IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MARTIN C. SMITH, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11759 Trial Court No. 4FA-10-357 CR MEMORANDUM OPINION No. 6616 — April 11, 2018

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Robert B. Downes, Judge.

Appearances: Robert John, Law Offices of Robert John, Fairbanks, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge WOLLENBERG.

On March 23, 2009, Martin C. Smith sold twelve oxycodone pills to a police informant during a recorded controlled buy. Two days later, in another controlled buy, Smith sold the informant 240 pills of Valium. The police had obtained a *Glass*

warrant to monitor and record these transactions.[1] Based on these two events, the State indicted Smith in February 2010 for second- and fourth-degree misconduct involving a controlled substance.[2]

After extensive pretrial litigation, Smith waived his right to a jury trial and proceeded to a bench trial on stipulated facts. The court found Smith guilty of both counts.

On appeal, Smith raises seven claims. For the reasons explained in this opinion, we reject Smith's claims and affirm his convictions.

Underlying facts and procedure

In 2008, Smith was prescribed pain medication (oxycodone) and a muscle relaxer (Valium). At the health center where Smith picked up his medication, Smith became friendly with several people who regularly filled their prescriptions there.

In early 2009, one of those people, J.E., agreed to work as a confidential informant for the Fairbanks unit of the Alaska Bureau of Alcohol and Drug Enforcement (ABADE), a statewide drug task force comprised of troopers and local police. J.E. identified Smith as someone from whom she could buy pills. Avery Thompson, then an investigator with ABADE, obtained a *Glass* warrant to record the transactions between J.E. and Smith.

That same day, J.E. contacted Smith about purchasing ten oxycodone pills. She proceeded to his residence, outfitted with a recording device, and Smith came outside to sit with J.E. in her car.

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[1] *See State v. Glass*, 583 P.2d 872 (Alaska 1978).

[2] Former AS 11.71.020(a)(1) (2009) and former AS 11.71.040(a)(1) (2009), respectively.

The *Glass* recording then revealed the following: Smith and J.E. initially made small talk; Smith said he was having a problem with his phone, and J.E. discussed her daughter.

When J.E. produced $100, Smith responded, "I usually give twelve for a hundred, so let me go get you two more." Before Smith went back inside to get the additional pills, Smith told J.E. that the Valium pills were on a thirty-day cycle and thus, he had not received them yet.

Smith returned to the car with two extra pills. In total, he gave J.E. twelve tablets of Roxicet, a variant of Percocet containing oxycodone and Tylenol, in exchange for $100 in cash.

Smith and J.E. chatted for another minute about unrelated personal issues. As Smith exited the car, he thanked J.E., and J.E. confirmed that she should call Smith on Wednesday.

In the subsequent debriefing with the ABADE officers, J.E. explained that Smith would be getting his Valium pills on Wednesday and that he had agreed to sell her the pills.

Two days later (Wednesday), J.E. picked Smith up from the AT&T store, where Smith was getting his phone fixed. J.E. then drove him back to his house, and Smith sold J.E. his entire bottle of 240 Valium pills for $120.

Eleven months later, the State charged Smith with one count of second-degree misconduct involving a controlled substance (for the first transaction) and one count of fourth-degree misconduct involving a controlled substance (for the second transaction).[3]

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[3] Former AS 11.71.020(a)(1) (2009) and former AS 11.71.040(a)(1) (2009), respectively.

Smith subsequently filed several motions. First, Smith moved to suppress the evidence derived from the *Glass* warrant and to dismiss the charges against him due to the failure by the police to timely notify him that he had been the subject of a *Glass* recording. Second, Smith moved to dismiss the charges due to pre-accusation charging delay.

Third, Smith moved to dismiss the charges against him based on entrapment. In particular, Smith's attorney argued that J.E. had leveraged her personal friendship with Smith by making repeated claims of pain that induced Smith to sell her pills, despite Smith's previous unwillingness to do so.

Following several evidentiary hearings, the trial court denied Smith's motions.

Smith's attorney continued to pursue his claim that J.E. had improperly induced Smith to sell her drugs. He sought to relitigate the entrapment defense, and he then reformulated the entrapment claim as a necessity defense and, later, as a "medical necessity" defense. The trial court rejected these efforts.

Smith's attorney also moved to dismiss the indictment, arguing that the superior court had improperly instructed the grand jury regarding its discretion to decline to indict. The court denied this motion.

