IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA, Plaintiffs, v. THOMAS JACK, JR., Defendant.	**FILED IN CHAMBERS** STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU By: KJK On: 1.28.10 Case No. 1JU-09-194 CR

ORDER DENYING MOTION TO DISMISS INDICTMENT

I. INTRODUCTION

The defendant moves to dismiss the superseding indictment issued October 23, 2009.[1] That indictment charges the defendant with four counts of Sexual Abuse of a Minor in the First Degree (counts II, III, V and VI) and three counts of Sexual Abuse of a Minor in the Second Degree (counts I, IV, and VII).

The defendant argues that the State failed to present exculpatory evidence to the grand jury, and presented inadmissible evidence to the grand jury. The State opposes the motion. In considering the defendant's motion, I have considered the parties' memoranda and the various exhibits they have submitted, including but not limited to the grand jury transcript, the transcripts of the defendant's conversations with Leah Ogoy, the transcript of the defendant's

[1] That indictment supersedes the original indictment issued February 27, 2009, which also charged Sexual Abuse of a Minor in the First and Second Degree, but with a different alignment of counts. The State indicated that it obtained a superseding indictment because of a *Covington* problem with the initial indictment. *See, Covington v. State*, 703 P.2d 436 (Alaska App. 1985).

interview with Trooper Dobson, the medical reports of Dr. Carolyn Brown, and the Children Advocacy Center ("CAC") interviews with both children.

II. DISCUSSION

A. Applicable Law:

1. Duty to Present Exculpatory Evidence.

The prosecutor has a duty to present exculpatory evidence to the grand jury.[2] But this duty does not turn the prosecutor into a defense attorney; the prosecutor does not have to develop evidence for the defendant and present every lead possibly favorable to the defendant.[3] Rather, the prosecutor is obliged to present "material substantially favorable to the defendant".[4] Evidence is deemed substantially favorable if it "tends, in and of itself, to negate the defendant's guilt."[5] This narrow definition of "exculpatory evidence" is intended to prevent grand jury proceedings from turning into a "mini-trial".[6]

2. Hearsay Evidence.

Criminal Rule 6(r)(1) provides that hearsay evidence shall not be presented to the grand jury absent compelling justification. If inadmissible hearsay is presented to the grand jury, the court must subtract the hearsay evidence from the total case submitted to the grand jury and determine (1) whether the remaining evidence is sufficient to support the indictment and, if so, (2) whether "the probative force of [the] admissible evidence was so weak and the unfair

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[2] *Frink v. State*, 597 P.2d 154, 164-5 (Alaska 1979).
[3] *Id.* at 166.
[4] *State v. McDonald*, 872 P.2d 627, 639 (Alaska App. 1994); *Sheldon v. State*, 796 P.2d 831, 838 (Alaska App. 1990), *quoting Tookak v. State*, 648 P.2d 1018, 1021 (Alaska App. 1982).
[5] *State v. McDonald*, 872 P.2d at 639.
[6] *Preston v. State*, 615 P.2d 594, 602 (Alaska 1980).

prejudice engendered by the improper evidence was so strong that it appears likely that the improper evidence was the decisive factor in the grand jury's decision to indict."[7]

B. Analysis:

1. Exculpatory Evidence.

The defendant points to four categories of allegedly exculpatory evidence which he contends should have been presented to the grand jury. The first involves the defendant's statements.

Thomas Jack had conversations with social worker Ms. Ogoy which were recorded pursuant to a *Glass* authorization. Ms. Ogoy testified about these conversations, but the tapes themselves were not played for the grand jury.

Mr. Jack was then interviewed by Trooper Dobson. The State presented no evidence about the Dobson interview because, according to the State, it believes it was the product of a *Miranda* violation. The parties each have their own characterizations of the various conversations.

The defendant describes the conversations with Ms. Ogoy as conversations in which Ms. Ogoy told Mr. Jack about the allegations and Mr. Jack responded with concern. The defendant indicates that Mr. Jack told Ms. Ogoy that he did not believe T.T. was lying about the sexual activity, but it just hadn't occurred with him.

The defendant contends that Ms. Ogoy's testimony about these conversations was misleading. In particular, he contends that Ms. Ogoy testified about his "lack of denial" of guilt. The defendant contends that the failure to tell the grand jury about the interview with

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[7] *Stern v. State*, 827 P.2d 442, 445-46 (Alaska App. 1992).

Trooper Dobson, in which he expressly denied his guilt, left the grand jury with a misimpression of Mr. Jack's position.

The State, on the other hand, contends that both conversations consist of a mixture of inculpatory statements and denials. Both sets of conversations, in the State's view, are partially inculpatory and similar to each other. Accordingly, in the State's view, Ms. Ogoy's testimony accurately summarized her conversations with Mr. Jack, and any testimony about Trooper Dobson's interview would be cumulative to this.

In ruling on this motion, I have read all of the transcripts of the Ogoy conversations provided by the defendant by fax on January 27. It is clear that those conversations are susceptible to various interpretations. Defense counsel, in her briefing, has presented her view of the conversations. The State offers a different view, consistent with Ms. Ogoy's testimony.

