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

TIMON MICHAEL PETLA,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13043
Trial Court No. 3AN-16-07201 CR

MEMORANDUM OPINION

No. 7079 — November 22, 2023

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

Appearances: Laurence Blakely, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, 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 HARBISON, writing for the Court.
Judge WOLLENBERG, concurring.

Timon Michael Petla was convicted of second-degree sexual assault for digitally penetrating his girlfriend, S.A., while she was incapacitated.[1] On appeal, Petla argues for the first time that he was unconstitutionally prohibited from raising a particular type of consent defense — that, at a time when S.A. was not incapacitated, she consented to engaging in sexual conduct while she was incapacitated.

At trial, however, Petla never attempted to raise this defense, nor did he present any evidence or offer of proof specifically showing that S.A. had consented (at a time when she was not incapacitated) to engaging in sexual penetration while she was incapacitated. And when Petla testified in his defense, he asserted that S.A. was fully conscious and responsive at the time of the sexual conduct.

Accordingly, we conclude that Petla's claim was not preserved, and Petla cannot demonstrate plain error or any other exception to the preservation requirement. Put differently, Petla has presented an insufficient factual record to establish that his constitutional rights were violated. We therefore affirm his conviction.

Underlying facts and procedural history

In April 2016, Petla and S.A. were unhoused and living in midtown Anchorage. Both suffered from severe alcoholism. On April 15, Petla, S.A., and a friend were drinking from a bottle of alcohol on a bus stop bench at A Street and Northern Lights Boulevard. They remained at the bus stop for several hours. During this time, Petla and S.A. were kissing, fondling, and holding each other.

At one point, S.A. had to urinate, so she got up and urinated on the sidewalk nearby. According to Petla, while they were sitting on the bench after S.A. had

---

[1] Former AS 11.41.420(a)(3)(B) (2016). Petla was also found guilty of third-degree sexual assault under former AS 11.41.425(a)(1)(B), but this offense merged with the second-degree assault conviction.

urinated, Petla reached into S.A.'s pants and touched her vagina. S.A. told him to stop because she was on her period. Petla withdrew his hand, stood up, and wiped his hand on the grass nearby.

While this was occurring, an Anchorage resident drove by and saw Petla, S.A., and their friend sitting on the bus stop bench. The driver observed Petla's hand down S.A.'s pants and it appeared to her that S.A. was not "conscious or aware of what was going on." She drove around the block in order to pass the bus stop for a second time, and observed Petla standing behind the bench and smelling his hand. The driver then called 911.

Anchorage police officers arrived and found S.A. unresponsive. Soon after, medics arrived and were able to wake S.A. Upon questioning by the police, S.A. identified Petla and the friend as her "uncles." When asked if she would be angry if they had touched her "inappropriately," she said, "No." Although she was initially reluctant to submit to a sexual assault response team (SART) examination, S.A. eventually agreed to do so. But the SART nurse determined that S.A. was too intoxicated to provide informed consent for the examination.

During a subsequent interview with the police, Petla reported that he had met S.A. about a month before, and that she had been dating a man named "Robbie." Petla stated that he and S.A. were just "friends," but that he and his other friend at the bus stop were both "kissing" S.A., anticipating having a sexual relationship with her. Petla denied putting his hand in S.A.'s pants, but instead said that he had touched her "from the outside of the pants." Petla told the police that S.A. was not passed out but was instead awake and kissing him back. He said that he would never touch someone who was passed out.

A grand jury indicted Petla on one count of second-degree sexual assault (for sexual penetration) and one count of third-degree sexual assault (for sexual contact)

on the theory that Petla engaged in sexual conduct with S.A. when Petla knew that S.A. was incapacitated or unaware that a sexual act was being committed.[2] The case proceeded to trial. Although the State subpoenaed S.A. (and the defense also wished to keep her under subpoena), the parties were unable to locate her, and she did not testify.

Petla testified in his defense. He described having a romantic relationship with S.A. prior to the incident in this case. Petla acknowledged that he digitally penetrated S.A.'s vagina on the bus stop bench, but he insisted that he stopped and removed his hand after S.A. told him "not right now" because she was on her period. (Later testing confirmed the presence of blood and S.A's DNA on Petla's finger.) Petla testified that S.A. was fully conscious at that time — kissing and fondling him and "laughing back at [him]" — and that she was sleeping only once the police arrived. He insisted that he never would have touched S.A. when she was passed out, especially "after she said 'no.'"

The friend who was present with Petla and S.A. at the bus stop testified that, on that day, S.A. and Petla "were playing kissy-face," and were being affectionate with each other and acting like a couple.

