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.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

THOMAS JACK JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-10922 Trial Court No. 1JU-09-194 CR MEMORANDUM OPINION No. 6110 — November 5, 2014

Appeal from the Superior Court, First Judicial District, Juneau, Philip M. Pallenberg, Judge.

Appearances: Brooke Berens, Assistant Public Advocate, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Tamara de Lucia, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.*

Judge ALLARD.

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* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

A jury convicted Thomas Jack Jr. of three counts of sexual abuse of a minor in the first degree[1] and three counts of sexual abuse of a minor in the second degree.[2] The superior court sentenced Jack to a composite term within the applicable presumptive range — 50 years and 3 days with 10 years suspended, 40 years and 3 days to serve.

Jack appeals his convictions and his sentence, raising three main arguments: (1) that his motion to dismiss the indictment should have been granted because the prosecutor failed to present Jack's exculpatory statements to the grand jury and presented inadmissible hearsay to the grand jury; (2) that the superior court mistakenly permitted the State to introduce three hearsay statements at Jack's trial; and (3) that the superior court committed plain error at sentencing by failing to merge some of the counts and failing to refer Jack's case sua sponte to the three-judge sentencing panel.

For the reasons described below, we reject Jack's claims of error with the exception of his merger argument. We therefore affirm Jack's convictions but remand his case to the superior court with directions to merge Counts III & IV and Counts VI & VII on double jeopardy grounds, and to resentence Jack in light of those mergers.

Factual and procedural background

In August 2007, Thomas and Angela Jack became the foster parents of two sisters, T.T., 10 years old, and Z.T., 9 years old. Leah Ogoy was the case worker with the Office of Children's Services (OCS) assigned to oversee the placement. Initially, the foster placement went well and appeared to be leading in the direction of adoption.

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[1] AS 11.41.434(a)(3).

[2] AS 11.41.436(a)(5).

However, a year later, various problems arose, eventually leading to the removal of the girls from the Jacks' home.

The specific event that led to the removal of the children occurred in November 2008 and was referred to at trial as "the shower incident." Angela called Ogoy to report that she had seen Jack in the bathroom earlier that day staring at T.T. while T.T. was taking a shower. Based on this report and other concerns about the family situation, Ogoy removed the girls from the home.

On December 31, Ogoy informed T.T. that she would not be returning to the Jacks' home. About a week and a half later, T.T. first reported that while she was living with the Jacks, Thomas had sexually abused her. T.T. later testified that Thomas began coming into her bedroom in the middle of October, at first for an "extra hug." He began touching her breasts and vagina and, on later occasions, attempted to have vaginal and anal intercourse with her.

T.T. underwent a forensic examination by a medical doctor. During the examination, the physician found evidence of some type of past injury in T.T.'s vaginal area, but she could not determine its cause.

Jack was subsequently indicted on four counts of sexual abuse of a minor in the first degree and three counts of sexual abuse of a minor in the second degree. Before the grand jury, Ogoy testified about the girls' placement in the Jacks' home and reported several out-of-court statements by Angela and Z.T., including Angela's expressions of jealousy and her demands that Ogoy remove the girls from the home. Ogoy also testified that she recorded telephone conversations with Jack about T.T.'s allegations and that Jack did not "adamantly deny" the allegations.

Jack moved to dismiss the grand jury indictment on the grounds that the prosecutor had failed to introduce various exculpatory statements Jack made to Ogoy and

had failed to introduce Jack's clear denials of any wrongdoing in an interview with the police when they arrested him. Jack also argued that the prosecutor introduced various hearsay statements of Angela and Z.T. without justification. Superior Court Judge Philip M. Pallenberg denied Jack's motion.

In February 2010, Jack's case went to trial. The jury was unable to reach a verdict and a mistrial was declared. Jack's second trial began in July 2010. The second jury acquitted Jack of one count of first-degree sexual abuse of a minor but convicted him of the six remaining counts.