Certainly the prosecutor could have presented more portions of the Ogoy conversation that were favorable to the defendant, and could have presented the conversation in a light more favorable to the defendant. But as noted above, the prosecutor is not obligated to develop evidence for the defendant and present every lead possibly favorable to the defendant. There is nothing in either the Ogoy conversations or the Dobson interview that would have tended, in and of itself, to negate the defendant's guilt.

While Ms. Ogoy's testimony about the conversations did not present them in the most favorable light to the defendant, I do not find that Ms. Ogoy's testimony was misleading or false in its characterization of the conversations. There was not anywhere in the Ogoy conversations a clear and unequivocal denial of guilt. I cannot find that the failure to present

other portions of the conversations represented a failure to present exculpatory evidence as that term has been defined in Alaska law.

The parties can certainly argue their varying interpretations of these conversations to the jury at trial. A grand jury proceeding is not a mini-trial. It is not necessary for the State, at grand jury, to develop the evidence in the way that the defense might at trial.

With respect to the Dobson interview, I do not agree with the State's view that this interview is entirely cumulative of the Ogoy conversations. The Dobson interview includes more explicit denials and fewer ambiguous non-denials. In that sense it is more exculpatory and less inculpatory than the Ogoy conversations.

At trial, a defendant's denial of guilt in a police interview would be inadmissible hearsay if offered by a defendant.[8] Defendant points to no authority for the proposition that a defendant can require the state to offer his denials of guilt in a police interview as exculpatory evidence to the grand jury, when they would not be admissible at trial. Even assuming this evidence should have been presented to the grand jury, I find any error to be harmless when the grand jury had the opportunity to see and hear the direct testimony of T.T. that she was sexually abused by the defendant. I cannot conclude it is likely that – even if the grand jury heard that Mr. Jack denied the offenses to Trooper Dobson – the grand jury would have refused to indict.[9]

The second element of exculpatory evidence the defendant points to is the statements of ten year old Z.T., T.T.'s younger sister. The defendant contends that Z.T. would have testified

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[8] *See, State v. Agoney*, 608 P.2d 762, 763-4 (Alaska 1980).
[9] *See, Azzarella v. State*, 703 P.2d 1182, 1187 (Alaska 1985).

that she often slept in the same bed with T.T., and she would have contradicted T.T.'s testimony about being sexually abused by the defendant. The defendant further contends that Z.T. would have testified that she did not see the defendant alone with T.T. in her bedroom.

In her interview at the CAC,[10] Z.T. ~~testified~~ talked about an incident that occurred in a hotel in Juneau when the defendant was in bed with T.T. and Z.T. Z.T. said in her interview that the defendant lay down with T.T. and had his arm and leg over her. Z.T. not only described this incident, but she said that the defendant "always, like, puts his leg over [T.T.] and his arm and just gives [T.T.] more attention." Z.T. indicated that T.T. was uncomfortable with that. It is unclear what Z.T. meant when she said that the defendant "always" does that, but it suggests that she observed this on other occasions. Z.T. indicated that she was about to tell the defendant not to do that, when she fell asleep.

Z.T. described other occasions at home when the defendant would come into the bed with both children, and indicated that the defendant would ask Z.T. to "scoot over" so he could lie next to T.T. While her interview was not clear, she apparently said that the defendant would put his leg over T.T. in the bed at home. She said that T.T. "hated when [the defendant] putted his arm and leg over her," and T.T. asked Z.T. to ask the defendant's wife to clean the sheets so Z.T. could sleep in her room.

It is true, as the defendant says, that Z.T. said that T.T. never slept in her room by herself. Later in her interview, though, Z.T. said that T.T. did sometimes sleep in her room by herself, but that she never did so if the defendant was there. She would only sleep alone if the defendant was away. It appeared from Z.T.'s testimony that T.T. wanted Z.T. to be in her

[10] A transcript of this interview was provided to the court by the defendant.

room so that she would not have to be in the room alone with the defendant because he made her uncomfortable. Z.T. may have believed that T.T. was never alone in her room with the defendant, but Z.T.'s testimony cannot rule out the possibility that the defendant entered T.T.'s room at times that Z.T. was not aware of.

While it is true that Z.T.'s testimony contradicted this one aspect of T.T.'s testimony, I am not convinced that Z.T.'s testimony, if it had been presented to the grand jury, would have been "substantially favorable" to the defendant, or would have tended to negate his guilt. On the contrary, there are aspects of Z.T.'s statement to the CAC that are not at all helpful to the defendant. The testimony of Z.T. does not qualify as exculpatory evidence under the narrow definition adopted by the Alaska Supreme Court.

The third area of exculpatory evidence that the defendant points to is the medical evidence. T.T. was examined by Dr. Brown on two occasions – January 8, 2009 and again on February 16, 2009. In the first examination, Dr. Brown observed some abnormal findings of the fourchette[11] which she felt might have been caused by sexual abuse. She recommended reexamination of the fourchette in about a month. The second examination in February showed some healing as compared to the earlier examination.