During its deliberations, the jury sent a note to the court asking whether a person could be "legally incapacitated if he or she is not passed out." The court responded that "[b]eing passed out would be one type of incapacitation," and referred the jury to the definition of "incapacitation," stating that "if an individual is incapable of appraising the nature of their own conduct or physically unable to express unwillingness to act, they are incapacitated, even if they are not passed out."

---

[2] Former AS 11.41.420(a)(3)(B)-(C) (2016) and former AS 11.41.425(a)(1)(B)-(C) (2016), respectively.

The jury found Petla guilty of second- and third-degree sexual assault. The court merged the verdicts into a single conviction for second-degree sexual assault.

This appeal followed.

Why we reject Petla's claim on appeal

Petla was charged with second- and third-degree sexual assault for engaging in sexual conduct with an individual whom he knew to be incapacitated or unaware that a sexual act was being committed.[3] On appeal, the parties agree that Alaska law does not allow someone accused of violating these statutes to defend against the charges by arguing that the other person agreed, at a time when they were not incapacitated, to engage in sexual conduct while incapacitated.[4]

Petla argues that this preclusion impermissibly infringed on his right to privacy and personal autonomy under the Alaska Constitution,[5] and that the statutes are

---

[3] Former AS 11.41.420(a)(3)(B)-(C) (2016) and former AS 11.41.425(a)(1)(B)-(C) (2016), respectively. The term "'incapacitated' means temporarily incapable of appraising the nature of one's own conduct or physically unable to express unwillingness to act." AS 11.41.470(2).

[4] We note that Alaska law does establish a marital defense to certain types of otherwise prohibited sexual conduct when the parties have not filed for separation or divorce. AS 11.41.432(d)-(e). At the time of Petla's offense, this defense applied to prosecutions for second- and third-degree sexual assault brought under an incapacitation theory (the crimes for which Petla was found guilty) and did not require an affirmative showing of consent. Former AS 11.41.432(a)(2) (2016). Since then, however, the legislature has narrowed the marital defense, and it no longer applies to such cases. AS 11.41.432, *as amended by* FSSLA 2019, ch. 4, §§ 6, 8, 138.

[5] *See* Alaska Const. art. 1, § 22.

therefore overbroad and violative of substantive due process.[6] The State responds that the sexual assault laws under which Petla was charged do not infringe on the constitutional rights to liberty and privacy, and that Petla's conduct falls within the core conduct precluded by the statutes.

After reviewing the record, we conclude that Petla did not preserve this issue in the superior court — he neither raised this defense at trial nor presented a factual basis at trial for his claim that S.A. consented to incapacitated sexual activity (nor what form this consent took). Thus, even assuming *arguendo* that the sexual assault statutes at issue could potentially reach a case of consensual sexual activity that might implicate a person's constitutional rights, Petla cannot establish that his rights were violated at trial.

The requirement that a litigant preserve an issue for appeal "serves important judicial policies":

> It ensures that "litigation in the trial court remains the 'main event' (as opposed to the appeal)." It allows the opposing party to respond to the objection with evidence and argument. It provides the trial court an opportunity to promptly correct the alleged error. And it ensures that there is both a ruling and a developed factual record for the appellate court to review.[7]

In this case, when Petla testified in his own defense at trial, he asserted that S.A. was fully conscious and responsive at the time of the sexual conduct, and that she fell asleep only once the police arrived. He made similar statements in his police interview at the time of the incident. He never claimed, as he now argues, that S.A.

---

[6] *See* Alaska Const. art. 1, § 7.

[7] *State v. Ranstead*, 421 P.3d 15, 22 (Alaska 2018) (citations omitted).

consented at some point to engaging in sexual conduct while she was incapacitated.[8] In fact, Petla insisted both in his interview with the police and in his testimony at trial that he would not have touched S.A. if she were passed out.

To establish plain error, a defendant must show, *inter alia*, that there was an error and that the error was obvious, "meaning that it should have been apparent to any competent judge or lawyer."[9] As we have just explained, however, Petla's testimony at trial was that S.A. was *not* incapacitated at the time of the sexual conduct. And Petla never sought to present the consent defense he now claims he was prohibited from presenting.

