IN THE COURT OF APPEALS OF THE STATE OF ALASKA

REX VICTOR WESTON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13575 Trial Court No. 3AN-16-04414 CR MEMORANDUM OPINION No. 7067 — August 23, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Erin B. Marston, Judge.

Appearances: Megan R. Webb, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

Rex Victor Weston was convicted, following a jury trial, of attempted first-degree sexual assault for entering P.H.'s home through her bedroom window,

pulling down his pants, and lying on top of her as she slept.[1] Weston appeals his conviction, contending that the superior court erred by precluding statements that Weston made to himself at a police station, and by admitting evidence that he was previously convicted of attempted second-degree sexual assault. For the reasons explained, we reject Weston's claims of error.

Background facts and proceedings

P.H., a seventy-seven-year-old woman, lived in a ground-floor apartment in a retirement community. According to her trial testimony, P.H. awoke one night to find a stranger (later identified as Weston) on top of her with his knee on her chest. P.H. saw that Weston was shirtless and had his pants pulled down below his hips, and she thought she felt his erect penis against her. P.H. screamed and repeatedly kicked Weston as he held her down. After he relented, P.H. ran out of her apartment.

Eddye Williams, P.H.'s neighbor's daughter, heard screaming and went into P.H.'s apartment to investigate. Williams encountered Weston in P.H.'s living room and saw him pull up his pants and flee the apartment through a window. Police later apprehended Weston in P.H.'s neighborhood. When officers searched Weston, they located his underwear "bunched up" in the bottom of his pants leg. Detective Christopher Thomas interviewed Weston at the police station and then arrested him for attempted sexual assault and burglary.

Weston's case proceeded to a jury trial. At trial, over Weston's objection, the State introduced evidence of his prior conviction for attempted second-degree sexual assault under Alaska Evidence Rule 404(b)(3).

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[1] AS 11.41.410(a)(1) & AS 11.31.100. This appeal relates to Weston's second trial. A first jury found Weston guilty of first-degree harassment and burglary, but it could not reach a verdict on the charges of attempted first-degree sexual assault and a second burglary charge. The court accordingly declared a mistrial, and the State elected to retry Weston on the attempted first-degree sexual assault count.

Detective Thomas testified at the trial, and during his testimony, the State introduced a recording of his interview with Weston at the police station.

In the recorded interview, Weston claimed that he could not remember many details of the incident because he was intoxicated. Weston recalled that he broke into P.H.'s apartment with the intent to steal some of her belongings, climbed into P.H.'s bed, witnessed P.H. screaming and struggling, and "probably" exited her apartment through a window. However, Weston was equivocal in the interview about his motives for getting into bed with P.H. At one point, Weston claimed he was "just trying to go to sleep" and not to have sex, but at a different point, Weston admitted that he was "probably trying to get sex."

During his testimony, Thomas explained that he left Weston alone in the interview room on several occasions, but that the interview room's recording device continued running. While Weston was alone, he made several statements out loud to himself that were captured by the room's recording device. These statements included Weston stating that he did not know "what [was] going on" and that he could not remember why he had entered P.H.'s home. The defense attorney sought to introduce these statements during cross-examination. The State objected to the statements as inadmissible hearsay, and the court sustained the objection.

During the defense case, Weston called Dr. Aron Wolf as an expert witness in forensic psychiatry. Wolf testified to his opinion that Weston was experiencing an alcoholic blackout at the time of the offense, and thus could not have formed the specific intent to sexually assault P.H. On cross-examination, Wolf admitted that it was impossible to objectively determine whether a person had experienced an alcoholic blackout without directly observing the person at the time of the alleged blackout.

In response, the defense attorney sought again to introduce evidence of statements Weston made while alone in the interview room, and the State again objected. The superior court ruled that the statements could not be admitted through

Wolf. The jury found Weston guilty of attempted first-degree sexual assault. This appeal followed.

Why we affirm the superior court's ruling that Weston's spontaneous statements could not be introduced through Detective Thomas

Weston first argues that the superior court erred in ruling that the statements he made to himself in the interview room were inadmissible hearsay. Specifically, Weston claims that his statements were admissible to demonstrate his state of mind during the interview.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and is inadmissible unless an exception applies.[2] Weston claims that his statements were admissible under Evidence Rule 803(3). Under this rule, a statement of the declarant's "then existing state of mind" is admissible to "prove the declarant's present condition or future action, but not including a statement of memory or belief to prove the fact remembered or believed."[3]

At trial, Weston sought to admit two statements that he spontaneously uttered while Detective Thomas was out of the room: (1) "I don't know, man, why did I go in there? I can't remember . . . I went in there for what? . . . I don't know. Ugh. I can't remember"; and (2) "I don't know what's going on. I don't know, uh, I don't fuckin' remember." According to Weston, his inability to remember the incident at the police station supported his claim that he was blacked out when the incident occurred and could not form the specific intent to sexually assault P.H.

