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

ERNEST MARTIN HERNANDEZ,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12978
Trial Court No. 3AN-16-05148 CR

MEMORANDUM OPINION

No. 6933 — April 7, 2021

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack W. Smith, Judge.

Appearances: Sharon Barr, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge ALLARD, writing for the Court.
Judge HARBISON, concurring.

Ernest Martin Hernandez was convicted, following a jury trial, of second-degree sexual abuse of a minor for engaging in sexual contact with his twelve-year-old adopted sister while she was sleeping.[1]

On appeal, Hernandez argues that the trial court erred when it failed to sustain the defense attorney's objection to the prosecutor's closing argument that sexual abuse is a "selfish crime" committed "for a temporary moment of sexual gratification" that results in a "lifetime of trauma" for the victim. We agree with Hernandez that the trial court should have sustained the defense attorney's objection to this improper line of argument, but we also conclude that this single error does not require reversal of Hernandez's conviction.

Hernandez also challenges various portions of a special probation condition. We agree with Hernandez that the evidence presented to the trial court failed to justify the objected-to provisions, and that those provisions must therefore be vacated.

Hernandez's challenge to the prosecutor's rebuttal argument

At the end of the State's rebuttal closing argument, the prosecutor said,

> The thing about sexual abuse is that it's a selfish crime in some ways, right, because for a moment of sexual gratification, for a temporary moment of sexual gratification, the abuser is imposing a lifetime . . . .

At this point, the defense attorney objected. In a bench conference, the defense attorney argued that talking about a lifetime of trauma was prejudicial, extremely inflammatory, and had nothing to do with whether Hernandez committed the crime. The prosecutor responded that it was "argument" and asked "how somebody couldn't possibl[y] have

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

a lifetime of trauma after being sexually abused." The court agreed with the prosecutor that this was "argument" and the prosecutor's opinion.

The court then announced to the jury that it was overruling the objection, and invited the prosecutor to continue. The prosecutor then continued,

> All right, for a brief moment of temporary sexual gratification, the abuser is imposing a lifetime of trauma, right? It takes — it — this will never go away in the mind of [D.H.]. She lives with this for the rest of her life. And I ask that you return a verdict of guilty.

This concluded closing arguments.

On appeal, Hernandez argues that the prosecutor's comments were improper and that the court should have sustained his objection. We agree. Under the American Bar Association Criminal Justice Standards, prosecutors "should not make arguments calculated to appeal to improper prejudices of the trier of fact." Instead, the prosecutor "should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty."[2]

The prosecutor's final rebuttal comments crossed this line. The prosecutor's claim that sexual abuse is a "selfish crime" committed "for a brief moment of temporary sexual gratification" appears designed to inflame the passions of the jurors shortly before they retired to deliberate on Hernandez's guilt.[3]

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[2] *ABA Standards for Criminal Justice*, § 3-6.8(c) (4th ed. 2017); *see also Patterson v. State*, 747 P.2d 535, 538 (Alaska App. 1987) (relying on the ABA Standards in reaching a similar conclusion).

[3] *See, e.g.*, *Hinson v. State*, 377 P.3d 981, 986 (Alaska App. 2016) (noting that "a simple reference" to the underlying legislative purpose of the sex offender registry would not necessarily have been improper, but concluding that the prosecutor's comments exceeded the (continued...)

The State contends that the prosecutor's comments were not improper because they were intended only to impress on the jury the gravity of the offense and the need to deliberate carefully. In support of these arguments, the State cites to an unpublished memorandum opinion, *Geerhart v. State*, where this Court wrote, "The general impact on public welfare that occurs when a criminal statute is violated is an appropriate topic for final argument."[4] But *Geerhart* is clearly distinguishable from the current case.

In *Geerhart*, the prosecutor referred in general terms to the reasons why society has laws criminalizing sexual assault, noting the life-long impact that rape has on victims and on the community.[5] These statements were made during the opening portion of the prosecutor's closing argument and were not directly tied to either the defendant or the victim in that case.[6]

Here, in contrast, the prosecutor was directly accusing Hernandez of having committed a "selfish crime" that created a lifetime of trauma for D.H.: "this will never go away in the mind of [D.H.]. She lives with this for the rest of her life." Moreover, the prosecutor made these emotionally-charged statements immediately before his final exhortation to the jury to find Hernandez guilty of the charged crime. In other words, the prosecutor ended his rebuttal with what appears to be an emotional plea to the jury to convict for reasons other than the fact that the State had proved the criminal conduct

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[3] (...continued)
bounds of permissible argument and improperly encouraged the jury to decide the case based on emotional considerations rather than the evidence).

[4] *Geerhart v. State*, 1999 WL 458111, at *6 (Alaska App. July 7, 1999) (unpublished).

[5] *Id.* at *5.

[6] *Id.*

beyond a reasonable doubt. The defense attorney's objection to this line of argument was proper and should have been sustained by the trial court.

However, although we agree with Hernandez that the prosecutor's final statements were improper, we do not agree that reversal is required because of this single error. We have reviewed the closing arguments and, with the exception of these final objectionable remarks, the prosecutor's closing argument and rebuttal were otherwise measured in tone and properly focused on the evidence presented at trial. The jury was also instructed on the importance of jury impartiality and the need to decide the case "objectively without being swayed by information that might cause you [the jury] to respond emotionally."[7] Moreover, the record shows that the jury engaged in lengthy deliberations, coming to a final verdict only after requesting and receiving playbacks of various witnesses' testimony.

Given these circumstances, we conclude that the prosecutor's comments, although objectionable, were not likely to have appreciably affected the jury's verdict.[8] Reversal is therefore not required.