Indeed, when the prosecutor expressly stated on the record that this type of defense was precluded by the statutes and sought to ensure that Petla was not raising it, Petla's attorney did not contest the prosecutor's characterization of the law, or assert that

---

[8] As part of his defense at trial, Petla's attorney presented evidence that Petla and S.A. were in an ongoing consensual relationship. But Petla's attorney did not rely on evidence of this relationship to argue that S.A. had consented to engage in sexual conduct with Petla while she was incapacitated. Rather, the attorney relied on the ongoing relationship between Petla and S.A. to argue that Petla was in the best position to know if S.A. was awake and conscious — *i.e.*, not incapacitated — at the time of the sexual conduct, and to explain why S.A. would have agreed to engage in sexual conduct with Petla on a public bench. And this was the purpose for which the superior court admitted the evidence. *Cf. Napoka v. State*, 996 P.2d 106, 110 (Alaska App. 2000) (holding that the fact that the victim had previously engaged in consensual sexual activity with the defendant was relevant to whether the victim consented to having sex during the charged incidents and to whether, even if the victim did not consent, the defendant nevertheless reasonably believed that she consented); *Nickoli v. State*, 2000 WL 1471558, at *3 (Alaska App. Oct. 4, 2000) (unpublished) (reaching a similar conclusion).

[9] *Adams v. State*, 261 P.3d 758, 773 (Alaska 2011).

he was attempting to raise the defense.[10] And Petla's attorney did not dispute the court's description of his theory of the case — that S.A. was "conscious, consented, and fell asleep before the police showed up" (but after the sexual conduct). Indeed, the attorney told the court that Petla's "primary defense" was that S.A. "was awake and conscious and all of that."

And when the prosecutor proposed a jury instruction stating that S.A.'s consent to sexual acts with Petla on *other* occasions was not a defense to the charged offenses, Petla's attorney did not object on the grounds that he should be permitted to argue that S.A. consented to engaging in incapacitated sexual conduct on the occasion in question.[11]

Under these circumstances, Petla cannot establish that any error was obvious, or that the defense he now proposes on appeal would have applied to his case. Because there is no factual record to support Petla's proposed defense, he is unable to explain how or under what conditions S.A.'s consent was given, the circumstances to

---

[10] In response to the prosecutor's comments — and in particular, the comment that, at the time of Petla's offense, only marriage was a defense to the statutes under which Petla was charged — Petla's attorney raised only one objection. He argued "just for the record" that the marital status defense violated the equal protection clause and was unconstitutionally vague. But when the court responded that Petla's claims should have been raised prior to trial, the attorney dropped the issue, stating, "No, I understand," and said that Petla's "primary defense" was that S.A. "was awake and conscious and all of that."

Petla's attorney returned to the equal protection argument at sentencing, in the context of requesting the minimum sentence. The court rejected this claim, noting that a constitutional challenge to the law "wasn't briefed or argued to any extent" and stating that there are "valid reasons" for "treat[ing] married couples different[ly] than we do individuals who aren't married."

Petla does not raise an equal protection challenge on appeal.

[11] Petla raised several other objections to the instruction that he does not renew on appeal.

which it extended, or — of particular importance where one party is incapacitated — the ways in which it could have been withdrawn.[12] We agree with the parties' arguments that these statutes regulate some of the most personal aspects of people's lives, under some of the most vulnerable of circumstances. But we think that is all the more reason to not decide the issue in a factual vacuum.

In its brief, the State points out that "Petla never alleged that S.A. was incapacitated but gave . . . consent; instead, he consistently claimed (and testified) that S.A. was awake and consenting." But the State does not argue that Petla has failed to preserve this issue, and neither party directly addresses preservation on appeal. We note that it is possible both parties are implicitly relying on a long line of cases in which the Alaska Supreme Court has held that a criminal defendant may challenge the "[]constitutionality of a criminal prohibition for the first time on appeal and receive full appellate review[,]" essentially because such a challenge is "jurisdictional."[13]

To the extent the parties are relying on those cases, we do not read them so broadly as to require appellate courts to decide complex constitutional issues even when the defendant lacks a factual predicate for their claim.[14] Rather, those cases involved

---

[12] *See McGill v. State*, 18 P.3d 77, 84 (Alaska App. 2001) ("Nothing in the legislative history of our statute supports McGill's argument that once a person is sexually penetrated with consent, that consent cannot be withdrawn."); *see also People v. Dancy*, 124 Cal. Rptr. 2d 898, 911 (Cal. App. 2002) (concluding that "advance consent" is not a defense to "unconscious sexual intercourse" because it deprives the other person of the right to withdraw their consent at the time of intercourse).

[13] *Johnson v. State*, 328 P.3d 77, 83-84 (Alaska 2014) (collecting cases).

