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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

GREGORY KAMEROFF,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13399
Trial Court No. 4AK-18-00003 CR

MEMORANDUM OPINION

No. 7059 — June 7, 2023

Appeal from the Superior Court, Fourth Judicial District, Bethel, Nathaniel Peters, Judge.

Appearances: Bradly A. Carlson, The Law Office of Bradly A. Carlson, LLC, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Clyde "Ed" Sniffen Jr., Acting Attorney General, Juneau, for the Appellee.

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

Judge TERRELL.

Gregory Kameroff appeals his conviction for third-degree recidivist assault.[1] He raises five claims on appeal.

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

First, Kameroff argues that the trial court abused its discretion in admitting evidence of two prior assaults pursuant to Alaska Evidence Rule 404(b)(4).

Second, Kameroff argues that the trial court abused its discretion in not declaring a mistrial when a trooper testified that he filed a criminal complaint charging Kameroff with third-degree assault "based on priors."

Third, Kameroff contends that the trial court abused its discretion in not declaring a mistrial after the prosecutor noted in closing argument that Kameroff could subpoena witnesses if he wished to dispute the accuracy of the judgments the State used to establish that he had two prior qualifying assault convictions.

Fourth, Kameroff argues that the trial court erred in declining to instruct the jury on fourth-degree fear assault as a lesser included offense.

Finally, Kameroff claims that the evidence was insufficient to support his conviction.

For the reasons stated below, we reject Kameroff's contentions and affirm his conviction.

Background facts

In the late evening and early morning hours of January 5-6, 2018, Gregory Kameroff was at his house in Lower Kalskag, drinking homebrew with his fifteen-year-old daughter, S.M., and her sixteen-year-old friend, S.K., with whom he was having a relationship. An exact chronology of events is difficult to pin down because both S.M. and S.K. were intoxicated and their trial testimony differed from each other and from their earlier statements to the troopers. However, they both agreed on the following facts: (1) Kameroff, S.K., and S.M. drank to the point of intoxication; (2) Kameroff became angry and dragged S.K. off a bed before kicking and punching her multiple times; (3) while attacking S.K., Kameroff called her a "whore" and a "Harvey whore"

(apparently in reference to a local boy whom he suspected of being interested in S.K.); (4) S.K. and S.M. were able to escape and attempted to seek help from neighbors, but were chased down by Kameroff after they left his house; and (5) when they ran, they both fell on the ice multiple times (which Kameroff later asserted was the source of their injuries). S.M. also testified that when Kameroff chased her down, he punched her in the back of the head.

A neighbor, Lucy Jordan, testified that around 6:30 a.m., she heard someone pounding on her door. When she went outside to investigate, she saw that Kameroff and S.K. were on the ground, Kameroff had one knee on S.K.'s chest, and he was yelling insults at S.K. Jordan intervened to separate them. After Kameroff stood up, Jordan saw him attempt to kick S.K. in the head. Jordan then laid on top of S.K. to physically shield her from Kameroff. S.K. was able to get away and ran into Jordan's house.

Kameroff was charged with two counts of recidivist third-degree assault — committing fourth-degree injury assault while having two prior qualifying assault convictions — for hitting his daughter, S.M., and for hitting and kicking S.K.[2] The jury acquitted Kameroff of assaulting S.M. but convicted him of assaulting S.K.

This appeal followed.

The trial court did not abuse its discretion in admitting evidence of two prior assault convictions under Alaska Evidence Rule 404(b)(4)

Prior to trial, the State asked the court for permission to introduce evidence of five prior incidents of assault where Kameroff was intoxicated and hit his current or former girlfriends. The State argued that these prior assaults were admissible under

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

Alaska Evidence Rule 404(b)(1) to show absence of mistake and to establish Kameroff's identity as the perpetrator of the current charged offenses. Additionally, the State argued that these assaults were admissible under Evidence Rule 404(b)(4) to show "the defendant's character trait for assaulting his significant other while intoxicated."