In November 2010, a sentencing hearing was held before Judge Pallenberg, who had presided over both trials. Jack's attorney did not propose any statutory mitigating factors, nor did he request a referral to the three-judge sentencing panel. Instead, Jack's attorney joined the State's attorney in asking the court impose the lowest presumptive term available. At the hearing, numerous family and community members testified about Jack's positive traits and qualities. Judge Pallenberg imposed the lowest sentence permitted by statute: 50 years and 3 days with 10 years suspended, 40 years and 3 days to serve, and 15 years of probation.

Jack now appeals his conviction and sentence.

Did the superior court err in denying the motion to dismiss the indictment based on the State's alleged failure to present exculpatory evidence to the grand jury?

In *Frink v. State*,[3] the Alaska Supreme Court held that the prosecutor has a duty under Alaska Criminal Rule 6(q) to disclose exculpatory evidence to the grand

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[3] 597 P.2d 154 (Alaska 1979).

jury.[4] As the court explained in *Frink*, this duty is consistent with the proper role of the district attorney in a criminal prosecution, which is to seek justice, not simply indictment or conviction.[5]

But the prosecutor's duty under *Frink* remains relatively limited. A grand jury proceeding is not intended to be a mini-trial.[6] Alaska courts must dismiss an indictment only when the prosecutor has failed to present "substantially favorable" exculpatory evidence — evidence that tends, in and of itself, to negate the defendant's guilt.[7]

Jack identifies two sets of statements that he claims were "clearly exculpatory" and should have been presented to the grand jury. The first set includes statements Jack made to Ogoy, the OCS social worker. The second set includes statements Jack made to Sergeant Matthew Dobson, the police officer who arrested him. We address each in turn.

Jack's recorded statements to the social worker

Shortly after T.T. reported the sexual abuse, Ogoy called Jack to discuss the allegations and elicit his view of why T.T. was making them. Jack's statements were

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[4] *Id.* at 165-66.

[5] *Id.* at 166 ("The duty of the district attorney ... is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial.") (quoting *In re Ferguson*, 487 P.2d 1234, 1238 (Cal. 1971)).

[6] *State v. Gieffels*, 554 P.2d 460, 465 (Alaska 1976).

[7] *State v. McDonald*, 872 P.2d 627, 639 (Alaska App. 1994) (citing *York v. State*, 757 P.2d 68, 73 (Alaska App. 1988)).

recorded pursuant to a *Glass* warrant.[8] However, rather than playing the recording for the grand jury, the prosecutor had Ogoy testify to her subjective recall of Jack's statements.

Jack asserts that Ogoy's grand jury testimony was an incomplete and misleading version of his otherwise exculpatory statements. However, the trial court disagreed, finding that Jack's statements to Ogoy were equivocal and "susceptible [of] various interpretations," and that Ogoy's testimony regarding Jack's statements was not false or misleading.

Having reviewed the original recorded statements and Ogoy's grand jury testimony, we agree with this conclusion. In the telephone conversations with Ogoy, Jack repeatedly stated that he "does not know" or "cannot remember" if any inappropriate touching occurred, although he also asserted that if it did happen it would have been accidental. Jack further acknowledged that T.T. might have felt his arousal on her leg when the whole family was sleeping together in one bed or when Jack fell asleep next to T.T. watching television. But he stated that if that happened, it would have been while he was sleeping because he would never do "anything like that on purpose."

For the most part, Ogoy's grand jury testimony was a fair representation of what Jack said to her. However, her testimony was sometimes inaccurate. For example, Ogoy testified that when she discussed the possibility that T.T. could be pregnant and that pregnancy could occur from ejaculation outside the vagina, Jack responded that he would "never take it that far." But Ogoy did not include the rest of Jack's response, which was his statement that "I'd never do that or anything like that."

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[8] *See State v. Glass*, 583 P.2d 872 (Alaska 1978), *on rehearing*, 596 P.2d 10 (Alaska 1979) (holding that the Alaska Constitution requires police to obtain judicial authorization before electronically monitoring or recording a person's private conversations).