[14] *Cf. Wilson v. State*, 473 P.2d 633, 637 (Alaska 1970) ("[I]t would be expecting too much of a trial court to require it to speculate on various possible theories of defense in formulating [jury] instructions. We would, in effect, be imposing upon the trial courts a duty to ferret out and instruct upon any number of different lines of defense which are not even
(continued...)

either "facial" challenges to a statute (*i.e.*, challenges that the statute of conviction was unconstitutional as applied to anyone, regardless of the specific facts of the defendant's case),[15] or, in at least one case, an "as-applied" challenge to a statute (*i.e.*, a challenge that the statute was unconstitutional as-applied to the specific facts of the defendant's case) that was based on agreed-upon facts.[16]

Petla, by contrast, is arguing that the statute is unconstitutional as applied to a hypothetical set of facts that he never attempted to prove, and that would contradict the version of events to which he testified at trial.[17] Further, it is unclear from Petla's

---

[14] (...continued)
seriously contended or pursued by counsel at trial.").

[15] *See, e.g.*, *Crutchfield v. State*, 627 P.2d 196, 199 (Alaska 1980) (addressing a challenge to a statute as unconstitutionally vague); *Gray v. State*, 525 P.2d 524, 527 n.8 (Alaska 1974) (citing *Tarnef v. State*, 512 P.2d 923, 928 (Alaska 1973), and *Harris v. State*, 457 P.2d 638, 640 (Alaska 1969)).

[16] *Gudmundson v. State*, 822 P.2d 1328, 1332-33 (Alaska 1991). To the extent that Petla would characterize his challenge as a facial challenge to the statute, that characterization fails on its own terms. Petla himself contemplates circumstances under which the statute is valid: those in which no consent is given. *See, e.g.*, *Javed v. Dep't of Pub. Safety, Div. of Motor Vehicles*, 921 P.2d 620, 625 (Alaska 1996) ("A statute is facially unconstitutional if 'no set of circumstances exists under which the Act would be valid.'" (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))). He does not argue that the statute lacks "a plainly legitimate sweep," nor does he seek invalidation of the statute *in toto*. *See State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1000 (Alaska 2019); *see also State v. ACLU of Alaska*, 204 P.3d 364, 372 (Alaska 2009) (explaining that challenge was "as-applied" where plaintiffs argued that marijuana prohibitions violated privacy rights of only certain categories of marijuana users and possessors).

[17] *See McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014) (stating that it is "an uncontroversial principle of constitutional adjudication[] that a plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him"); *Reasner v. State, Dep't of*
(continued...)

brief exactly what type of consent he claims to have received from S.A., or the type of consent that would satisfy the defense he maintains he would have the burden of proving. Our case law does not require us to address such a claim, and indeed it would be unwise to do so.[18]

Moreover, although we have framed Petla's claim on appeal as an argument that he was unconstitutionally prohibited from raising a particular defense, we note that the same conclusion would be reached if Petla's claim were framed as an argument that the statute criminalizes constitutionally protected conduct. To obtain reversal of a conviction on such grounds, Petla would have to show that his conduct fell into the category of conduct that Petla argues is constitutionally protected.[19] But even though there was evidence that Petla and S.A. were in a relationship, Petla never claimed that S.A. consented to sexual conduct despite her incapacitation — he only claimed that S.A. was not incapacitated.

---

[17] (...continued)
Health & Soc. Servs., Off. of Child.'s Servs., 394 P.3d 610, 618 (Alaska 2017) ("For a statute to be unconstitutional as applied to a particular set of facts, the statute must *actually apply* to those facts.").

[18] *See Pierce v. State*, 261 P.3d 428, 433 (Alaska App. 2011) (explaining the importance of the preservation rule: "appellate courts do not decide issues of law in a factual vacuum, or under hypothetical facts, or under 'facts' that are actually counter-factual").

[19] *See Petersen v. State*, 930 P.2d 414, 429 (Alaska App. 1996) ("[W]hen a constitutional challenge is leveled against a statute whose main concern is conduct rather than speech, 'the possibility of difficult or borderline cases will not invalidate a statute' if there is a 'hard core of cases to which . . . the statute unquestionably applies'." (quoting *Stock v. State*, 526 P.2d 3, 9 (Alaska 1974))); *see, e.g.*, *Kurzendoerfer v. State*, 2004 WL 2349407, at *3 (Alaska App. Oct. 20, 2004) (unpublished) (rejecting a challenge to the constitutionality of Alaska's controlled substances laws on the theory that the laws could criminalize innocent behavior because the facts of the defendant's case showed that her conduct was "within the core of the statutory prohibition").

For these reasons, we conclude that Petla failed to preserve his argument for appeal, and he has failed to establish plain error.