Kameroff opposed. He argued that the State was not trying to introduce evidence of these past assaults to show identity or lack of mistake, but rather solely to show his propensity to engage in criminal behavior, in violation of Evidence Rule 404(b)(1). Kameroff further argued that the State had failed to identify an admissible character trait that would render the assaults admissible under Evidence Rule 404(b)(4).

After hearing argument, the court agreed with Kameroff as to Evidence Rule 404(b)(1), ruling that the assaults were not admissible under that provision because the perpetrator's identity was not at issue as to the current offenses and there was no claim of mistake or accident.

The court then analyzed the admissibility of the evidence under Evidence Rule 404(b)(4) and noted this was "a closer call." The court ruled that three incidents were inadmissible because they did not involve domestic partners or were too factually dissimilar from the charged offenses. But the court allowed the State to introduce evidence of two prior assault incidents, both involving domestic partners, which occurred in 2011 and 2013, respectively. The court found that the relevant character trait these prior acts tended to prove was that "Kameroff gets intoxicated and assaults his significant others or ex-significant others." The court considered the rest of the *Bingaman* factors and concluded that they favored the admissibility of the 2011 and 2013 incidents, and that the evidence was more probative than prejudicial.[3]

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[3] *Bingaman v. State*, 76 P.3d 398, 415-16 (Alaska App. 2003); Alaska R. Evid. 403.

On appeal, Kameroff claims that the court erred by framing the second *Bingaman* factor — what character trait do the other acts tend to prove — at a level of generality so high as to simply show a propensity to commit the offense at issue, instead of relying on a more narrowly-drawn character trait. Kameroff does not dispute that, in enacting Evidence Rule 404(b)(4), the legislature intended to permit the introduction of propensity evidence in domestic violence cases. His argument is rather that if the character trait is framed too broadly, then the third and fourth *Bingaman* factors — whether the character trait is relevant to a material issue, and how seriously disputed is this material issue — are always satisfied in cases that go to trial, making Evidence Rule 404(b)(4) into a rule of near-automatic admissibility.

The fundamental premise of Kameroff's argument is mistaken. It is not inevitable that a defendant going to trial will dispute every element of the offense or even their commission of the charged act. For example, a defendant may concede committing the physical act described in the charging document, but argue that they are not legally culpable due to an affirmative defense or because they lacked the culpable mental state for the offense. Accordingly, regardless of the level of generality at which the relevant character trait is drawn, the third and fourth *Bingaman* factors still have a specific role to play that turns on the facts of the case and the defense.

Moreover, we recognized in *Bingaman* that the trial court must also evaluate whether the prior act has case-specific relevance under Alaska Evidence Rule 402 and must engage in an Alaska Evidence Rule 403 analysis that balances the probative value of the prior bad act evidence against any potential prejudice.[4] These rules additionally ensure that Evidence Rule 404(b)(4) does not turn into a rule of near-automatic admissibility of prior bad acts evidence in domestic violence cases. Thus, the

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[4] *Bingaman*, 76 P.3d at 412-15.

court's identification of the relevant character trait as whether Kameroff had a propensity for getting intoxicated and assaulting his significant others does not reflect a misunderstanding or misapplication of Evidence Rule 404(b)(4).

Kameroff also argues that even if evidence of the two admitted incidents was generally admissible under Evidence Rule 404(b)(4), the court nonetheless erred in admitting this evidence because it failed to conduct an Evidence Rule 403 balancing test on the record in violation of *Bingaman*.[5]

We reject Kameroff's claim because the court did conduct an on-the-record balancing analysis. As part of its *Bingaman* analysis, the court made specific findings that related to its analysis under Evidence Rule 403.[6] The court considered whether there was any less prejudicial evidence that could be offered, and concluded that there was not. The court also concluded that the two prior acts would take up a relatively small amount of time and would not distract the jury or lead it to base its decision on improper grounds. These on-the-record findings support the court's ruling that evidence of the prior acts was more probative than prejudicial under Evidence Rule 403.

