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

ESTATE OF JOHN CARLIN III, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-10155 Trial Court No. 3AN-06-10139 CR MEMORANDUM OPINION No. 6135 — January 21, 2015

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Dan S. Bair, Assistant Public Advocate, Appeals and Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Coats, Senior Judge,[*] and Hanley, District Court Judge.[**]

Judge MANNHEIMER.

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[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

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

John Carlin III was convicted of murder in connection with the shooting death of Kent Leppink. While his appeal was pending, Carlin died in prison. His estate now pursues this appeal. [1]

The question presented on appeal is whether Carlin's trial was rendered unfair because the court allowed the State to introduce a letter that Leppink sent to his parents, to be opened in the event he died under suspicious circumstances. In this letter, Leppink asserted that three people — among them, Carlin — would likely be responsible for his death.

For the reasons explained here, we conclude that it was improper for the trial court to allow the State to introduce this letter, and we further conclude that the introduction of this evidence appreciably affected the jury's verdict. We therefore reverse Carlin's conviction.

Underlying facts

Between mid-1994 and mid-1996, Mechele Linehan (whose name was then Mechele Hughes) maintained romantic relationships with several men, three of whom are important to this case: Scott Hilke, John Carlin, and Kent Leppink. Linehan's romantic relationships with these three men were essentially simultaneous, and all three men were aware (to a greater or lesser extent) of the nature of the others' relations with Linehan. Indeed, for several months, Linehan, Carlin, and Leppink all lived in the same house in Anchorage. (Hilke lived in California.)

On the morning of May 2, 1996, Leppink was found shot to death outside of the small town of Hope (about 90 miles by road from Anchorage). According to the

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[1] *See State v. Carlin*, 249 P.3d 752 (Alaska 2011) (holding that a criminal appeal is not abated by the defendant's death if the defendant's estate wishes to pursue the appeal).

pathologist's investigation, Leppink was killed sometime between 6 hours and 48 hours before his body was discovered — that is, sometime between mid-day on April 30th and the early morning hours of May 2nd.

When the Alaska State Troopers investigated this homicide, they interviewed Linehan, Carlin, and Hilke. However, the troopers were not able to identify any culprits, and the case remained unsolved for several years. In 2004, the state trooper cold case investigative unit re-opened the investigation. Based on a review of the earlier investigation, plus new witness interviews and a forensic examination of the e-mails and other materials recovered from two computers, the troopers concluded that Carlin had lured Leppink to Hope and had shot him there.

The troopers further concluded that Linehan was Carlin's accomplice — not that she physically assisted Carlin during the shooting, but rather that she solicited Carlin to commit this murder, and that she also helped Carlin compose a note that would be left for Leppink to find — a note that would make Leppink want to go to Hope (by falsely making him think that Linehan was staying there in a cabin with another man).

The State's case against Carlin was lengthy and detailed, but it was primarily circumstantial. The State's basic theory of the case was that Linehan was the one who wanted Leppink killed (because she believed she was the beneficiary of his life insurance policy), and that Carlin was so infatuated with Linehan that he agreed to commit murder for her.

In an effort to convince the jury to view the circumstantial evidence in a light that would support Carlin's conviction for murder, the State introduced evidence of a letter that Leppink wrote to his parents shortly before his death — a letter to be opened only if he died under suspicious circumstances.

In this letter, Leppink told his parents that if he was found dead, Mechele Hughes (*i.e.*, Mechele Linehan), John Carlin, and/or Scott Hilke would probably be the

ones responsible. Leppink told his parents that Linehan had a "split personality", and that "the part [he] fell in love with is very beautiful", but Leppink also admonished his parents "to take Mechele down", to "[m]ake sure she is prosecuted", and to "[m]ake sure they [*i.e.*, Linehan, Carlin, and/or Hilke] get burned".

The admissibility of this letter was first litigated before Carlin's trial began. The State took the position that the letter was admissible because it was probative of Leppink's state of mind shortly before the homicide. Carlin's attorney initially told the superior court that she objected to only one portion of the letter: the part where Leppink suggested that Carlin would be among the ones responsible for his death. The trial judge overruled Carlin's objection and concluded that Leppink's accusations were admissible because they tended to prove Leppink's state of mind.

Shortly after the trial judge issued this ruling, the defense attorney asked the judge for permission to file a motion for reconsideration of this issue later that week, based on "some additional cases" she had found. The trial judge told the defense attorney that she could seek reconsideration.