Nevertheless, given Jack's overall equivocal responses to Ogoy's questions, we do not think that this statement — "I'd never do that or anything like that" — qualifies as "substantially favorable" evidence such that its omission requires dismissal of the indictment under *Frink*. Nor do we believe that this omission made Ogoy's testimony false or misleading such that the prosecutor failed in her duty to present the evidence in a fair and accurate manner.[9]

We note, however, that the risk of this type of inaccuracy could have been easily avoided if the prosecutor had simply played the recorded statements to the grand jury rather than have Ogoy testify to her subjective recall of the conversation. As the Alaska Supreme Court emphasized in *Frink*, a prosecutor's duty in presenting evidence to the grand jury includes both the requirement to present "substantially favorable" exculpatory evidence and also the duty to "fully and fairly" present the available evidence.[10]

Jack's recorded statements to Sergeant Dobson

Four days after his last recorded conversation with Ogoy, Jack was interviewed by Sergeant Dobson of the Alaska State Troopers. Unlike the surreptitiously recorded conversations with Ogoy, Sergeant Dobson directly accused Jack of attempting to have sexual intercourse with T.T., ejaculating on her leg and/or pajamas, and touching her breasts and vagina. Also unlike the Ogoy interview, Jack adamantly denied the accusations and repeatedly asserted his innocence.

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[9] *See Frink*, 597 P.2d at 165-66.

[10] *Id.*; *see also* American Bar Association Standards Relating to the Prosecution Function Standard 3-3.6; Alaska R. Prof. Conduct 3.8(d).

In the proceedings below, Jack argued that the prosecutor had an obligation to present the grand jury with Jack's statements to Sergeant Dobson. The superior court ruled that these statements would be inadmissible hearsay at trial if offered by the defendant and that their omission was in any case harmless given the grand jury's ability to see and hear T.T. testify at length regarding the sexual abuse.

We agree with the superior court that hearing Jack's bare denials of any wrongdoing to the police officer who arrested him would not have made a difference in this case.[11] We therefore do not reach the separate legal question of whether a prosecutor has a duty to present "substantially favorable" exculpatory hearsay evidence if the evidence would be inadmissible at trial if offered by the defendant. We note that there is authority supporting both sides of this issue and that it remains an unsettled question of law in Alaska.[12]

Did the trial court err in failing to dismiss the indictment based on inadmissible hearsay that was presented to the grand jury?

Jack argues that in addition to failing to disclose exculpatory evidence, the prosecutor presented inadmissible hearsay to the grand jury.

During the grand jury proceeding, Ogoy testified that pursuant to her work with OCS, she kept notes of conversations she had with Angela, T.T., and Z.T. Ogoy provided extensive testimony based upon her notes, including testimony regarding

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[11] *See, e.g.*, *Azzarella v. State*, 703 P.2d 1182, 1187 (Alaska App. 1985) (reasoning that in light of the "overwhelming evidence" against Azzarella, the grand jury would not have refused to indict, even if they had known of his "bald denial of guilt").

[12] *See Lipscomb v. State*, 700 P.2d 1298, 1304 (Alaska App. 1985) (noting the existence of "some authority indicating that a denial of guilt by the accused may be considered exculpatory material").

Angela's statements that she was jealous of Jack's relationship with T.T. and Angela's statements asking to have the girls removed long before the shower incident. Ogoy also testified that members of Jack's family and members of the community made threatening statements to T.T. after her allegations against Jack became known, and that T.T. partly recanted her accusations in the face of this harassment. (T.T. also testified about the harassment before the grand jury.)

The superior court ruled that Ogoy's testimony regarding Angela's statements and the community harassment were inadmissible but that its admission was nevertheless harmless given the other testimony presented to the grand jury, in particular T.T.'s testimony. We agree with the trial court's conclusion that the admission of these statements to the grand jury was harmless given the other admissible evidence presented to the grand jury. We therefore affirm the court's ruling on that ground.[13]

Did the superior court err in admitting Angela's out-of-court statements and text messages at trial?