Thus, we conclude that the court carefully evaluated all of the *Bingaman* factors and engaged in the required balancing under Evidence Rule 403. Having

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[5] *Id.* at 416 ("[W]henever the government offers evidence of a defendant's other bad acts under Evidence Rules 404(b)(2), (b)(3), or (b)(4), trial judges *must* conduct a balancing under Evidence Rule 403 and *must* explain their decision on the record."); Alaska R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

[6] *See Bennett v. Anchorage*, 205 P.3d 1113, 1117 (Alaska App. 2009) ("The *Bingaman* factors simply guide trial courts in applying these rules of evidence [*i.e.*, Evidence Rules 402 and 403] in cases in which the government seeks to admit evidence of a defendant's other crimes or bad acts.").

reviewed the record, we conclude that the court did not abuse its discretion in admitting evidence of the 2011 and 2013 assaults.

The trial court did not abuse its discretion in declining to grant a mistrial based on a trooper's statement that he had filed a criminal complaint charging Kameroff with third-degree assault "by priors"

At trial, S.M. testified that during Kameroff's initial assault of S.K. at his house, he picked up an axe in an apparent effort to strike S.K., but then S.M. talked him into putting the axe down. She also testified that shortly after this, Kameroff picked up an eight-pound weight as if to strike S.K., but was prevented from doing so when S.M. pushed him. S.K. testified that she worried that it would drop on her head.

Kameroff later sought to undercut this testimony, requesting leave of the court to ask the investigating trooper about his decision not to recommend charges related to any specific conduct involving an axe or weight. (The apparent purpose of this inquiry was to suggest that if the trooper did not refer charges based on this conduct, it likely did not happen and S.M. was testifying falsely.) The court permitted this line of inquiry and Kameroff's counsel asked the trooper, "You did not forward any charges related to an axe or a dumbbell, or anything like that, right?" The trooper responded, "No."

During re-direct examination, the prosecutor returned to this topic to clarify for the jury that, although the trooper did not refer any charges based on the statements involving an axe or weight, the trooper had initiated charges of physical injury assault based on Kameroff's conduct during the course of the night:

> *Prosecutor*: And just to be really clear, you did forward — did you forward physical injury charges to the District Attorney's office?
>
> *Trooper*: I —

> *Prosecutor*: Charges of physical (indiscernible) assault?
>
> *Trooper*: Yeah, I sent over the complaint (indiscernible) when I arrested him for assault III —
>
> *Prosecutor*: Okay.
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> *Trooper*: — times two based on priors.

The prosecutor stopped him there, and Kameroff's counsel then requested a sidebar at which he asserted that the mention of prior convictions was so prejudicial that the court should declare a mistrial. Kameroff's counsel claimed that the reference to "assault III times two based on priors" was prejudicial because jurors would recognize that this was a reference to prior convictions, and because they would recognize that Kameroff was actually on trial for felony level conduct (rather than the misdemeanor assault charge they were asked to find in the first phase of the trial). The prosecutor suggested that the court should issue a curative instruction, which Kameroff's counsel rejected.

The court ultimately denied the mistrial request, finding it was possible that the jurors thought the reference to "priors" was to the prior assault incidents introduced under Evidence Rule 404(b)(4). The court also noted that many of the jurors may have already understood that this was a felony level offense due to the fact the jury was comprised of twelve members, the size for felony proceedings. The court concluded that the single reference to "priors" had not impaired Kameroff's ability to obtain a fair trial and did not warrant a mistrial.