When Carlin's trial began, the prosecutor gave an opening statement in which he summarized Leppink's letter to the jurors — including Leppink's belief "that if he was killed, it was probably Mechele [Linehan] and John Carlin or Scott Hilke" who were responsible. Later in his opening statement, as he neared his conclusion, the prosecutor displayed a redacted version of Leppink's letter to the jurors, and he read the text of the letter aloud to the jurors while the letter was being displayed.

Here is the relevant portion of Leppink's letter to his parents, as read aloud by the prosecutor to the jurors at the beginning of the trial:

> *Prosecutor*: "Since you're reading this, you assume that I'm dead. Don't dwell on that. It was my time, and there's nothing that can change that. There are a few things

> that I would like you to do for me, though. I hate to be vindictive in my death, but paybacks are hell.
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> . . .
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> "Mechele [Linehan], John [Carlin], and Scott [Hilke] were the people or persons that probably killed me. Make sure they get burned.
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> . . .
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> "Sorry about giving you all this stuff to do. I wouldn't have done it, but I wanted to make things work. I wanted to marry Mechele. If that would have happened, this [letter] would have all been destroyed. I have kept it as my 'insurance policy'. Use it. I'll rest easier.
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> "Do me another favor and make sure Mechele goes to jail for a long time. But visit her there, and tell her how much I really did/do love her. Tell her you love her and help her. She has a split personality, and the part I fell in love with is very beautiful. I really did want to marry her and make her dreams come true.
>
> "Love ya, Kent."

Several days later, Carlin's attorney filed her contemplated motion for reconsideration. This motion raised both a hearsay objection and a confrontation clause objection to the entire contents of Leppink's letter. The trial judge overruled these objections and, instead, re-affirmed his ruling that the letter was admissible because it tended to prove Leppink's state of mind.

This letter was not admissible

We addressed the admissibility of Leppink's letter (in some detail) in our decision in the connected case of *Linehan v. State*, 224 P.3d 126, 132-37 (Alaska App. 2010). To summarize that discussion:

Even though Leppink's letter was probative of his state of mind, no pertinent facet of Leppink's state of mind was disputed at Carlin's trial. Because there was no dispute as to Leppink's state of mind, the main evidentiary impact of Leppink's letter was its lengthy accusation against Mechele Linehan, and its accompanying accusation that Carlin was probably Linehan's accomplice.

As our supreme court stated in *Wyatt v. State*, 981 P.2d 109, 113 (Alaska 1999), "[e]vidence of a murder victim's fear of the accused is inadmissible if its only relevance is as circumstantial evidence of the *accused's* conduct". (Emphasis added) That is, the evidence is not admissible "if its probative value depends on the impermissible inference that, because the victim feared the accused, the accused likely did something or planned to do something [that would] justify the fear." *Ibid.* [2]

In the present appeal, the State does not argue that Leppink's letter was admissible. Rather, the State relies on two other arguments: first, that it was *Carlin* who chose to introduce the evidence of Leppink's letter; and second, that even if the letter should not have been admitted, this error was harmless in Carlin's case.

We address these two arguments in turn.

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[2] Quoting this Court's decision in *Linton v. State*, 880 P.2d 123, 130 (Alaska App. 1994), *affirmed on rehearing*, 901 P.2d 439 (Alaska App. 1995).

The State's argument that it was Carlin who chose to introduce the letter

In its brief to this Court, the State asserts that "before the letter was admitted as an exhibit" at trial, Carlin's attorney "elicited testimony about the contents of the letter to buttress his defense that Hughes [*i.e.*, Linehan] was the murderer." In other words, the State contends that Carlin's attorney made a tactical decision to elicit testimony concerning the contents of the letter *before* the prosecutor introduced the letter — and that, for this reason, Carlin should not be heard to complain about the admission of this evidence.

The State's characterization of the procedural facts is technically correct, but it is materially misleading.

It is true, as the State asserts, that Carlin's attorney elicited testimony about the contents of Leppink's letter before the prosecutor actually offered the letter into evidence. The defense attorney elicited this testimony during the defense's cross-examination of Linehan's sister, Melissa Hughes. Here is the relevant portion of that cross-examination:

> *Defense Attorney*: One more thing. Now, back during [your] visit [with Mechele] around the 19th [of June], did she also tell you that she was aware that [Leppink] had sent a box to his parents that would implicate her in the murder?
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> *Melissa Hughes*: Yes.
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> *Defense Attorney*: She said that to you on [June] 19th?
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> *Ms. Hughes*: Not necessarily a box. I remember a letter or an e-mail, but I — I seem to remember her saying that he [Leppink] had sent a letter to his parents saying that, if something happened to him, she was responsible.

Defense Attorney: Okay. So [Mechele] knew [about] that on the 19th of June.

Ms. Hughes: I believe so.

