IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MELVIN LEE GUTHRIE SR., Appellant/Cross-Appellee, v. STATE OF ALASKA, Appellee/Cross-Appellant.	Court of Appeals Nos. A-13280 & A-13300 Trial Court No. 1KE-15-00424 CR MEMORANDUM OPINION No. 7094 — March 6, 2024

Appeal from the Superior Court, First Judicial District, Ketchikan, William B. Carey, Judge.

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Office of Public Advocacy, Anchorage, for the Appellant/Cross-Appellee. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee/Cross-Appellant.

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

Judge TERRELL.

Melvin Lee Guthrie Sr. was convicted, following a jury trial, of two counts of first-degree sexual assault for engaging in digital and penile penetration with T.H. without her consent.[1]

Prior to trial, Guthrie moved to compel discovery of T.H.'s medical and mental health records, including superior court records referencing T.H. from a different criminal case in which T.H. was the alleged victim. Guthrie asserted that these records were relevant to T.H.'s credibility and competence to testify. The superior court denied these motions, and Guthrie appeals. Because we conclude that Guthrie demonstrated a reasonable likelihood that these records will contain exculpatory evidence that is unavailable from a less intrusive source, we remand for the superior court to order production of these documents, review them *in camera*, and disclose any materially exculpatory evidence to Guthrie. The superior court must then determine, in light of any evidence that may be disclosed, if the failure to perform this procedure in the first instance was harmless beyond a reasonable doubt.

Guthrie also appeals the superior court's order precluding Guthrie from presenting DNA evidence showing that T.H. had sex with her fiancé the day before the incident. The superior court's ruling relied on Alaska's rape shield law.[2] For the reasons explained, we conclude that any error in precluding this evidence was harmless.

The State also cross-appeals, arguing that the superior court's order suppressing statements that Guthrie made to the police shortly after the incident was erroneous. We decline to address this issue at this time. We will consider the State's cross-appeal if, on remand, the superior court determines that Guthrie is entitled to a new trial.

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[1] Former AS 11.41.410(a)(1) (2015).

[2] AS 12.45.045.

Why we conclude that Guthrie sufficiently demonstrated the need for in camera review of records pertaining to T.H.'s medical and mental health

On appeal, Guthrie argues that the superior court erred when it denied his motions for *in camera* review of various records discussing T.H.'s medical and mental health. In his motions, Guthrie asserted that T.H. had been diagnosed with fetal alcohol spectrum disorder (FASD), as well as other mental health conditions that could negatively interact with FASD. Guthrie asserted that people with FASD often cannot accurately distinguish social cues or discern truth from fiction when recounting events, and that these symptoms can be even more serious when combined with other mental health conditions. The superior court denied these motions, concluding that T.H.'s records were privileged under the psychotherapist-patient privilege in Alaska Evidence Rule 504(b), and that Guthrie had not made a sufficient showing that his constitutional rights as a defendant required piercing this privilege.

As an initial matter, the State argues that Guthrie waived this argument because he sought to exclude evidence of T.H.'s FASD at trial. After the superior court denied his motions to review T.H.'s mental and medical health records, Guthrie moved *in limine* to prohibit the State from mentioning T.H.'s FASD at trial, and the court granted the motion *in limine*.[3]

In support of its waiver argument, the State cites to *State v. Wickham* and *Sam v. State*.[4] *Wickham* and *Sam* concern situations where a trial court made a conditional ruling that, if the defendant introduced certain evidence, the State would be allowed to introduce certain other evidence in rebuttal. However, after these conditional rulings, the defendants declined to introduce the initial evidence at trial. In this situation,

[3] The State first made this argument in a supplemental brief, and Guthrie declined our invitation to file a supplemental reply brief responding to it. We nevertheless will consider this waiver argument.

[4] *State v. Wickham*, 796 P.2d 1354, 1355-59 (Alaska 1990); *Sam v. State*, 842 P.2d 596, 598-99 (Alaska App. 1992).