Ultimately, Smith waived his right to a jury trial and proceeded to a bench trial on stipulated facts. The court found Smith guilty of both counts.

This appeal followed.

Why we uphold the trial court's denial of Smith's motion regarding delayed notification of the execution of the Glass warrant

Alaska Criminal Rule 37(b) requires an officer seizing property pursuant to a warrant to contemporaneously notify the person from whom the property has been

seized. Although this provision does not expressly apply to statements "seized" pursuant to a *Glass* warrant, in *Jones v. State*, we held that this rule was applicable to electronic monitoring of conversations.[4] However, we also recognized that contemporaneous notification might prematurely alert the subject of a wiretap and thwart an on going investigation.[5] Accordingly, we held that the police could delay notifying an individual who has been the subject of a *Glass* warrant for a "reasonable period of time," and we declared that ninety days was an appropriate benchmark, subject to extension upon an ex parte showing of good cause.[6]

Consistent with *Jones*, the *Glass* warrant in Smith's case authorized the police to delay notifying Smith about the execution of the warrant for ninety days from the date of the warrant.[7] The warrant provided that any extension of the notification period required a further court order and good cause.

The warrant was issued and executed on March 23, 2009; hence, the police were required to notify Smith of the warrant by June 21, 2009 or apply for an extension of that deadline. The record is undisputed that the police failed to notify Smith of the execution of the *Glass* warrant at any time, or apply for an extension. Smith only learned of the execution of the *Glass* warrant when he was indicted in February 2010, eleven months after the controlled buys involving J.E. (and eight months after the notification period expired).

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[4] *Jones v. State*, 646 P.2d 243, 249 (Alaska App. 1982).

[5] *Id.*

[6] *Id.* at 250 & n.8.

[7] The warrant clearly sets a ninety-day notification period but contains vague language about precisely when the ninety-day period begins to run. Investigator Thompson testified that the ninety-day period ran from the date of the warrant.

Based on the lack of notification, Smith moved to suppress the *Glass* recording (and dismiss the charges against him). Failure to properly notify a person whose privacy has been invaded by the execution of a *Glass* warrant will justify suppression only if the police intentionally violate the notification requirement, or if the delay in notification results in actual prejudice to the accused.[8] In his motion, Smith's attorney argued that suppression was warranted because of the intentional nature of Thompson's conduct; he did not present any argument regarding prejudice.

The State responded that Thompson's failure to notify Smith was not intentional. The State attached to its opposition a ruling from another superior court judge finding that a different ABADE officer's failure to timely notify under similar circumstances was only negligent.

At the evidentiary hearing on Smith's motion, Investigator Thompson was the only witness, and his testimony focused almost entirely on the reasons why he failed to notify Smith of the warrant. Thompson testified that he mistakenly assumed that his act of referring the charges to the district attorney's office in July 2009 (just after the expiration of the ninety-day notification period) satisfied his notification obligation, since the charging document given to the defendant generally lists the applicable search warrants. Thompson explained that he realized his error in late 2009 and has since corrected his practice.

Smith did not present any witnesses or evidence. The trial court summarily denied Smith's motion.

On appeal, Smith renews his claim that Thompson's failure to notify him was intentional. Although the trial court did not issue any factual findings when it

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[8] *Gallagher v. State*, 651 P.2d 1185, 1186-87 (Alaska App.1982); *accord Brannen v. State*, 798 P.2d 337, 339 (Alaska App. 1990).

resolved Smith's motion, the litigation on Smith's motion focused almost exclusively on the nature of the police conduct. Given this record, it is clear that the trial court rejected the notion that Thompson deliberately violated the notification rule. This finding is not clearly erroneous.

Smith also argues on appeal that he was prejudiced by the delay because he failed to preserve text messages with J.E. that would have corroborated his claim of entrapment. But as noted above, Smith did not testify at the evidentiary hearing on the motion to suppress, nor did he present any evidence as to the nature of his text messages with J.E., when the text messages were deleted, or whether the text messages would have been retrievable from his phone or from another source had the State given him proper notice. Accordingly, this claim is not preserved.

In any event, the record defeats Smith's claim of prejudice. At a later evidentiary hearing on his entrapment motion, Smith testified that he was having trouble with his cell phone as early as the second controlled drug buy on March 25, when his phone was "water damaged" and "refused to work." As a result, he took the phone to AT&T to get it fixed, which is where J.E. picked him up prior to the second buy. Smith testified that by the end of March or the first part of April — long before the June 2009 *Glass* warrant notification deadline — he had exchanged his phone for a replacement.

