

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

SHANE RAY HANDY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13616  
Trial Court No. 3NA-19-00174 CR

MEMORANDUM OPINION

No. 7041 — February 8, 2023

Appeal from the Superior Court, Third Judicial District, Naknek,  
Christina L. Reigh, Judge.

Appearances: Monique Eneiro, Attorney at Law, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Madison M. Mitchell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge WOLLENBERG.

Shane Ray Handy was convicted, following a jury trial, of one count of third-degree assault for placing a police officer in fear of imminent serious physical

injury by pointing a rifle at him.<sup>1</sup> Believing that Handy had fired a shot at him, the officer fired seven rounds in Handy's direction.

Following this incident, the Alaska Bureau of Investigation conducted an independent evaluation of the officer's conduct. At trial, the State introduced evidence regarding this investigation. The State also introduced testimony that the officer ultimately did not face any disciplinary action as a result of the incident.

On appeal, Handy argues that the superior court erred in admitting testimony that the officer did not face any disciplinary action. Specifically, Handy claims that the testimony constituted improper vouching for the officer's credibility and was overly prejudicial. Given that Handy did not object to the admission of other evidence from the investigation, and given the limited nature of the evidence that was admitted regarding the outcome of the investigation, we reject Handy's claim and affirm the judgment of the superior court.

#### *Underlying facts and proceedings*

In July 2019, Donna Williams called the police to report "an armed guy" at her house, with "a rifle pointed at [her]." During the course of the phone call, she told the dispatcher that the man was "beating [her] down" and a physical struggle could be heard over the phone. Williams testified at trial that this man, Shane Handy, was her boyfriend at the time, and that they had been living together.

Officer Joshua Lobato and Interim Police Chief Jesse Poole of the Bristol Bay Borough Police Department responded to the scene. The officers parked their cars a short distance from the house and observed Handy running across the yard toward a

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<sup>1</sup> AS 11.41.220(a)(1)(A).

sliding glass door on the porch. Lobato testified that both officers chased Handy toward the house, but Handy got inside before either could catch him.

According to the officers, Handy then reemerged from the house with a rifle; Lobato ran behind a car in the driveway for cover. Poole testified that he saw Handy point the rifle at him, and Poole drew his own weapon in response. Poole then fired seven shots in the direction of the house, causing Handy to retreat inside. Poole testified that, at the time he fired his gun, he believed Handy had shot at him first. Lobato's testimony suggested that he believed the same.

When another officer arrived shortly thereafter, Handy surrendered to the police and was arrested. The police later discovered a rifle directly inside the threshold of the sliding glass door.

Handy was charged with two counts of third-degree fear assault, for pointing the rifle at Officers Lobato and Poole, and one count of fourth-degree assault, for recklessly causing injury to Williams while they were fighting prior to the officers' arrival.<sup>2</sup>

Before trial, the Alaska Bureau of Investigation conducted an evaluation of whether Officer Poole's shooting constituted a justified use of force. Through its investigation, the Bureau determined that Handy had not fired any shots at the officers. However, the Bureau also determined that much of Poole's accounting of the events was corroborated by the evidence collected. The Bureau submitted its final report to the Office of Special Prosecutions, as it does in every instance of an officer-involved shooting, so that the prosecutors' office could make a final decision as to how to proceed. Neither Poole nor Lobato faced any disciplinary action as a result of the incident.

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<sup>2</sup> AS 11.41.220(a)(1)(A) and AS 11.41.230(a)(1), respectively.

At trial, Handy argued that the police officers were not trustworthy witnesses. In his opening statement to the jury, Handy's defense attorney explained that:

They had a motive to lie. They had a motive — the motive is the fact that seven bullets are in that resident's home. They may be in trouble. They certainly are going to be held accountable. And because their account is not reliable, . . . the evidence they collected and documented cannot be used to prosecute the crimes of this case.

In response to this argument, the State sought to introduce evidence regarding the Bureau's investigation and the final outcome of that process. Handy did not object to the State's introduction of information regarding the investigation, and the superior court permitted this line of questioning, noting that Handy could object if he believed the State's inquiry went too far.

The State then called Officer Lobato to testify. At the end of his direct examination, Lobato testified that he had discussed the incident with the Bureau of Investigation. The State asked him whether he "ever ha[d] any reprimand or punishment . . . over what happened?" And Lobato answered, "No." Handy did not object to this questioning.

Later in the trial, the State called Alaska State Trooper Scott Bartlett, an investigator with the Bureau, to testify about the investigation into the officers' conduct in this case. Bartlett explained the procedure that Bureau investigators followed, and he testified that the evidence collected from the scene (*e.g.*, the angles at which the bullets hit Williams's residence and the audio from the officers' recording devices) corroborated the narrative of events provided by Officers Lobato and Poole.