A trial court's decision whether to grant a mistrial is reviewed for an abuse of discretion.[7] Both the Alaska Supreme Court and this Court have often recognized that

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[7] *Hewitt v. State*, 188 P.3d 697, 699-700 (Alaska App. 2008).

a brief reference to prior convictions or criminal history may not be sufficiently prejudicial to warrant reversal of a trial court's order denying a mistrial request.[8]

We conclude that the court did not abuse its discretion in denying Kameroff's mistrial request. Here, the trooper's single brief mention of Kameroff's "priors," after which the prosecutor immediately cut him off, was not sufficiently prejudicial to warrant a mistrial. As the trial court noted, the jury very well could have understood this to be a reference to the two prior bad acts already admitted — the 2011 and 2013 assaults. And even if that was not the case, any potential for prejudice was ameliorated by the general prior bad acts jury instruction, which stated that evidence of Kameroff's prior acts of domestic violence was not sufficient to convict him for the currently charged acts, and that the State had the burden to prove the charges beyond a reasonable doubt.[9] Given all of the above, we affirm the court's denial of a mistrial.

The trial court did not abuse its discretion in declining to grant a mistrial based on the prosecutor's comment that Kameroff could call witnesses to dispute that his prior convictions were for assault

Kameroff's recidivist third-degree assault charges required the State to prove that he had at least two prior qualifying assault convictions, and the trial was

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[8] *See, e.g.*, *Preston v. State*, 615 P.2d 594, 603-04 (Alaska 1980) (affirming denial of mistrial where the defendant's status as a probationer was inadvertently mentioned); *Allen v. State*, 51 P.3d 949, 955 (Alaska App. 2002) (affirming denial of mistrial where witness violated protective order and mentioned that he had been in jail with the defendant); *Malemute v. State*, 791 P.2d 624, 626 (Alaska App. 1990) (affirming denial of mistrial where witness made only "passing reference" to defendant's prior incarceration); *Hines v. State*, 703 P.2d 1175, 1178 (Alaska App. 1985) (affirming denial of mistrial where witness made single reference to defendant's prior offenses, and the court gave a curative instruction).

[9] *See Coffin v. State*, 425 P.3d 172, 175 (Alaska App. 2018) ("As a general matter, jurors are presumed to follow the instructions that they are given.").

bifurcated so that the existence of these convictions would be litigated during the second phase of the trial.[10] At the second phase, the prosecutor stated his intent to introduce judgments showing four prior assault convictions.

During his closing argument at the second phase of the trial, Kameroff's counsel told the jury that the State had the burden to prove these prior convictions beyond a reasonable doubt, and argued that the State had not done so. Kameroff's attorney noted that the State had not produced recordings of the sentencing proceedings in his prior cases, or the testimony of a court clerk who was present at those proceedings, and he argued that the State had failed to eliminate reasonable doubt as to whether the prior convictions were for assault.

In his rebuttal closing argument, the prosecutor began by noting that defense counsel was "right, it is the State's burden to prove the charges beyond a reasonable doubt. But if you believe it beyond a reasonable doubt, the defense always has the option to subpoena witnesses [in order to rebut and discredit the State's evidence]." Kameroff's counsel objected that this amounted to impermissible burden shifting, and the court sustained the objection. The prosecutor then attempted to clarify his point to the jury, stating, "So the State has the burden to show beyond a reasonable doubt, right? But the defense here, if the State shows beyond a reasonable doubt, then the defense has the option of subpoenaing witnesses."

Kameroff moved for a mistrial, but the court denied it, concluding that Kameroff had not shown prejudice and noting that the prosecutor had repeatedly emphasized that the State bore the burden of proof.

On appeal, Kameroff renews his contentions that the prosecutor engaged in improper burden shifting and that the court should have granted his mistrial motion.

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[10] AS 11.41.220(a)(5)(A)-(E).

As an initial matter, we note that the prosecutor's statement does not appear to have been intended as a burden-shifting argument, *i.e.*, an argument suggesting that the defendant had the burden to produce evidence disproving the State's allegations, or that the defendant bore the ultimate burden of persuasion. The prosecutor was correct in asserting that the certified copies of the judgments could, on their own, be accepted by the jury as proof beyond a reasonable doubt of the qualifying prior convictions absent any evidence suggesting that they were invalid.[11]

But even accepting that the prosecutor's statement could be viewed as a form of burden shifting, we still conclude that the court did not abuse its discretion in declining to grant a mistrial. The prosecutor was responding directly to defense comments suggesting that there was some flaw with the State's case, and both the prosecutor and defense attorney repeatedly reminded the jury that the State bore the burden of establishing the prior convictions.[12] Further, the jury instructions stated that the State had the burden of proving the prior convictions beyond a reasonable doubt.