There was no evidence that Smith would have been able to retrieve the text messages from his phone even if he had received proper notice, or that he ever attempted to recover the messages. At the entrapment hearing, the trial court noted that a significant amount of data can sometimes be retrieved from phones, and the court asked Smith's attorney whether he had attempted to recover any of the text messages from Smith's phone. Smith's attorney responded that he did not "because Mr. Smith's phone was damaged." At oral argument before this Court, Smith's attorney confirmed that he

had not contacted AT&T, and he acknowledged that there was no indication in the record that there was any way to retrieve the text messages once Smith replaced his phone.

Accordingly, we uphold the trial court's denial of Smith's motion to suppress or dismiss based on the improper *Glass* warrant notification.

Why we reject Smith's claim of pre-accusation delay

In a related claim, Smith challenges the trial court's denial of his motion to dismiss the indictment due to pre-accusation delay. The due process clauses of the United States and Alaska Constitutions protect criminal defendants against "unreasonable preaccusation delay."[9] The primary concern of the rule is "the impact of the delay on the accused's ability to present a defense, and not on the length of the delay as such."[10] Thus, to establish an unconstitutional pre-accusation delay, "the defendant must prove both that the delay was not reasonable and that the defendant suffered actual prejudice from the delay."[11]

In the trial court, the prosecutor asserted that at least some of the delay was due to the government's desire to keep J.E.'s status as an informant confidential during the ninety-day period after the issuance of the *Glass* warrant. However, the prosecutor conceded that this need expired by July 2009, and the prosecutor gave no explanation for why the indictment was not filed until February 2010.

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[9] *State v. Mouser*, 806 P.2d 330, 336 (Alaska App. 1991) (citing U.S. Const. amend. XIV; Alaska Const. art. I, § 7).

[10] *Id.*

[11] *State v. Gonzales*, 156 P.3d 407, 411 (Alaska 2007); *Marks v. State*, 496 P.2d 66, 68 (Alaska 1972).

On appeal, the State acknowledges that it failed to explain the delay in filing charges against Smith. However, the State argues that Smith failed to demonstrate prejudice.

Smith's argument regarding prejudice stems from the same contention he raised in connection with his motion to suppress: he argues that he was prejudiced by the loss of text messages between him and J.E., and that these messages would contextualize his recorded statements to her and explain why he felt compelled to sell her his medications. But this claim of prejudice suffers from the same deficiency we discussed earlier. Smith presented no evidence that he lost the text messages because of the long delay.[12] To the contrary, the evidence affirmatively indicated that Smith's messages with J.E. were irretrievable as early as the date of the second controlled buy.

At oral argument, Smith's attorney claimed that even a short charging delay of a day or two constituted impermissible pre-accusation delay in this case, in light of the phone problems Smith was having by the time of the second buy. But the State provided a reason for at least a short delay — the need to protect J.E.'s identity as an informant. The Alaska Supreme Court has recognized this as a valid reason for at least a short delay.[13]

To the extent Smith is proposing a blanket rule that would require the State to immediately charge a defendant as soon as the State has probable cause to believe the defendant has committed a crime, without the benefit of further investigation or

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[12] *Mouser*, 806 P.2d at 337 (recognizing that to prevail on a claim of pre-accusation delay, a defendant must, at the very least, show "that but for the delay, he would have been able to present favorable evidence") (internal quotations omitted).

[13] *Coffey v. State*, 585 P.2d 514, 519 (Alaska 1978) ("Some delay between offense and formal charge is clearly justified in cases involving drug undercover agents[.]").

reflection, and absent any consideration of the reasonableness of the delay, courts have uniformly rejected such a rule.[14]

We therefore affirm the trial court's denial of Smith's motion to dismiss the indictment based on pre-accusation delay.

Why we uphold the trial court's rejection of Smith's entrapment defense

Smith filed a pretrial motion to dismiss the charges due to entrapment, arguing that J.E. had leveraged her personal friendship with Smith by making repeated claims of pain that induced Smith to sell pills to her. At the evidentiary hearing on Smith's entrapment motion, J.E. testified that she believed her prescriptions were insufficient, and she would often buy medications from other people. J.E. testified that she began buying pills from Smith in 2008, approximately one year before the controlled buys.