Bartlett then testified that, upon completing his report, he sent the report to the Office of Special Prosecutions, which decided the next steps. The State began to ask whether any action was taken against Poole or Lobato, but Handy objected. Handy

argued that allowing Bartlett to introduce the results of the investigation (*i.e.*, that Poole and Lobato were not charged with any misconduct) would impermissibly “lend[] credibility to Lobato[’s] and Poole[’s] testimony which is for the jury to decide” and that the testimony should therefore be limited to the fact that “he’s done his report, the procedure was followed, and was submitted to the higher ups.”

The superior court overruled Handy’s objection, explaining, “It’s relevant, the door was opened previously. I think if the question wasn’t answered it would be even more confusing to the jury. But no further information is going to be provided.”

The State then asked Bartlett, “[W]as any action taken against Chief Poole?” and Bartlett answered “No.” The State also called Officer Poole as a witness, and he testified that he had spoken with investigators from the Bureau, cooperated with their investigation, and that no disciplinary action had been taken against him as a result of this incident.

Ultimately, the jury found Handy guilty of third-degree assault against Officer Poole. The jury found Handy not guilty of fourth-degree assault against Williams, and it was unable to reach a verdict on the other count of third-degree assault against Officer Lobato.

This appeal followed.

*Why we conclude that, given the information about the investigation that was introduced, the superior court did not abuse its discretion in admitting evidence that the officer had not been disciplined*

On appeal, Handy argues that the superior court erred in admitting testimony regarding the *outcome* of the Bureau’s investigation — *i.e.*, that there was no disciplinary action taken — because the testimony amounted to improper vouching of the officers’ version of events.

However, Handy is not specific in his appellate brief regarding precisely what testimony he believes was improperly admitted. Three witnesses provided relevant testimony regarding the outcome of the Bureau’s investigation: Officer Lobato and Officer Poole each testified that they were not individually disciplined as a result of the investigation, and Trooper Bartlett testified that Officer Poole (who fired his gun) did not face any consequences. Handy did not object to Officer Lobato’s testimony that he had not been subject to any discipline after the incident in this case, and Handy does not appear to argue on appeal that the superior court plainly erred by failing to *sua sponte* preclude this testimony. We therefore understand Handy to be more narrowly challenging the testimony provided by Trooper Bartlett and Officer Poole regarding the fact that Officer Poole did not face any consequences as a result of his conduct.<sup>3</sup>

Handy’s argument — that the testimony that Officer Poole did not face disciplinary action amounted to improper vouching — requires several inferential steps. Handy argues that the fact that Officer Poole was not subject to any disciplinary action would have suggested to the jury that Officer Poole was justified in his use of force, and therefore that Handy did, in fact, point a rifle at the officers.<sup>4</sup> Thus, he claims that the testimony that Poole received no punishment amounted to improper vouching of the officers’ version of events — *i.e.*, that Handy pointed a rifle at the officers — which undermined Handy’s defense — *i.e.*, that he did not point a rifle and the jury should not

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<sup>3</sup> Specifically, the State asked Trooper Bartlett and Officer Poole himself whether any action was taken against Officer Poole as a result of the Bureau investigation. Both witnesses responded in the negative.

<sup>4</sup> The record does not clearly establish the reasons why Officer Poole did not face discipline.

trust the officers' accounts because they had an incentive to lie in order to justify Officer Poole's shooting into the house.<sup>5</sup>

To support his argument that this testimony was improper, Handy cites to this Court's decision in *Kim v. State*.<sup>6</sup> In *Kim*, we noted that courts have condemned "human polygraph" testimony; that is, courts have condemned "allowing a witness to offer a personal opinion about the credibility of another witness's prior statements or testimony."<sup>7</sup> But the testimony in this case that Officer Poole did not face any consequences after the shooting did not directly constitute improper vouching or "human polygraph" testimony.

In *Kim*, and similar cases where we have held that a witness provided improper "human polygraph" testimony, the witness provided an explicit evaluation of another witness's credibility.<sup>8</sup> For example, the officer in *Kim* was improperly permitted

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<sup>5</sup> In closing argument, Handy's attorney argued that the officers were not credible, and that they were untruthful in their recounting of events, including in their reporting to the Bureau of Investigation.

<sup>6</sup> *Kim v. State*, 390 P.3d 1207 (Alaska App. 2017).

<sup>7</sup> *Id.* at 1209.

<sup>8</sup> *Id.*; see, e.g., *Thompson v. State*, 769 P.2d 997, 1003-04 (Alaska App. 1989); *Garcia v. State*, 2020 WL 3445391, at \*1 (Alaska App. June 24, 2020) (unpublished) (investigating officer testified that defendant was not credible and two witnesses testifying against the defendant were credible); *Bolden v. State*, 2019 WL 1752590, at \*2 (Alaska App. Apr. 17, 2019) (unpublished) (investigating officer heavily implied that defendant was lying when the officer made a more general statement that suspects do not always tell the truth); *George v. State*, 2014 WL 2937874, at \*1 (Alaska App. June 25, 2014) (unpublished) (trooper testified that, based on his experience, he believed the defendant's confession was truthful), *rev'd on other grounds*, 362 P.3d 1026 (Alaska 2015); cf. *Nunooruk v. State*, 2021 WL 3522394, at \*6 (Alaska App. Aug. 11, 2021) (unpublished) (officer not permitted to link his observations of witness's demeanor to his study of "micro-expressions," as this testimony improperly  
(continued...)

to testify as to whose story — the defendant’s or the witness’s — he thought was more credible.<sup>9</sup> And in *Thompson v. State*, a school nurse testified that she believed the complaining witness and thought that the witness was being truthful when she made her report.<sup>10</sup> The challenged testimony in this case — that Officer Poole was not subject to discipline following the Bureau’s investigation — was not this kind of explicit credibility vouching.