The defendant contends that this timeline is inconsistent with the State's allegation of sexual abuse in October of 2008. Because the children were removed from the Jack's home on November 4, 2008, according to the defendant, the medical evidence would have shown that

[11] The fourchette is a small fold of membrane connecting the labia minora in the posterior part of the vulva. Merriam-Webster's Medical Dictionary (2002).

there must have been a more recent cause for the findings at the fourchette on the first examination.

The defendant has not demonstrated that Dr. Brown's testimony would have been exculpatory. Dr. Brown knew the timeline: she said in her report that T.T. described sexual activity in October of 2008. There is nothing in Dr. Brown's reports suggesting that her findings on January 8, 2009 had to have been caused by trauma more recent than October of 2008. Nor is there anything in Dr. Brown's observation that healing occurred between January 8 and February 16 that would require more recent trauma. It has not been shown that the prosecutor failed to present exculpatory medical testimony.

The fourth area of exculpatory evidence the defendant argues was not presented has to do with T.T.'s report that she had a dream that she had been lying. This evidence was presented to the grand jury, but the defendant complains that it was presented through the wrong witness. Ms. Ogoy testified to this information, but T.T. was not asked about it.

A defendant has a right to have exculpatory evidence presented to the grand jury. There is no authority for the proposition that he has a right to have this evidence presented through the witness of his choosing. Exculpatory evidence may be presented through hearsay.[12] Thus I do not find that there is merit to his complaints about the manner in which evidence of T.T.'s dream was presented to the grand jury.

[12] *Esmailka v. State*, 740 P.2d 466, 469 n. 3 (Alaska App. 1987).

2. Hearsay.

Ms. Ogoy testified about statements made to her by both Angela Jack (defendant's wife) and Z.T., the younger sister of the alleged victim. The defendant objects to the use of this testimony, arguing that it is inadmissible hearsay.

The State responds that this evidence was admissible under Evidence Rule 803(8) as public records. This argument is based on a misunderstanding of the public records exception in two respects.

First, and most fundamentally, while Ms. Ogoy testified that she kept records of her conversations, the records were never placed in evidence. Rule 803(8) does not say that a witness can testify to hearsay if it was previously written down in a public record somewhere. Rather, it says that the records are admissible if they fall within that rule. Because no records were given to the grand jury, this rule is inapposite.

Secondly, the records – even if they had been offered to the grand jury – were double hearsay. Ms. Ogoy wrote down in her notes an account of things people told her. Her notes, then, are a written out-of-court statement by Ms. Ogoy which contains out-of-court statements by Ms. Jack and Z.T. The hearsay exception of Rule 803(8), if it applies, could only excuse the first link in the hearsay chain – Ms. Ogoy's statements. Under Evidence Rule 805, there must still be a hearsay exception applicable to the statements by Ms. Jack and Z.T. to Ms. Ogoy. The State has not offered an exception for these statements.

The issue here is not the admissibility of public records: no records were admitted. Instead, the grand jury heard testimony from Ms. Ogoy about things people told her. That testimony was, clearly, offered for the truth of what was asserted.[13] That is classic hearsay.

The analysis, then, is to excise the improperly admitted hearsay testimony from the testimony before the grand jury, and determine (1) whether the remaining evidence is sufficient to support the indictment and, if so, (2) whether "the probative force of [the] admissible evidence was so weak and the unfair prejudice engendered by the improper evidence was so strong that it appears likely that the improper evidence was the decisive factor in the grand jury's decision to indict."[14]

If one excises the hearsay testimony from the grand jury presentation, one is left with T.T.'s testimony that the defendant sexually abused her on multiple occasions, and Ms. Ogoy's testimony about her conversations with the defendant. This was sufficient evidence to support the indictment. And one cannot say that this evidence was so weak and the improper hearsay testimony so strong that it appears likely that the hearsay evidence was the decisive factor in the grand jury's decision to indict. On the contrary, the strongest piece of evidence was the testimony of T.T. that the defendant sexually abused her.[15]

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[13] Ms. Ogoy testified to things Ms. Jack told her about her relationship with the defendant and the defendant's interactions with T.T. And she testified that Z.T. told her that she would get upset when T.T. got more attention than her.

[14] *Stern v. State*, 827 P.2d 442, 445-6 (Alaska App. 1992).

[15] The court recognizes that much of T.T.'s testimony was obtained by leading questions and she had difficulty recalling some details. Nevertheless, she gave some specific answers and there was no doubt that she testified that the acts occurred.

III. CONCLUSION

I do not find that the prosecutor failed to present exculpatory evidence to the grand jury. While I do conclude that the prosecutor presented inadmissible hearsay evidence to the grand jury without compelling justification, I find that this error was harmless. Accordingly, the motion to dismiss the indictment is DENIED.

Entered at Juneau, Alaska this 28 day of January, 2010.

Philip M. Pallenberg
Superior Court Judge

CERTIFICATION OF SERVICE

I certify that I served the following parties on the ____ day of January, 2010.

District Attorney	Natasha Norris

via fax

Keitha J. Kolvig
Judicial Assistant to Judge Pallenberg