(Carlin's attorney later relied on this information during her summation to the jury. The defense attorney argued that Leppink's parents did not open his letter until *after* June 19th — so if Linehan did, in fact, know about the letter on June 19th, she could only have learned this information from Leppink himself. The defense attorney argued that Leppink would not have divulged this letter to Linehan unless *Linehan* was the one who killed Leppink — unless Leppink was standing in Linehan's presence, negotiating for his life, and warning Linehan that, if she killed him, his parents would open the letter and read his accusation against her.)

The State relies heavily on the fact that the above-quoted cross-examination of Melissa Hughes took place before the prosecutor introduced Leppink's letter into evidence. Indeed, the prosecutor did not formally seek admission of the letter until the very end of the trial, shortly before he delivered his summation to the jury.

But as we described in the preceding section of this opinion, the trial judge had already ruled (at the prosecutor's behest) that the letter was admissible. And, following the judge's ruling, the prosecutor displayed Leppink's letter to the jurors during his opening statement, and he read aloud from the letter at some length — including (most notably) Leppink's accusations against Linehan and Carlin.

Later in the trial, in the defense motion for reconsideration, Carlin's lawyer raised both a hearsay and a confrontation clause objection to the letter — asking the trial judge to declare the letter inadmissible in its entirety. The trial judge overruled these objections and re-affirmed his ruling that the letter was admissible to prove Leppink's state of mind shortly before the homicide.

Four days after the trial judge overruled these defense objections and re-affirmed his ruling that the letter was admissible, the defense attorney elicited testimony about the contents of Leppink's letter during the cross-examination of Melissa Hughes.

Thus, even though this cross-examination took place before the prosecutor formally offered the letter into evidence (at the very end of the trial), the prosecutor had already openly relied on the letter in his opening statement (by displaying the letter to the jurors and by reading significant portions of it aloud), and the trial judge had already expressly overruled all of Carlin's objections to the letter.

We therefore conclude that, as a practical matter, it was the prosecutor who first introduced the contents of the letter. The defense attorney's cross-examination of Melissa Hughes, and the defense attorney's efforts to portray the letter (or, more precisely, Linehan's *knowledge* of the letter) as potentially exculpatory for Carlin, came after the prosecutor had already apprised the jurors of the letter and its contents, and after the trial judge had denied the defense motion to exclude the letter on hearsay and confrontation grounds.

For these reasons, we reject the State's contention that Carlin was the first one to introduce evidence of the letter's contents, and we accordingly reject the State's argument that Carlin should therefore be estopped from challenging the admission of the letter.

Whether the improper introduction of this letter requires reversal of Carlin's conviction

We now turn to the question of whether the erroneous admission of Leppink's accusatory letter was so prejudicial to the fairness of Carlin's trial that we must reverse the jury's verdict.

Many courts have noted the extremely prejudicial and inflammatory nature of a victim's accusatory statements "from the grave". *See*, *e.g.*, *People v. Coleman*, 695 P.2d 189, 198; 211 Cal.Rptr. 102, 111 (1985); *State v. Prudden*, 515 A.2d 1260, 1263 (N.J. App. 1986); *State v. Downey*, 502 A.2d 1171, 1178 (N.J. App. 1986). Even in cases where the victim's accusatory statement was found to be properly admitted to prove or explain the victim's ensuing actions, appellate courts have acknowledged that this type of evidence is fraught with inherent dangers, and that it requires rigid limitations on its admission and its use by the jury. *See generally United States v. Brown*, 490 F.2d 758, 766 (D.C. Cir. 1973).

When the victim of a murder was involved in a close relationship with the person accused of the murder, and when the jury hears evidence that the victim feared or predicted that they would meet death at the hand of the defendant, it is a natural tendency for the jury to surmise (in the words of our supreme court in *Wyatt*) that "[if] the victim feared the accused, the accused likely did something or planned to do something [that would] justify the fear."

In Carlin's case, when the prosecutor delivered his opening statement, the prosecutor informed the jurors of the accusations contained in Leppink's letter. It is true that most of Leppink's letter was devoted to the accusation against Linehan; Leppink's accusation against Carlin was more cursory. But for purposes of the State's case, Leppink's accusation against Linehan was almost as telling as a direct accusation against Carlin. The State's theory of the case was that Linehan was the actual mastermind behind Leppink's death, and that Carlin agreed to be Linehan's accomplice because he was so infatuated with her. (The State presented a great deal of independent evidence to back up this latter assertion.)

It is true that the trial judge instructed the jurors that the accusatory statements in Leppink's letter could be considered only for the purpose of ascertaining

Leppink's state of mind near the time of his death. But the incantation of "state of mind" could not cure the prejudice of this evidence.