Hernandez's challenges to his probation condition

At sentencing, the superior court imposed Special Probation Condition No. 5 over Hernandez's objections. Special Probation Condition No. 5 reads as follows, with the objected-to portions in italics:

> The defendant shall, if decided appropriate by your probation officer and sex offender treatment provider, enter and successfully complete any other Department-approved

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[7] We presume the jury followed this instruction. *See Whiteaker v. State*, 808 P.2d 270, 277 (Alaska App. 1991).

[8] *See Anderson v. State*, 372 P.3d 263, 265 (Alaska 2016).

> programs, *including but not limited to domestic violence programming*. The defendant shall sign releases of information to enable other programs to exchange verbal and written information with the probation officer and sex offender treatment provider. *The defendant shall, if determined necessary by an appropriate mental health professional, enroll in a residential mental health program for up to 6 months if determined necessary by the appropriate professionals. The defendant shall also comply with [the] use of medications prescribed as part of the treatment program.*[9]

Hernandez now renews his objections to the italicized portions of this probation condition, arguing that these conditions are not supported by a factual basis.

On appeal, the State concedes error regarding the portion of the condition requiring domestic violence programming. The State's concession is well founded.[10]

The trial court overruled Hernandez's objection to the domestic violence programming requirement because the court found that "[t]his was clearly a domestic violence incident. They're related. They were living together, so it fits." The court is correct that Hernandez's crime fits within the broad statutory definition of "domestic violence."[11] But, as the State recognizes, domestic violence programming is not targeted at anyone whose crime might fit the statutory definition of "domestic violence." Instead, it is generally targeted at what most people would colloquially refer to as "domestic violence" — that is, violence committed by one domestic partner against another.[12]

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[9] Emphasis added.

[10] *See Marks v. State*, 496 P.2d 66, 67 (Alaska 1972).

[11] *See* AS 18.66.990(3)(A).

[12] *See, e.g.*, *Carpentino v. State*, 42 P.3d 1137, 1140 (Alaska App. 2002) ("Although (continued...)

Hernandez has no record of violence against a domestic partner. We therefore agree with Hernandez and the State that the provision requiring domestic violence programming should be vacated.

Hernandez also objects to the provision requiring him to complete up to six months of a "residential mental health program" if directed to do so by an appropriate mental health professional, and he further objects to the provision requiring him to take any medication required as part of such a residential treatment program.

Alaska Statute 12.55.100 grants the trial court the authority to impose a probation condition that requires the defendant to participate in an inpatient rehabilitation program if the program is "related to the defendant's offense or to the defendant's rehabilitation."[13] However, as we have previously recognized, inpatient treatment as a condition of probation is essentially the functional equivalent of incarceration, and therefore it must be justified at the time of sentencing and any provision authorizing inpatient treatment must be limited by a specified maximum term.[14]

Hernandez argues that there is no factual basis for ordering the inpatient mental health treatment program required here. We agree. As Hernandez points out, he has a separate probation condition that requires him to complete sex offender treatment.

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[12] (...continued)
non-violent sexual relations with a minor are rightly condemned, most people would not apply the term 'domestic violence' to this criminal activity. Rather, 'domestic violence' is normally understood to mean violent assault committed by one domestic partner against another.").

[13] *See* AS 12.55.100(a)(2)(E).

[14] *See Lock v. State*, 609 P.2d 539, 542 (Alaska 1980); *Hester v. State*, 777 P.2d 217, 218 (Alaska App. 1989); *see also* AS 12.55.100(c); *Shaw v. State*, 1992 WL 12153173, at *14 (Alaska App. May 6, 1992) (unpublished); *cf. Christensen v. State*, 844 P.2d 557, 559 (Alaska App. 1993).

There is nothing in his record to show that he is in need of separate mental health treatment, let alone residential mental health treatment.

On appeal, the State notes that Hernandez has a prior adjudication as a juvenile for sexually abusing the same sister, and the State argues that this "suggests a long-standing and deeply-ingrained compulsion and sexual attraction to his sister, which may have a mental health component to it." We agree that, in some instances, the nature of a crime may lead to a reasonable inference that the defendant has corresponding mental health needs, thereby justifying the imposition of probation conditions that require a mental health assessment and outpatient counseling, if recommended. But we disagree with the State that such inherently speculative suppositions justify the imposition of what is essentially an additional period of incarceration in this case, particularly when there is already a probation condition for sex offender treatment in place.

Accordingly, we vacate the probation provision requiring Hernandez to participate in residential mental health treatment for up to six months. We also vacate the medication provision that is directly tied to the residential mental health treatment requirement.[15]

Conclusion

The judgment of the superior court is AFFIRMED with the exception of Special Probation Condition No. 5, which the superior court shall modify in accordance with this decision.

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[15] On appeal, the State concedes that the trial court failed to apply special scrutiny when imposing the medication requirement and failed to include the procedural protections that we have held are required when such a probation condition is imposed. *See Love v. State*, 436 P.3d 1058, 1060-61 (Alaska App. 2018).

Judge HARBISON, concurring.

Although I join the Court's opinion, I write separately to express my view that the prosecutor's comments discussed in our unpublished opinion *Geerhart v. State* were improper.[1] These comments — purportedly explaining the reasons why society has laws criminalizing sexual assault — were not relevant to the jury's decision-making, and they referred to information that was not in evidence. In my view, the comments did nothing more than appeal to the jury's prejudices.

Trial judges should not hesitate to correct an attorney during closing arguments if the attorney's remarks could be viewed as encouraging the jury to decide the case based on emotional considerations rather than the evidence.

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[1] *Geerhart v. State*, 1999 WL 458111, at *6 (Alaska App. July 7, 1999) (unpublished).