with A.H. or E.H.[4]

The testimony regarding the images and video recordings was relevant to prove these latter two elements. First and foremost, the images were relevant to proving the eight separate acts of sexual abuse upon which each of the charges against Hauge were based. Second, at least some of the images were relevant to show whether Hauge was reckless as to whether Hayward would sexually abuse A.H. or E.H.

Hauge argues that her attorney did not dispute that Hayward sexually abused A.H. and E.H., and that without that particular element in dispute, the admission of Worthy's testimony to prove the acts of abuse was improper. But Hauge's attorney did not offer to stipulate to the eight acts of abuse, nor did the attorney clearly concede this element as to each of the eight counts until his closing argument. In the absence of a stipulation, both the State and the judge could rightfully assume that the State needed to prove beyond a reasonable doubt all the elements of each offense, including the eight separate acts of abuse.

We note that Hauge did not want either A.H. or E.H. to have to testify at trial, so she stipulated to the introduction of both A.H.'s CAC interview and her grand

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[3] *See* AS 11.51.100(a)(3).

[4] *See id.*; AS 11.81.610(b)(2) (when a criminal statute does not prescribe a culpable mental state, the culpable mental state applicable to a circumstance or result is "recklessly").

jury testimony. But A.H.'s statements during her CAC interview and her grand jury testimony were vague. And E.H. was too young to give an interview or to participate in the grand jury proceeding. Accordingly, the State relied on the images and video recordings to prove a different sexual act for each count, so as to avoid duplicative counts.

Even if Hauge had stipulated to the eight separate acts of abuse, at least some of Worthy's testimony was relevant to establishing Hauge's recklessness, an issue vigorously contested at trial. For instance, in one of the video recordings, a woman's voice can be heard in the background as A.H. is engaging in sexual acts. The State argued that this voice belonged to Hauge, and Hauge acknowledged on cross-examination that the voice could be hers. In the same video recording, A.H. asked to stop the recording so she could close the door, insinuating that the video was being recorded in plain sight of the rest of the apartment — an apartment that the OCS specialist testified "wasn't much bigger than an average hotel room."

Additionally, several of the still images show A.H. wearing My Little Pony underwear with the crotch cut out. Hauge testified that she chose and set out clothing for both girls each day. The prosecutor argued that Hauge would have noticed if some of A.H.'s clothing had gone missing or was damaged.

For these reasons, the admission of Worthy's testimony regarding the images and video recordings was not obviously error.[5]

We acknowledge that the still images and video recordings described by Worthy, and the audio recordings played for the jury, contained highly inflammatory

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[5] *See Adams v. State*, 261 P.3d 758, 773 (Alaska 2011) (setting out the requirements of plain error: "(1) there must be error, and the error must not have been the result of an intelligent waiver or a tactical decision not to object; (2) the error must have been obvious . . . ; (3) the error must affect substantial rights . . . ; and (4) the error must be prejudicial").

content and that it is possible to conceive of other ways this case could have been presented to minimize the prejudice to Hauge. But Hauge is essentially asking us to rule that the trial judge had a *sua sponte* obligation to review each of the video recordings and images ahead of time to determine whether the admission of Worthy's testimony as to that particular item was more probative than prejudicial under Alaska Evidence Rule 403. Given the way this case was charged, and given the defense attorney's affirmative statement to the court that he had "obvious reasons" for not objecting to Worthy's testimony, we decline to impute this obligation to the judge. Whether the attorney's "reasons" for failing to object were objectively reasonable is a question that is more appropriately addressed in a post-conviction relief application.

We therefore reject Hauge's claim of plain error related to Worthy's testimony.

Hauge's claim that the prosecutor committed plain error in her closing argument

Hauge next challenges two statements that the prosecutor made during the rebuttal portion of her closing argument. Because Hauge's attorney did not object to these statements, Hauge must again show plain error.

In the State's rebuttal argument, the prosecutor contrasted the State's approach with the defense's approach to Hauge's case. In particular, the prosecutor contended that the State was examining the evidence against Hauge as a whole, while the defense was looking at each piece of evidence in isolation. The prosecutor twice remarked that this piecemeal examination of the facts was "the defense's job."