Conclusion

The judgment of the superior court is AFFIRMED.

Judge WOLLENBERG, concurring.

I agree with the Court that Petla did not raise his proposed defense in the superior court, and thus cannot raise it for the first time on appeal. As the majority points out, Petla testified that S.A. was awake and conscious (or at least that he believed she was) at the time of the incident — not that she was incapacitated but had nonetheless consented. The consent defense that Petla now proposes on appeal is inconsistent with his own testimony and with his statement to the police at the time of the incident.

Moreover, Petla's attorney never asked to present this type of defense at trial. Rather, he accepted that the statutes under which Petla was charged precluded a consent defense,[1] and he expressly told the court that he was arguing that S.A. was awake and consenting.

Perhaps as a result of this factual void, the contours of the defense for which Petla is advocating on appeal are unclear.

As the superior court noted at sentencing, there was no evidence presented that S.A. gave advance consent to engaging in sexual penetration despite her incapacitation. Indeed, in an interview with the police immediately following the incident, Petla said that he was just "friends" with S.A. and that he *anticipated* having a sexual relationship with her. (He later contradicted this statement in his testimony, testifying that he and S.A. were already in a sexual relationship when the incident in this case occurred.) He also told the police — and later testified — that he never would have touched S.A. when she was passed out, especially after she said "no." An advance consent defense therefore would have rested on an alternative reading of the evidence — *i.e.*, that S.A. *was* incapacitated at the time of the sexual conduct.

---

[1] *See* former AS 11.41.420(a)(3)(B)-(C) (2016); former AS 11.41.425(a)(1)(B)-(C) (2016).

It is possible that Petla is arguing that S.A. approved or ratified Petla's conduct after the fact. At sentencing, S.A. appeared as a witness for the first time and testified on behalf of the defense that at the time of the April incident, she and Petla were a couple. She also testified, in response to defense questioning, that, when she learned that Petla had engaged in sexual conduct with her at the bus stop, "[i]t was okay" with her. But Petla's attorney did not move for a new trial at that time or otherwise argue that S.A.'s testimony factually amounted to a form of consent that negated Petla's conviction. (Instead, he argued that S.A.'s "consent" should mitigate Petla's sentence — a claim Petla does not renew on appeal.)

At various points during trial, Petla's attorney seemed to intimate that consent could be implied from their relationship alone. But if Petla's attorney intended to formally argue this as a defense, one would have expected him to raise a constitutional challenge to the statutes Petla was charged with violating, or an equal protection challenge, arguing that the marriage defense that was in effect at the time of the incident in this case was improperly limited to spouses.[2] Yet, as the superior court noted, the attorney never briefed an equal protection or constitutional challenge prior to trial. (The attorney briefly mentioned the possibility of an equal protection challenge mid-trial, but he did not pursue that argument once the court noted that it was untimely.)

I acknowledge that this case raises difficult questions. S.A. was unhoused and could not be located before trial, and the jury did not have the benefit of her testimony. Additionally, while the relevant statutes have a plainly legitimate sweep — criminalizing sexual acts with a person who is incapacitated or unaware and thus unable

[2] This defense has since been repealed by the legislature in relation to the statutes Petla was charged with violating. *See* FSSLA 2019, ch. 4, § 138 (repealing former AS 11.41.432(a)(2) (2016)).

to consent in the moment[3] — it is possible to conceive of cases at the margins, particularly related to sexual contact, that could potentially raise concerns about the breadth of the statutes when applied to consenting adults.[4]

Here, however, Petla engaged in sexual penetration with S.A. at a public bus stop. The jury found that, at the time, S.A. was incapacitated (and Petla knew she was incapacitated). And no evidence was presented at trial that S.A. had consented to engaging in this type of conduct. That being so, I agree with the Court that we should reserve decision on the constitutional issue raised by Petla for a case where we have more than a vague and undefined factual underpinning for the claim. I therefore concur with the Court's decision.

---

[3] *Cf. People v. Dancy*, 124 Cal. Rptr. 2d 898, 911 (Cal. App. 2002) (rejecting "advance consent" as a defense to "unconscious sexual intercourse" because it deprives the other person of the right to withdraw their consent at the time of intercourse).

[4] *See* AS 11.81.900(b)(61)(A)(i) (defining "sexual contact" to include "knowingly touching, . . . through clothing, the victim's genitals, anus, or female breast"); *King v. State*, 978 P.2d 1278, 1280 (Alaska App. 1999) (concluding that evidence a person was sleeping was sufficient to establish that the person was "temporarily incapable of appraising the nature of [their] conduct").