In contrast, Smith testified that although J.E. would constantly "pester" him for his medication, he had never sold his prescription medication to anybody, including J.E., prior to the two controlled buys. When Smith was asked at the evidentiary hearing what led him to engage in the initial transaction with J.E., given his purported previous

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[14] *See United States v. Lovasco*, 431 U.S. 783, 794 (1977) ("[R]equiring the Government to make charging decisions immediately upon assembling evidence sufficient to establish guilt would preclude the Government from giving full consideration to the desirability of not prosecuting in particular cases."); *Yarbor v. State*, 546 P.2d 564, 566 (Alaska 1976) ("When the potential harm which results from reasonable delay is weighed against the anxiety and concern accompanying public accusation, it is clearly in the citizens' best interests to allow district attorneys some latitude in filing criminal cases."); *see also Burke v. State*, 624 P.2d 1240, 1244-45 (Alaska 1980) (concluding that delay caused by need to further investigate case was reasonable under the circumstances of the case and excusing limited additional delay by temporary leave of investigating officer, but cautioning that "continued or long term inactivity or a pattern of lack of prompt investigation of cases might warrant . . . reconsideration").

reluctance, Smith responded that "in March, [J.E.] was really adamant about her pain and not being able to get any help whatsoever. So in our friendship, it really came down to I was the only person that could help her." Smith then asserted that the transaction two days later was a "follow-through" to the earlier transaction; according to Smith, once he had committed to helping her, J.E. viewed his commitment as a promise.

At the conclusion of the hearing, the court orally denied Smith's entrapment motion. The court found that the exchange between Smith and J.E. was clearly "a business transaction," and the court rejected the notion that Smith had been induced to commit the offenses by pleas of pain by J.E. The court found the recording of the transaction highly persuasive, noting that Smith told J.E. that he "usually" gave two extra oxycodone pills in exchange for $100, implying that he had a regular practice of selling drugs.

In later written findings, the court concluded that Smith had failed to show that J.E.'s actions constituted prohibited inducements. The court found that "the recording reveals [that] Mr. Smith, who was obviously friendly to [J.E.], treated her as someone he was doing business with." The court also found:

> The recording of the transaction shows normal conversation without any begging or cajoling, and lacks anything that would convince a non-willing individual to sell drugs. In short, Mr. Smith showed himself to be more than a willing seller of oxycodone to [J.E.], who was simply a willing buyer.

Under Alaska law, entrapment is an affirmative defense decided by the court, not by a jury.[15] To establish entrapment, a defendant must prove, by a preponderance of the evidence, that (1) a law enforcement official, or a person working in cooperation with the official, directly induced the defendant to commit a crime he

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[15] AS 11.81.450; *see Washington v. State*, 755 P.2d 401, 405 (Alaska App. 1988).

would not otherwise have committed, and (2) the police conduct "falls below an acceptable standard for the fair and honorable administration of justice."[16] Alaska's entrapment statute further states that the persuasion or inducement employed by the police must be of a type that "would be effective to persuade an average person, other than one who is ready and willing, to commit the offense."[17]

On appeal, Smith argues that J.E.'s testimony was internally inconsistent, that it was contradicted by other evidence, and that it was therefore not credible. But Smith's attorney fails to even discuss the trial court's ruling. Instead, he repeats whole sections of his trial court briefing without acknowledging the trial court's factual findings or the role of this Court on appeal. We do not re-weigh issues of credibility, and we are obliged to accept the trial court's factual findings unless they are clearly erroneous.[18]

Here, the trial court acknowledged that J.E.'s testimony contained inconsistencies, but the court found that these inconsistencies were immaterial. Rather, the court found that Smith was a ready and willing seller and that the exchange between Smith and J.E. was "a business transaction" unmotivated by any protestations of pain.

In particular, the court noted the following statement by Smith during the transaction: "I usually give twelve [oxycodone pills] for a hundred [dollars] so let me go get you two more." Smith testified that he only said this because J.E. had previously told him that *she* would typically get an extra two pills whenever she paid $100 in cash,

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[16] *Pascu v. State*, 577 P.2d 1064, 1066-67 (Alaska 1978); *Bachlet v. State*, 941 P.2d 200, 206 (Alaska App. 1997).

[17] AS 11.81.450.