Wickham and *Sam* held that the defendants waived any appellate argument challenging the conditional rulings. Because preliminary rulings are subject to change, a reviewing court has no way of knowing if the preliminary ruling was the reason the defendant declined to introduce the evidence or whether the State would have actually introduced its rebuttal evidence.[5] This lack of evidence also impedes meaningful review of whether any error was harmless.[6]

In this case, Guthrie is not challenging a conditional ruling on the admissibility of evidence at trial; he is challenging the denial of discovery motions. Unlike the erroneous denial of a conditional ruling, the erroneous denial of a discovery motion will always require a limited remand for the discovery to be provided before harmlessness can be evaluated.[7] Any need for an additional record before harmlessness can be evaluated was not caused by Guthrie. Accordingly, we conclude that Guthrie has not waived this claim, and we proceed to evaluate his claim on the merits — *i.e.*, whether the superior court erred by not ordering the *in camera* review of T.H.'s medical and mental health records.

In *Douglas v. State*, we recently considered the interplay between the constitutional rights of a defendant and the psychotherapist-patient privilege. We held that "a defense request for *in camera* review of privileged mental health records should be granted if the defendant has shown a reasonable likelihood that the records will contain exculpatory evidence that is necessary to the defense and unavailable from a less intrusive source."[8] Following *in camera* review, the court will "disclose those

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[5] *Wagner v. State*, 347 P.3d 109, 112 (Alaska 2015).

[6] *Id.*; *Sam*, 842 P.2d at 598-99; *Wickham*, 796 P.2d at 1358-59.

[7] *Douglas v. State*, 527 P.3d 291, 311-13 (Alaska App. 2023).

[8] *Id.* at 308.

records containing information that qualifies as *materially* exculpatory under the facts of that case."[9]

To support his claims about T.H.'s FASD diagnosis, Guthrie relied on a report from T.H.'s hospital visit on the night she reported the sexual assault in this case, which listed FASD in T.H.'s medical history. Guthrie also relied on court records from a 2004 superior court case, *State v. Williams*,[10] where T.H. was also the alleged victim. In that case, the defendant first presented expert testimony about FASD generally. Then, after the court granted the defendant's motion to subpoena T.H.'s mental health records, the expert testified specifically about T.H.'s condition.

The expert witness in *Williams* testified that people with FASD "very commonly" have difficulty separating fact from fantasy, are easily influenced by others, have poor comprehension of social rules and expectations, and have difficulty in predicting the consequences of their own and others' behavior. The expert explained that alcohol damages the frontal lobe, which is the source of these abilities within the brain. As a result, according to the expert, people with FASD are commonly reported to be "lying."

After the court in *Williams* granted the defendant's motion for *in camera* review of T.H.'s documents, and after the expert witness reviewed the documents the superior court disclosed to the parties, the expert confirmed that T.H. had been diagnosed with a particularly debilitating type of FASD — static encephalopathy, alcohol exposed. Based on this diagnosis, the expert concluded that there was a greater than fifty percent chance that T.H. did not have the capability to understand the duty of a witness to tell the truth. The expert witness testified to these conclusions at trial. The defendant in *Williams* was acquitted.

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[9] *Id.*

[10] *State v. Williams*, 1SI-04-00377 CR.

Based on the above information, Guthrie moved the superior court to subpoena T.H.'s medical and mental health records for *in camera* review. He moved for *in camera* review of the confidential and sealed record in *Williams* — *i.e.*, the portion of the record in *Williams* that might pertain to T.H.'s mental health.