In these circumstances, there is little reason to conclude that the prosecutor's statement would have caused the jury to believe that Kameroff had the initial or ultimate burden to disprove the validity of the prior convictions. Moreover, Kameroff has never claimed that he was not the person named in the judgments, and presented no evidence that the judgments erred in listing the offenses of conviction or

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[11] *See Brodigan v. State*, 95 P.3d 940, 944 (Alaska App. 2004) (recognizing that criminal judgments are subject to the presumption of regularity).

[12] *See D.S. v. State*, 2007 WL 778945, at *8-9 (Alaska App. Mar. 14, 2007) (unpublished) (concluding that prosecutor's statement in rebuttal closing argument that D.S. could have called a particular witness did not warrant reversal on grounds of improper burden shifting where the prosecutor's statement was responsive to a defense comment regarding a missing witness and the prosecutor and the judge reminded the jury that the burden of proof always rests on the State).

that the convictions were not for qualifying offenses under AS 11.41.220(a)(5). Thus, the alleged error is harmless and did not prejudice Kameroff.

For these reasons, we conclude that the court did not abuse its discretion in denying Kameroff's request for a mistrial.

The trial court did not err in refusing to instruct the jury on fourth-degree fear assault as a lesser included offense

Near the end of trial, Kameroff's counsel requested that the court instruct the jury on fourth-degree fear assault under AS 11.41.230(a)(3) — "by words or other conduct . . . recklessly plac[ing] another person in fear of imminent physical injury" — arguing that it was a lesser included offense of third-degree recidivist assault under AS 11.41.220(a)(5). Counsel argued that under the facts of this case, "Mr. Kameroff could not have committed any physical assault without also instilling fear in the victim of that assault."

The State argued that the starting point for the lesser included offense analysis should be with the offense tried in the first phase of the trial, *i.e.*, fourth-degree assault under AS 11.41.230(a)(1), "recklessly caus[ing] physical injury to another person." The State argued that fourth-degree fear assault under AS 11.41.230(a)(3) was not a lesser included offense of fourth-degree injury assault under AS 11.41.230(a)(1), arguing that they were simply alternative means of committing a single offense — fourth-degree assault. The State also argued that it was possible under the facts of this case for the jury to find that Kameroff committed injury assault without finding that he committed fear assault, and that fourth-degree fear assault was therefore not a lesser included offense of fourth-degree injury assault.

The court denied Kameroff's request for an instruction on fourth-degree fear assault. The court stated that it was not a "true" lesser included, *i.e.*, was not a lesser

included offense under the classical "statutory elements" approach, because it was possible in the abstract to commit injury assault without committing fear assault.[13] And the court further stated that it was not a lesser included offense under the facts of this case because the record did not suggest that S.M. or S.K. reasonably perceived that they were about to be struck by Kameroff.[14]

Under the approach used in Alaska, a lesser offense is included in a greater offense if, given the way the case was charged and litigated:

> (1) the defendant necessarily committed the lesser offense if he or she committed the charged offense in the manner alleged by the State;
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> (2) the defendant actually disputes the element or elements distinguishing the charged offense from the lesser, and
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> (3) the evidence would support a reasonable conclusion that the defendant is guilty of only the lesser offense and not the charged offense.[15]

On appeal, Kameroff argues that fourth-degree fear assault was a lesser included offense of the charged fourth-degree injury assault because the jury could have believed S.K.'s testimony that Kameroff picked up the weight in preparation to strike S.K. but disbelieved her other trial testimony that Kameroff hit and kicked her.

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[13] *See Elisovsky v. State*, 592 P.2d 1221, 1225 (Alaska 1979) ("Under the 'statutory elements' analysis, if it is possible to commit the greater offense under the statute without first having committed the lesser offense, an instruction on the lesser offense is not required.").