Hauge argues that in referring to "the defense's job," the prosecutor impermissibly disparaged the defense's role and diminished defense counsel's credibility with the jury.

The State acknowledges that the prosecutor's references to "the defense's job" were improper. We agree. We have previously held that closing arguments must be restricted to the evidence presented at trial, and that it is improper for the prosecutor to advance arguments based on issues other than the defendant's guilt or innocence.[6] Accordingly, a prosecutor should not denigrate a defense theory by referring to what defense attorneys purportedly do in cases other than the one before the jury.

But while the prosecutor's references to "the defense's job" were obviously improper, the prosecutor did not directly denigrate the defense's theory of the case — *i.e.*, that Hauge was not reckless as to whether the abuse would occur. Rather, the prosecutor fairly contended, in response to the defense summation, that Hauge's attorney had focused on the facts in isolation, rather than examining the evidence as a whole.

This case is therefore distinguishable from *Hess v. State*.[7] In *Hess*, the prosecutor improperly denigrated the defense theory that the victim had misperceived the events at issue by asserting that defense attorneys in general frequently vilify victims of domestic violence.[8] The prosecutor "was implicitly asking the jurors to reject Hess's defense, not because the defense lacked evidentiary support, but instead because of . . . his unsupported accusation that defense attorneys commonly resort to underhanded or misleading tactics."[9] The prosecutor's improper argument in *Hess* therefore "went

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[6] *Patterson v. State*, 747 P.2d 535, 538 (Alaska App. 1987).

[7] *Hess v. State*, 435 P.3d 876 (Alaska 2018).

[8] *Id.* at 881.

[9] *Id.* (quoting *Hess v. State*, 382 P.3d 1183, 1186 (Alaska App. 2016)).

directly to the defense's theory of the case and aimed to discredit the defense attorney as well as her argument."[10]

In contrast, here, the prosecutor validly sought to differentiate the State's approach to the evidence from the defense attorney's approach to the evidence. The prosecutor went a step too far, describing the defense's approach to *this* case as a tactic that defense attorneys employ *in all cases*. But the prosecutor's two brief references to "the defense's job" were made in the context of a much larger and unobjectionable closing argument, in which the prosecutor focused primarily on the evidence and the inferences to be drawn from the evidence. Given the record as a whole, we are not persuaded that there is a reasonable probability that the prosecutor's comments affected the jury's verdict.[11]

Accordingly, we decline to find that the trial judge committed plain error by failing to intervene to strike the challenged remarks.

Hauge's challenge to the probation condition precluding her possession of certain weapons

Lastly, Hauge challenges a condition of her probation, General Condition of Probation No. 6, that precludes her from having "under [her] control a concealed

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[10] *Id.* at 882; *see also Rossiter v. State*, 404 P.3d 223, 226-27 (Alaska App. 2017) (concluding that the prosecutor's argument that defense attorneys in general advance false claims of self-defense, hoping that jurors will view the victim in a negative light, impermissibly disparaged the legitimacy of the defense's legal theory).

[11] *Cf. Williams v. State*, 789 P.2d 365, 369 (Alaska App. 1990) (finding no error in the prosecution's characterization of the defense as "red herrings" because the prosecutor did not disparage the legitimacy of the defense's legal theory, but rather only the substance and credibility of the defendant's version of events).

weapon, a firearm, or a switchblade or gravity knife." Although Hauge did not challenge this probation condition in the trial court, we may review this claim for plain error.[12]

The record as it currently stands is plainly devoid of any indication that this condition is reasonably related to Hauge's rehabilitation or to the protection of the public.[13] Hauge has no prior convictions, and the record in this case does not reflect any history of violence. There is similarly no indication that Hauge's offense in this case involved the use of force or weapons.

At oral argument, the State acknowledged that a remand might be appropriate in this case to give the State an opportunity to present a record to support this condition, given Hauge's failure to object in the trial court. We agree. We therefore direct the superior court to reconsider Probation Condition No. 6.

Conclusion

We VACATE General Condition of Probation No. 6 and REMAND Hauge's case to the superior court for reconsideration of this probation condition. We otherwise AFFIRM the judgment of the superior court.

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[12] *See State v. Ranstead*, 421 P.3d 15, 24 (Alaska 2018).

[13] *See Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977).