Jack's third claim on appeal is that the superior court improperly allowed the prosecution to introduce out-of-court text messages and statements made by Angela, who did not testify at Jack's trial. Jack contends that these statements should have been excluded as inadmissible hearsay.[14] He also argues that the error in admitting these

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

[14] On appeal, Jack also argues that admission of these statements violated his rights under the confrontation clause. *See* U.S. Const. Amend. VI; Alaska Const. Art. I, §11. We agree with the State that this argument is inadequately briefed for purposes of appellate review. We note that Jack's confrontation clause argument is limited to a single sentence and a citation to an out-of-date 2005 case from the Sixth Circuit.

statements prejudiced his case because the evidence suggested to the jury that Angela believed T.T.'s relationship with Jack was sexual and inappropriate even before the sexual abuse occurred.

The first statement Jack challenges was a text message, sent from Angela to Ogoy, declaring: "Please do whatever it takes to find somewhere else for [T.T.] and [Z.T.] ASAP!!!" The second statement was made in a phone call to Ogoy after the shower incident. Ogoy testified that Angela told her: "[F]ind a place for the girls. They cannot — they — they cannot come home." The third challenged statement was introduced through T.T. She testified that Angela sent her a text stating, in effect: "[S]tay away from my husband, you're going to ruin my life."

The State argues that these statements were all admissible for the non-hearsay purposes of demonstrating the deterioration of the adoptive placement, the poor relationship between Angela and T.T., and the reasons why T.T. would be reluctant to confide in Angela about the abuse. The State also argues that Angela's statements to Ogoy did not qualify as hearsay because they were requests for Ogoy to take action.[15]

We agree with the State that there were legitimate non-hearsay purposes for which these statements were admitted. We also conclude that, when viewed in the context of the evidence as a whole, the evidence did not unfairly prejudice Jack's case. The jury heard other admissible evidence that Angela was jealous of Jack's relationship with T.T. and Z.T. Indeed, Jack emphasized in his opening statement how jealous and controlling Angela was to support his claim that Angela was too watchful for the alleged sexual abuse to have occurred in the Jacks' small home.

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[15] *See, e.g.*, *Stumpf v. State*, 749 P.2d 880, 893-94 (Alaska App. 1988) (declarant's demand for money not a factual assertion and therefore not hearsay); *State v. McDonald*, 872 P.2d 627, 645 (Alaska App. 1994) (declarant's request that someone not speak to the police not a factual assertion within the definition of hearsay).

Moreover, Ogoy made clear in her testimony that, at the time Angela made these statements to her, she did not view the statements as suggesting that Jack's relationship with T.T. was sexual or inappropriate. Even after the shower incident, Ogoy attributed Angela's jealousy to her emotional instability. Ogoy told the jury that Jack, Angela, and T.T. all wished to continue contact after the shower incident, and that she initially saw no reason not to allow this contact.

T.T.'s testimony that Angela told her to "stay away" from Jack likewise supported the inference that Angela's jealousy arose before Jack's sexual misconduct; T.T. received the text telling her to "stay away" in June 2008, and the first sexual contact did not occur until mid-October of that year. We think it unlikely, given this record, that Angela's statements influenced the jury's verdict in this case.

We acknowledge that, in closing argument, the prosecutor invited the jury to rely on Angela's out-of-court statements as independent corroborating evidence that T.T. was telling the truth. This was impermissible argument because the evidence was admitted for other, non-hearsay purposes. But Jack did not object to the prosecutor's argument or ask the judge to give the jury a limiting instruction. Nor has Jack raised this issue as a separate point on appeal. Instead, Jack primarily claims on appeal — as he did below[16] — that the court should have excluded the evidence as inadmissible hearsay. He has therefore not preserved any objection to the prosecutor's improper

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[16] We recognize that the exact basis for Jack's objection to the June text message to T.T. is unknown because the bench conference was transcribed simply as "indiscernible." *Cf.* Alaska R. App. P. 210 (b)(8) (providing procedures through which the appellant may supplement the record on appeal when adequate recordings of proceedings below do not exist). In their briefing, the parties both assume that the objection to this evidence was the same hearsay objection that was previously raised with regard to the other two statements.

argument, and we do not find the argument to be so obviously prejudicial that it amounted to plain error.