[18] *See Long v. State*, 772 P.2d 1099, 1101 (Alaska App. 1989) (noting that "[t]he trial court has the primary responsibility for determining issues of credibility" and reviewing factual findings for clear error); *Blakesley v. State*, 715 P.2d 269, 271 (Alaska App. 1986) (reviewing factual findings underlying entrapment claim for clear error).

and he was attempting to match her expectations. But the trial court rejected Smith's explanation.

We have listened to the *Glass* recording of the first drug transaction (the only recording in the record), and we have reviewed the pertinent portions of the record. The record supports the trial court's findings. We therefore uphold the trial court's conclusion that Smith failed to establish his claim of entrapment.[19]

In a related claim, Smith maintains that law enforcement officers failed to educate J.E. on entrapment and failed to determine the extent of her relationship with Smith prior to using her as an informant. He argues that this constitutes a separate basis for dismissal. But the cases cited by Smith do not directly support this assertion, and Smith did not obtain a ruling (or factual findings) by the trial court on this claim. We therefore conclude that Smith failed to preserve this issue for appeal.[20]

Why we reject Smith's claim that the trial court should have sanctioned the State for failing to preserve J.E.'s text messages

Prior to trial, Smith moved to compel production of J.E.'s text messages. The State indicated that it did not have (or have access to) J.E.'s text messages. Investigator Thompson testified that he did not recall looking at the text messages and did not think at the time he investigated the case in March 2009 that there was any particular importance to the messages.

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[19] *See McKay v. State*, 489 P.2d 145 (Alaska 1971) (rejecting entrapment claim where, despite police officer's representation to defendant that he had a friend who was addicted to heroin and badly in need of the drug, there was a strong inference that the defendant was "ready and willing to engage in the drug transactions wholly independent of [the officer's] pleas" to the defendant's humanitarian motives).

[20] *See Mahan v. State*, 51 P.3d 962, 966 (Alaska App. 2002) (recognizing that to preserve an issue for appeal, an appellant must obtain a ruling from the trial court).

On appeal, Smith argues that the trial court erred in failing to sanction the State for not preserving J.E.'s text messages with Smith — either by dismissing Smith's case or, at a minimum, by presuming that the lost text messages would have been favorable to his entrapment defense (or his medical necessity defense, as described later in this opinion). Smith adds that as a confidential informant, J.E. was part of the law enforcement team, and thus, J.E.'s failure to preserve the texts must be viewed as a failure by the State to preserve evidence.

The State responds that Smith's case does not present a question of failing to *preserve* evidence, but rather of failing to *collect* evidence.

This distinction is potentially significant. When the State destroys already-collected evidence, a criminal defendant may be entitled to a presumption that the evidence would have been favorable.[21] In contrast, while the police may have a duty to collect and preserve evidence that they know is important, the State generally does not have a duty to collect all evidence related to a crime.[22] Thus, the State's failure to collect evidence does not generally warrant a presumption that the evidence would have been favorable to the defense.[23]

We need not resolve whether this case involves a failure to "preserve" or a failure to "collect" because Smith failed to meaningfully litigate his request for a sanction in the trial court. After the presentation of evidence at the hearing on Smith's entrapment claim, the trial court declined to hear further argument, ruling directly on the evidence presented that Smith's case was clearly "not an entrapment situation." Smith's attorney indicated that he wished to argue the issue further, and he sought to file

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[21] *See Thorne v. Dep't of Pub. Safety*, 774 P.2d 1326, 1331-32 (Alaska 1989).

[22] *Carter v. State*, 356 P.3d 299, 300-01 (Alaska App. 2015).

[23] *Id.*

supplemental briefing. The court allowed Smith's attorney to file a supplemental brief, but the court clearly stated that it would not change its ruling.

Smith filed a post-hearing brief, in which he raised, for the first time, the possibility of a sanction for the State's failure to preserve J.E.'s text messages. But Smith's argument regarding this proposed sanction was cursory, stating only that "as a matter of fundamental fairness, the Court must infer that the text messages J.E. sent Smith support a finding of entrapment."