We conclude that the expert testimony in *Williams* was sufficient to establish a reasonable likelihood that the records Guthrie identified in his motions — T.H.'s medical and mental health records and the confidential and sealed files in *Williams* — would contain exculpatory evidence that is necessary to the defense and unavailable from a less intrusive source.[11] We therefore remand for the superior court to order production of these records, review them *in camera*, and disclose any materially exculpatory evidence contained therein. The court should then determine whether the failure to conduct an *in camera* review in this case was harmless beyond a reasonable doubt. The case will then return to this Court.[12]

Why we conclude that the superior court's order precluding admission of evidence of T.H.'s recent sexual activity was harmless

Guthrie also argues that the superior court erred by granting the State's motion *in limine* seeking to preclude evidence under Alaska's rape shield statute, AS 12.45.045. Specifically, T.H. had told a forensic nurse who examined her after she reported the assault that she had sex with her fiancé the night before, and testing of vaginal and cervical swabs from T.H. contained DNA from both Guthrie and T.H.'s

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[11] *Douglas*, 527 P.3d at 308.

[12] *See id.* at 311-13. Guthrie's decision to move *in limine* to preclude evidence about T.H.'s FASD does not amount to a waiver of his appellate challenge to the superior court's denial of his discovery motions. However, it does reflect a strategic decision not to present any evidence that he may have had about T.H.'s FASD and its possible effects on her credibility as a witness. In conducting a harmlessness analysis, the superior court may consider whether the failure to disclose to Guthrie additional evidence about T.H.'s mental health was harmless in light of the evidence Guthrie had that he chose not to present.

fiancé. The State asked the court not to allow Guthrie to introduce this evidence at trial. The State conceded that this meant it could not present any evidence about the fact that Guthrie's DNA was found in T.H.'s vagina.

Guthrie opposed the motion *in limine*, arguing that this prior recent consensual sex, and not Guthrie's alleged actions, could have been the cause of injuries that T.H. had sustained to her face and legs.[13] The superior court granted the State's request, concluding that "[t]here [was] nothing to actually suggest, other than total speculation, that these minor injuries happened in the earlier, consensual[] activity" because "[t]he injuries were not to the genital area or of a nature that would itself be considered sexual."

Although the State presented no evidence about the vaginal and cervical swabs of T.H., it did present evidence that a penile swab was taken from Guthrie and that testing of this revealed sperm from both Guthrie and an unidentified second source. Additionally, during direct examination, T.H. volunteered that she had "hooked up" with her fiancé the night before, adding when the prosecutor told her that she did not have to talk about it that it was "not a bad thing" and "was consensual."

"The rape shield law prohibits evidence of a victim's sexual conduct when the 'relevance' of this evidence rests on the impermissible inference that the victim is likely to have freely engaged in sexual relations with the defendant because the victim has freely engaged in sexual relations with other people."[14] "The purpose of the statute . . . is to forestall the argument that the victim is promiscuous and therefore probably

[13] The nurse who examined T.H. at the hospital testified that T.H. had tenderness and soreness on the left side of her face, superficial abrasions on her left knee, a tender spot or bruise on the back of her right thigh, and a bruise on the back of her upper left arm. The prosecutor introduced photos that the nurse took to document her examination.

[14] *Napoka v. State*, 996 P.2d 106, 108 (Alaska App. 2000).

consented to have sex with the defendant."[15] We question whether there was a high danger of this impermissible inference in this case. At the same time, given the State's agreement not to introduce evidence of the DNA found in the vaginal and cervical swabs from T.H., and given the nature of T.H.'s injuries, it appears that evidence of T.H.'s recent sexual activity had little additional probative value.

In any event, we conclude that any error in granting the motion *in limine* was harmless because the State did not introduce into evidence the test results from the vaginal and cervical swabs and the jury ultimately heard much of the evidence that Guthrie wanted admitted.[16]

Conclusion

The superior court's decision to preclude evidence of T.H.'s recent sexual activity is AFFIRMED. Otherwise, this case is REMANDED for further proceedings in accordance with this opinion. We retain jurisdiction.

The State also cross-appeals a separate decision of the superior court. Because we must resolve this cross-appeal only if a new trial is required, we decline to address it at this time. If it is ultimately determined that Guthrie is entitled to a new trial, we will consider the State's cross-appeal at that time.

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[15] *Id.* at 109.

[16] *See Love v. State*, 457 P.2d 622, 632 (Alaska 1969) (holding that non-constitutional error is harmless if it does not appreciably affect the jury's verdict).