Did the superior court commit plain error by failing to sua sponte refer Jack's case to the three-judge panel?

As a first-time felony offender,[17] Jack faced a presumptive range of 25 to 35 years on each of the first-degree sexual abuse of a minor charges and 5 to 15 years on each of the second-degree sexual abuse of a minor charges.[18] In addition, because of various rules governing consecutive sentencing in these types of cases, Jack faced a presumptive composite sentence of at least 40 years and 3 days.[19] The superior court did not have the authority to impose a sentence below that active term unless the court found that a statutory mitigating factor applied to Jack's case. In the alternative, the superior court could have referred the case to the three-judge sentencing panel for consideration of a non-statutory mitigating factor, or because the court concluded that a sentence within the presumptive range was manifestly unjust.[20]

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[17] Jack's prior criminal history consisted solely of a 1998 disorderly conduct, class B misdemeanor conviction, which was later set aside.

[18] *See* AS 12.55.125(i)(1)(A) (first-degree); AS 12.55.125(i)(3)(A) (second-degree).

[19] Jack was convicted of three counts of first-degree sexual abuse of a minor, so the court was required to impose 25 years for the first count (the lowest end of the applicable presumptive range) and 7½ consecutive years for each of the other counts. *See* AS 12.55.125(i)(1)(A); AS 12.55.127(c)(2)(E); AS 12.55.127(c)(3). In addition, AS 12.55.127(c)(2)(F) required the court to impose "some additional" consecutive term of imprisonment for the remaining convictions; in Jack's case, that meant at least 1 day for each of the three counts of second-degree sexual abuse of a minor. Therefore, the statutory minimum amount of consecutive imprisonment Jack faced was 40 years and 3 days.

[20] *See State v. La Porte*, 672 P.2d 466, 467 (Alaska App. 1983).

Unlike the superior court, the three-judge sentencing panel has the authority to impose a sentence below the presumptive range if the defendant proves a non-statutory mitigating factor, such as extraordinary potential for rehabilitation, or if the defendant proves that a sentence within the presumptive range would result in manifest injustice.[21]

At Jack's sentencing, his attorney did not propose any statutory or non-statutory mitigating factors. Nor did his attorney argue that a referral to the three-judge sentencing panel was appropriate. Instead, Jack's attorney joined the State's recommendation that Jack receive a sentence at the lowest end of the applicable presumptive range.

Now on appeal, Jack argues that the superior court should have sua sponte referred his case to the three-judge sentencing panel, notwithstanding the lack of any defense request to do so. Jack emphasizes that numerous members of the Hoonah community appeared at sentencing to support a lower sentence and that the victim, through her foster mother, specifically requested that Jack serve a sentence of only 5 to 10 years with treatment. Jack also argues that the superior court's sentencing remarks include a de facto manifest injustice finding, and that the court's remarks indicate that the court viewed the 40-year sentence as inconsistent with the *Chaney* criteria.[22]

Our review of the sentencing record and the superior court's remarks shows otherwise. Although the superior court concluded that the *Chaney* goals of rehabilitation and individual deterrence could be served by a "substantially lighter" sentence, the court also concluded that other *Chaney* criteria, including isolation and

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[21] *See* AS 12.55.165; AS 12.55.175.

[22] *See State v. Chaney*, 477 P.2d 441 (Alaska 1970).

community condemnation, were served by a sentence within the legislatively defined presumptive range. The court further found that there was nothing atypical about this case or about Jack as an offender that would take him outside the presumptive range:

> There is nothing about this case that causes it to be mitigated below what is typical for the offense for which Mr. Jack was convicted. The breach of trust here was enormous. The potential harm is enormous. And so I think there is nothing in the 2006 statutes that would call for a lighter sentence than that.