We have previously acknowledged that any comment by a law enforcement officer that goes to credibility, guilt, or innocence can be prejudicial, given the nature of the officer’s position.<sup>11</sup> This is due to the fact that “jurors may surmise that the police are privy to more facts than have been presented in court, or they may be improperly swayed by the opinion of a witness who is presented as an experienced criminal investigator.”<sup>12</sup>

But we have rejected claims that a law enforcement officer provided “human polygraph” testimony when the officer’s opinion was based on evidence already

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<sup>8</sup> (...continued)  
cloaked the officer’s testimony in an “aura of scientific insight and infallibility”); *see also* 1 Kenneth S. Broun et al., *McCormick on Evidence* § 43, at 342 n.28 (8th ed. 2020) (“The prevailing view is that one witness may not be asked whether another witness lied or was untruthful.”); 3 Barbara E. Bergman & Nancy Holland, *Wharton’s Criminal Evidence* § 12:13, at 358 (15th ed. 1999) (“Most courts prohibit lay witnesses from commenting on someone else’s credibility because the factfinder must ultimately make that evaluation and lay witnesses are no better than the factfinder at reaching those conclusions.”).

<sup>9</sup> *Kim*, 390 P.3d at 1209.

<sup>10</sup> *Thompson*, 769 P.2d at 1003-04.

<sup>11</sup> *Sakeagak v. State*, 952 P.2d 278, 282 (Alaska App. 1998); *see also Kim*, 390 P.3d at 1209 (“We have expressed particular concern when the testifying witness is a law enforcement officer.”).

<sup>12</sup> *Sakeagak*, 952 P.2d at 282.



in front of the jury and the statement added little of substance to an inference the jurors could have drawn for themselves.<sup>13</sup> For example, in *Sakeagak v. State*, an investigating officer testified that he used a confrontational tone when interviewing the defendant because he “felt that [the defendant] was responsible for [the victim’s] death.”<sup>14</sup> We noted that the evidence at trial showed the officer was aware of key facts at the time he made this statement (namely, the autopsy results revealing that the victim had been strangled and the defendant’s account of his movements and actions the night of the victim’s death), and it was therefore “quite unlikely that the jury was left wondering about the basis of [the officer’s] suspicions.”<sup>15</sup>

While there may have been some inherent risk of prejudice here from informing the jury of the fact that Officer Poole did not face any consequences as a result of the shooting, the prejudice was lessened by the fact that considerable other evidence was presented to the jury about the Bureau’s investigation, much of it without objection. In fact, Handy himself first introduced the existence of the investigation in his opening statement, and he proceeded to ask specific questions about Poole’s and Lobato’s statements to the investigators who were called to testify. In particular, Handy emphasized that the Bureau’s report demonstrated that Officer Poole was mistaken in his belief that Handy had fired his weapon first.

Moreover, Handy did not object to the introduction of other evidence related to the investigation. He did not object to the State’s introduction of testimony about the investigative process and the physical evidence collected from the scene, or even that a report had been submitted to the Office of Special Prosecutions for a decision

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<sup>13</sup> *See id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

in this case. As the superior court noted, “I think if the question [about whether Poole faced consequences] wasn’t answered it would be even more confusing to the jury.” Given the evidence that had already been admitted, we cannot fault the superior court for reaching this conclusion.

Finally, the superior court only allowed limited testimony regarding the outcome of the investigation — *i.e.*, the fact that the officers did not face any disciplinary action — rather than detailed testimony about the Bureau’s findings, their methodology, or their specific conclusions (or why they reached these conclusions). No one from the Office of Special Prosecutions, who reviewed the Bureau’s report and determined whether or not to file charges against the officers, testified at Handy’s trial. Given that Handy did not object to the introduction of other evidence related to the investigation, and the limited nature of the evidence that was admitted regarding the outcome of the investigation, we cannot say that the superior court abused its discretion in permitting Trooper Bartlett and Officer Poole to testify regarding the bare fact that Poole was not subject to any disciplinary action as a result of this incident.<sup>16</sup>

### *Conclusion*

We AFFIRM the judgment of the superior court.

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<sup>16</sup> *See id.* at 282-83 (concluding that the trial court did not abuse its discretion in finding that the probative value of the officer’s testimony (*i.e.*, that at the time the officer interviewed the defendant, he believed the defendant was guilty) outweighed the potential for prejudice).