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[2] Alaska R. Evid. 801(a), 802.

[3] Alaska R. Evid. 803(3).

The superior court ruled that Weston's remarks were unreliable self-serving hearsay statements that were forbidden by *State v. Agoney*.[4] But as we have previously explained, Evidence Rule 803(3) does not specifically exclude statements that a court deems "untrustworthy."[5] The proper inquiry for whether a statement is admissible under Evidence Rule 803(3) is whether the statement expresses a "then existing state of mind." It is up to the jury, rather than the judge, to assess the credibility of the statement.[6]

To qualify for the then-existing state of mind hearsay exception, the statement must (1) demonstrate a state of mind; (2) be uttered contemporaneously with the state of mind; and (3) be offered to prove a current condition or future action, rather than a fact remembered.[7] The Ninth Circuit has explained that Federal Evidence Rule 803(3), from which Evidence Rule 803(3) was derived, allows the admission of statements offered to prove the defendant's state of mind *at the time* the statements were uttered, but bars statements offered to prove the defendant's *previous* state of mind.[8]

Here, Weston's statements that he "d[id]n't know what's going on" and "c[ould]n't remember" described his mental state — *i.e.*, his lack of memory — at the time he was speaking. But the defense attorney's stated purpose for introducing Weston's statements was to prove that Weston was so intoxicated at a previous time

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[4] *State v. Agoney*, 608 P.2d 762 (Alaska 1980).

[5] *Kelly v. State*, 116 P.3d 602, 605 (Alaska App. 2005).

[6] *Id.* at 608-09 (Mannheimer, J., concurring) (citing 4 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual*, § 803.02[4][d] at 803-30 to 803-31 (8th ed. 2002); 30B Michael H. Graham, *Federal Practice and Procedure*, § 7044 at 341 n.16 (Interim ed. 2000); 2 John W. Strong et al., *McCormick on Evidence*, § 274, at 217-18 n.8 (5th ed. 1999)).

[7] *See id.* at 604 (majority opinion).

[8] *United States v. Miller*, 874 F.2d 1255, 1263-65 (9th Cir. 1989).

(*i.e.*, at the time of the incident involving P.H.) that he blacked out and was unable to form the specific intent to sexually assault P.H. Thus, the statements were not uttered contemporaneously with the state of mind they were offered to prove. Instead, they were offered to prove Weston's state of mind at the time of the incident, which was over ten hours earlier.[9] The statements therefore did not meet the requirements of Evidence Rule 803(3), and it was not error for the superior court to exclude them.

In any event, even assuming that the statements were being offered to prove Weston's then-existing state of mind (rather than his prior state of mind), it is clear that any error in excluding them would have been harmless. While the proffered statements may have had limited probative value as circumstantial evidence of Weston's alleged alcoholic blackout (because his inability to remember the incident at the time of the interview could suggest that he was highly intoxicated during the incident), the statements were largely cumulative of other statements Weston made when the officer was present. For example, Thomas testified that Weston repeatedly said that he did not remember details of the incident. Moreover, Weston had written an apology letter in which he stated he had little memory of the incident because he was intoxicated.

Why we affirm the superior court's ruling that Weston's statements could not be introduced through expert witness testimony

Weston next argues that the superior court erred in precluding him from introducing through Dr. Wolf's testimony the statements he made while alone in the interview room. As we have explained, these statements were not independently

[9] The undisputed evidence showed that the incident occurred at approximately 4:45 a.m. and that Weston's statements were made after 3 p.m. on the same day. The defense attorney did not explain how Weston's inability to remember the incident at the time of the interview would be relevant to his mental state over ten hours earlier.

admissible under Evidence Rule 803(3). Nevertheless, Weston argues that they were admissible through Wolf because Wolf relied on them in forming his expert opinion.

Under Evidence Rule 705, when the facts or data that an expert relies on would be inadmissible for a purpose other than to explain the expert's opinion, the court must exclude these facts if "the danger that they will be used for an improper purpose outweighs their value as support for the expert's opinion."[10] Although Weston's statements were not independently admissible under a hearsay exception, they could potentially be admitted through Wolf under this provision.

Wolf testified that Weston was experiencing an alcoholic blackout at the time of the offense, and thus could not have formed the specific intent to sexually assault P.H. According to Wolf, while an individual experiencing an alcoholic blackout can do things they previously learned, they lack the ability to make decisions or to remember their actions.