Thus, in context, the superior court's sentencing remarks do not demonstrate that the superior court believed the sentence was manifestly unjust, such that referral to the three-judge panel was needed.

Jack also asks this Court to remand his case for resentencing under the standard set forth in *Collins v. State*.[23] We conclude such a remand is unnecessary. First, it is not clear what legal effect should be attributed to our decision in *Collins*, given the Alaska Legislature's subsequent repudiation of *Collins* and explicit adoption of the *Collins* dissent.[24] Second, even if there are aspects of the *Collins* decision or underlying reasoning that could apply to Jack's case, they do not alter the analysis described above.

In contrast to Jack's case, the defense attorney in *Collins* directly requested a referral to the three-judge sentencing panel on the grounds of both "extraordinary

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[23] 287 P.3d 791 (Alaska App. 2012).

[24] *See* ch. 43, §§ 1, 22, SLA 2013. The Alaska Supreme Court granted the State's petition for review of *Collins* but later dismissed the petition as improvidently granted. Supreme Court Case No. S-14966 (Feb. 25, 2014).

potential for rehabilitation" and "manifest injustice."[25] Our remand in *Collins* was therefore directed at providing a clearer, and more comprehensive, legal framework for the superior court to use in assessing these claims.

Here, there is no need for such a remand because Jack's attorney did not request a referral to the three-judge panel or assert that Jack's potential for rehabilitation warranted a referral. Moreover, the trial court specifically found, on the record before it at sentencing, that there was nothing atypical about this case or Jack that would require a departure from the applicable presumptive range. Having independently reviewed the sentencing record, we conclude that the superior court's decision to not sua sponte refer the case to the three-judge sentencing panel was not clearly mistaken.

Why a remand is needed to allow the superior court to merge certain counts and to correct a clerical error in the judgment

In his final argument, Jack asserts that the superior court committed plain error by failing to merge Count III (vaginal-penile penetration) with Count IV (touching of breasts while engaged in the vaginal penetration alleged in Count III), and by failing to merge Count VI (a different instance of vaginal-penile penetration) with Count VII (touching of breasts while engaged in the vaginal penetration alleged in Count VI). The State concedes error and agrees that these counts should merge. The concession is well-founded.[26]

As the State notes, the prosecutor at trial did not attempt "to establish that the two acts of second-degree sexual abuse occurred independently of the two acts of penetration charged during the same period of time." At the grand jury proceeding and

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[25] *Collins*, 287 P.3d at 795.

[26] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972).

at trial, the State's theory was that the sexual contact with T.T.'s breasts happened at the same time that Jack penetrated her vagina with his penis.

"It is a well-settled rule that an act of sexual touching and an act of sexual penetration will not constitute separate crimes if they occur on a single occasion and the touching is merely preliminary to the penetration."[27] Where a sexual penetration and a sexual contact are performed as part of a single episode, the defendant can only be convicted for the more serious contact, *i.e.*, the penetration.[28]

We therefore remand this case with directions to the superior court to merge Count IV with Count III, and Count VII with Count VI, and to resentence Jack in light of these mergers.

On remand, the court is also directed to correct a clerical error in Jack's judgment. Jack's judgment incorrectly states that Jack was convicted of Count V and acquitted of Count VI. This is a mistake: the jury acquitted Jack of Count V and convicted him of Count VI.

Conclusion

This case is remanded to the superior court for merger of Count IV with Count III, and Count VII with Count VI. On remand, the superior court is directed to resentence Jack in light of the newly merged counts, and to correct the clerical error identified above. In all other respects, the superior court's judgment is AFFIRMED. We do not retain jurisdiction.

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[27] *Joseph v. State*, 293 P.3d 488, 493 (Alaska App. 2012) (internal citation omitted).

[28] *Johnson v. State*, 762 P.2d 493, 495 (Alaska App. 1988).