[14] *See State v. Minano*, 710 P.2d 1013, 1016 (Alaska 1985) ("Whether the lesser offense is necessarily included is to be viewed from the perspective of the facts charged in the indictment, in light of the evidence actually presented.").

[15] *Geisinger v. State*, 498 P.3d 92, 103 (Alaska App. 2021).

We reject Kameroff's argument. At trial, the prosecutor specifically disclaimed that the State was charging Kameroff for conduct relating to the weight incident. Instead, the prosecutor argued that Kameroff was guilty of recklessly causing physical injury to S.K. during a different incident on the night in question — "when he hit her and punched her while calling her a 'whore'[.]"

Further, at trial, Kameroff's defense was that he did not hit S.K. or S.M., and that they made up the story of being hit to deflect attention away from their own misbehavior and thereby avoid discipline for being out of their homes at night and drinking alcohol.[16] Kameroff never argued that he caused S.K. or S.M. to fear imminent physical injury during the altercation for which he was charged, but instead argued that he did not hit them at all. Nor was there any evidence introduced at trial that would lead a reasonable juror to conclude that Kameroff caused S.K. to fear imminent physical injury but did not actually cause injury to S.K.

Given these circumstances, we conclude that it was not error for the court to decline to instruct the jury on the offense of fourth-degree fear assault.

There was sufficient evidence to support Kameroff's conviction

Kameroff's final claim is that there was insufficient evidence to support his conviction, *i.e.*, to prove that he committed the underlying fourth-degree assault that was the basis for his conviction of third-degree recidivist assault.

When we review a claim of insufficient evidence, we are required to view the evidence (and all reasonable inferences to be drawn from that evidence) in the light most favorable to upholding the verdict.[17] Here, to prove fourth-degree assault, the State

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[16] S.M. was Kameroff's biological daughter but did not live with him.

[17] *See Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).

had to show that Kameroff recklessly caused S.K. "physical injury," which is defined as "a physical pain or an impairment of physical condition."[18]

We conclude that the State met this burden. Kameroff's conviction was supported by S.K. and S.M.'s testimony that Kameroff hit and kicked S.K., their testimony regarding S.M.'s subsequent bruises, the testimony of other witnesses regarding S.K.'s bruises, and S.K.'s testimony regarding the pain she experienced.

Kameroff argues that "[t]hough S.K. did testify regarding pain [in] her body, she never connected the pain in her head, face, arms, and legs to Kameroff hitting her." But S.M. testified that after Kameroff had initially assaulted S.K., S.K. was holding her head in her hands and saying "ow." S.K. herself testified that it "sort of" hurt when Kameroff was hitting and kicking her, but that she could not feel the pain, with the implication that this was due to her intoxication. (S.K. pointed out several times that she was "still going" during the assault, *i.e.*, was still intoxicated, and was for hours after the assault.)

Kameroff also claims that the acquittal on Count I, the charge of assaulting S.M., shows that the jury disbelieved S.M. and that her testimony therefore cannot be relied upon in upholding the verdict. But jurors are free to credit parts of a witness's testimony while rejecting other parts. Kameroff's counsel noted in closing argument that S.M. testified, "It doesn't look like a punch to me," when shown photos of herself taken after the incident. Jurors could thus have doubts about the proof of the central allegation involving S.M. — that Kameroff punched her in the head — while still crediting the bulk of S.M.'s testimony, particularly with respect to Kameroff's conduct involving S.K.

Last, Kameroff claims that the inconsistencies in S.K. and S.M.'s testimony render their testimony unworthy of belief. But it is not uncommon for intoxicated

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[18] AS 11.41.230(a)(1); AS 11.81.900(b)(48).

persons to have imperfect recall of events that they perceived; it is up to the jury to decide what weight to give such testimony and what to credit.

We therefore conclude that the evidence was sufficient to support Kameroff's conviction.

Conclusion

For the reasons stated above, the judgment of the superior court is AFFIRMED.