During the State's cross-examination, Wolf agreed with the prosecutor's assertion that a defendant's statements claiming to have been in a blackout could be "inherently self-serving." He also agreed that, unless a patient was under his care at the time they are under the influence of alcohol, he had no objective way to determine whether they were, in fact, experiencing a blackout.

In response, the defense attorney asserted that the statements Weston made to himself when Thomas was not in the interview room provided "some further basis" to support Wolf's opinion that Weston was blacked out. The defense attorney argued that these statements were more reliable and less self-serving because Weston was likely unaware that his statements were being recorded when he was alone in the room. The superior court permitted the defense attorney to question Wolf outside the presence of the jury to establish a factual basis for his argument.

[10] Alaska R. Evid. 705(a), (c).

During this inquiry, it became evident that Wolf had not relied on the challenged statements in forming his initial opinion. When the statements were brought to Wolf's attention after the jury had been excused, Wolf testified that they would support his opinion that Weston experienced a blackout during the incident *if* Weston was unaware that he was being recorded. In response, the prosecutor argued that Weston was likely aware that he was being recorded given his criminal history. The superior court subsequently ruled that the statements were inadmissible hearsay, and could not be admitted through Wolf.

We find no error in the superior court's ruling. Given that other evidence of Weston's purported lack of memory was admitted at trial, Weston's statements provided little independent support for Wolf's opinion. Moreover, as Wolf acknowledged, the challenged statements only had distinct probative value if Weston was unaware that he was being recorded, and there was no direct evidence either way on that issue. Under these circumstances, the superior court could reasonably have concluded that admission of these statements would have been time consuming and potentially confusing for the jury. Indeed, if the statements had been admitted, the State would likely have been allowed to present evidence regarding why Weston would be familiar with police station recordings. For these reasons, we find no abuse of discretion in the superior court's ruling.

Why we affirm the superior court's ruling that evidence of Weston's prior conviction was admissible under Alaska Evidence Rule 404(b)(3)

At trial, the superior court allowed the State to introduce evidence of Weston's prior conviction for attempted second-degree sexual assault. Under Evidence Rule 404(b)(3), evidence of a defendant's prior attempted sexual assault is admissible in a subsequent attempted sexual assault trial if the previous offense "demonstrate[s]

the same type of situational behavior as the crime currently charged."[11] The court may exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.[12]

Weston's prior attempted sexual assault offense arose under similar circumstances to his present offense. On Easter Sunday, Weston entered a care facility posing as a visitor, commandeered a wheelchair occupied by S.L., an eighty-seven-year-old woman with dementia, and wheeled her into the facility's chapel. Weston then laid S.L. on the altar, got on top of her, and kissed her face. When a facility employee entered the chapel, Weston fled. For this conduct, Weston pleaded *nolo contendere* to attempted second-degree sexual assault.

In *Bingaman v. State*, this Court set out six factors for courts to consider when evaluating the admissibility of prior acts evidence under Evidence Rule 404(b)(2)-(4): (1) the strength of the evidence of the prior act, (2) the character trait the evidence tends to prove, (3) the relevance of the character trait to any material issue in the case, (4) how strongly the material issue is disputed, (5) whether the evidence will require an inordinate amount of time to present, and (6) the likelihood that the evidence will lead the jury to decide the case on improper grounds.[13]

In the present case, the superior court considered all of the *Bingaman* factors. The court found that the State had strong evidence that Weston committed attempted second-degree sexual assault in the prior offense and that Weston's prior offense was "eerily similar" to the current offense. The court further found that Weston's prior conduct was strong evidence of Weston's intent to sexually assault P.H., the central trial issue in the case, and it determined that it would not require a large

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[11] *Bingaman v. State*, 76 P.3d 398, 415 (Alaska App. 2003).

[12] *Id.* at 413-17; Alaska R. Evid. 403.

[13] *Bingaman*, 76 P.3d at 415-16.

amount of time for the State to present the evidence. However, recognizing that Weston's prior offense contained inflammatory facts (*e.g.*, Easter Sunday, the chapel altar, and dementia), the court issued a protective order barring the State from referencing these details. The court also instructed the jury as to the limited purpose for which the jury could consider the evidence.

The record supports the superior court's findings. In both cases, Weston entered elderly housing facilities in a surreptitious manner, and then fled when another person walked in and discovered his conduct. And in both cases, his victims were likely incapable of consenting to this contact (S.L. had dementia and P.H. was asleep). Given these similarities, the court's limiting instruction, and the court's protective order, we find that the superior court did not abuse its discretion in admitting evidence of Weston's prior conviction for attempted sexual assault.

Conclusion

The judgment of the superior court is AFFIRMED.