No one ever explained to the jurors how, or why, Leppink's belief or suspicion that Linehan and Carlin might conspire to kill him had any bearing on the jury's decision. Indeed, Leppink's accusation had no bearing on the jury's decision in Carlin's case — except for the improper inference that, if Leppink feared or suspected that Linehan and Carlin wished to kill him, then there must have been some good reason for Leppink's fears or suspicions.

We note that courts of other jurisdictions have generally rejected the claim that the erroneous admission of this type of evidence is harmless. *See*, *e.g.*, *People v. Lew*, 441 P.2d 942, 945-46; 69 Cal.Rptr. 102, 105-06 (Cal. 1968); *People v. Hamilton*, 362 P.2d 473, 481; 13 Cal.Rptr. 649, 657 (Cal. 1961); *Clark v. United States*, 412 A.2d 21, 30 (D.C. App. 1980); *People v. Coleman*, 451 N.E.2d 973, 977 (Ill. App. 1983); *State v. Ulvinen*, 313 N.W.2d 425, 427-28 (Minn. 1981).

In *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933), the Supreme Court reversed the defendant's conviction for the murder of his wife because the trial judge permitted the prosecutor to introduce a statement made by the wife three weeks prior to her death, in which she accused the defendant of poisoning her. The Supreme Court rejected the government's various theories as to why this evidence was properly admissible, although the Court conceded that the wife's statement might have been relevant to negate any suggestion that she had purposely committed suicide. [3]

In spite of this possible relevance, the Court held that the admission of the wife's out-of-court accusation was prejudicial error. The Court stated:

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[3] *Shepard*, 290 U.S. at 99-104, 54 S.Ct. at 23-25.

> It will not do to say that the jury might accept the [wife's] declarations for any light that they cast upon the [wife's will to live], and reject them to the extent that they charged [her] death to [someone] else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds.

Shepard, 290 U.S. at 104-06, 54 S.Ct. at 25-26.

Likewise, in *State v. Prudden*, the New Jersey appellate court rejected the argument that the trial judge's limiting instruction was sufficient to prevent the jurors from improperly using the victim's out-of-court accusation as proof of the defendant's likely conduct: "[W]e are convinced that even had more precise limiting instructions been given, they would have been to no avail." *Prudden*, 515 A.2d 1260, 1263 (N.J. App. 1986).

Or, as the California Supreme Court stated in *People v. Coleman*,

> Although the trial court ruled [that] the letters' contents [were] admissible only for the limited purposes of impeaching [the] defendant's credibility and to explain and challenge the basis for the opinions of the psychiatric experts, and [although the trial court] carefully instructed the jury on these limited proper uses for the letters, we agree with [the] defendant that these instructions did not — and could not — adequately insure that the letters would not be considered as proof of the truth of the hearsay accusations they contained.
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> . . .
>
> How could the jury possibly disentangle the charges in [those] letter[s] and treat the letter[s] only as evidence of state of mind, and forget about the substance of the charges?

Coleman, 695 P.2d at 196, 198.

In the present case, we likewise find that the trial judge's limiting instructions were ineffective to cure the prejudice of the erroneously admitted evidence.

At the very beginning of the case, the prosecutor told the jury that, shortly before Leppink was killed, he wrote a letter accusing Linehan and Carlin of complicity in his murder — essentially, an accusation from the grave. Neither the prosecutor nor the trial judge ever offered the jury any explanation as to how or why the state of mind revealed by the accusations in Leppink's letter made any difference to any aspect of the jury's decision in this case. This being so, it is almost inevitable that the jurors would view Leppink's assertions as at least circumstantial proof of the matters asserted. In other words, the jurors would suspect that Leppink probably knew what he was talking about — and that, if Leppink believed that Linehan and Carlin were complicit in his death, there was probably some good basis for that belief.

The unfair prejudice of this type of evidence is most acute in a prosecution like this one, where the State's case was based almost entirely on circumstantial evidence. In this situation, the evidence of Leppink's posthumous accusations may well have been the weight that tipped the jury's decision.

Even if the admission of the letter is viewed as non-constitutional error, we must reverse Carlin's conviction unless we are able "to fairly say that the error did not appreciably affect the jury's verdict". [4] Here, we believe there is a substantial possibility that the error did affect the verdict. Accordingly, we reverse Carlin's conviction.

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[4] *See Love v. State*, 457 P.2d 622, 634 (Alaska 1969) (holding that, for instances of non-constitutional error, the test for harmlessness is whether the appellate court "can fairly say that the error did not appreciably affect the jury's verdict").

Conclusion

The judgement of the superior court is REVERSED.