Smith did not discuss the State's obligation to collect or preserve the messages. He did not cite any cases or provide any authority for inferring a duty on the part of law enforcement to memorialize the text messages between an informant and the subject of the investigation, particularly any text messages that may have preceded the issuance of the *Glass* warrant. And even assuming that such an obligation exists, Smith did not discuss why the particular circumstances of this case warranted a sanction.[24]

Moreover, Smith never obtained an express ruling on his request for a favorable presumption. After Smith filed his supplemental brief, the court issued a written ruling again denying Smith's entrapment claim. The court did not address Smith's request for a presumption or make any factual findings related to that claim. We therefore conclude that Smith failed to preserve this issue for appeal.[25]

In any event, the issue appears to be moot. In response to further argument by Smith's attorney at a later hearing, the trial court effectively applied a favorable

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[24] *See Thorne*, 774 P.2d at 1331 (in determining the proper remedy for the State's destruction of evidence gathered during a criminal investigation, a court must balance four factors — "the degree of culpability on the part of the state, the importance of the evidence lost, the prejudice suffered by the accused, and the evidence of guilt adduced at the trial or hearing").

[25] *See Pierce v. State*, 261 P.3d 428, 430-31 (Alaska App. 2011).

presumption to the missing text messages, and still denied Smith's entrapment claim. The court found that, even assuming the text messages demonstrated that J.E. was making repeated pleas for pain relief, the messages would not "have any consequence" — that is, Smith's entrapment claim would still fail because the recording showed that Smith was "a dealer in drugs" who was not actually induced to complete the sales by J.E.'s alleged pleas of pain.

We therefore reject Smith's claim that he is entitled to relief for the State's failure to retrieve J.E.'s text messages with Smith.

Why we reject Smith's claim that he was entitled to present evidence of his entrapment defense at a jury trial

After the trial court denied Smith's claim of entrapment, Smith gave notice of his intent to present the defense of entrapment at trial. (Smith also gave notice of his intent to pursue a necessity defense, but he did not provide an explanation of this proposed defense or how it differed from his entrapment claim.)

The State objected, arguing that the court had already decided Smith's entrapment claim. The court struck Smith's notice of entrapment as "res judicata" and issued a protective order barring Smith from raising his entrapment defense at trial under the auspices of either a necessity or a justification defense.

On appeal, Smith acknowledges the long-standing case law holding that entrapment is decided by the judge and not by the jury,[26] and he does not argue that he was entitled to a *jury* determination on entrapment. Rather, Smith maintains that he was entitled to present evidence supporting his entrapment claim during the course of a jury

[26] *See Pascu*, 577 P.2d at 1066 n.2 (citing *Grossman v. State,* 457 P.2d 226, 230 (Alaska 1969)).

trial in order to allow the *trial court* an opportunity to reconsider its denial of Smith's entrapment defense.

But Smith had already litigated his entrapment claim. He did not proffer any new evidence related to the claim, nor was there any reason to think the trial court would reconsider its position. He was not entitled to a second opportunity to litigate an issue that had already been decided against him.[27]

Moreover, Smith does not argue that the evidence related to his entrapment claim was relevant to any issue that would have been before the jury for decision.[28] Thus, any entrapment-related evidence offered at a jury trial would have been subject to exclusion as irrelevant under Alaska Evidence Rule 402.

Accordingly, we uphold the trial court's order barring Smith from re-litigating his entrapment defense at trial.

The trial court did not abuse its discretion in denying Smith an opportunity to litigate a "medical necessity" defense

In May 2013, Smith waived his right to a jury trial and proceeded to a bench trial on stipulated facts. But shortly after Smith's waiver of jury, Smith's attorney indicated that he wished to raise a "medical necessity" defense. The attorney stated that if the Court granted the motion, Smith would be entitled to a jury trial.

The court expressed surprise and confusion about this motion. The court reiterated that, based on the *Glass* recording and the testimony presented, it had rejected

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[27] *See Smith v. Clearly*, 24 P.3d 1245, 1248 (Alaska 2001) (under the law of the case doctrine, courts generally refuse to reopen issues that have already been decided).

[28] *See Scudero v. State*, 917 P.2d 683, 686 (Alaska App. 1996) (noting that the right to a jury trial does not entitle the accused to have a jury resolve extrinsic factual issues that bear on a legal defense like entrapment unless the facts relate to an essential element of the charged offense).

Smith's entrapment claim. Smith's attorney acknowledged that entrapment was a question for the court, and that the trial court had made credibility findings that would be difficult to challenge on appeal. But Smith's attorney maintained that "medical necessity is a jury question," and he told the court that he wished to present "largely the same evidence" to the jury "for the jury to determine." Smith's attorney also acknowledged that the court had previously struck his necessity defense, but he claimed that he had recently discovered a new constitutional basis for his claim of necessity.

The trial court ruled that Smith was simply pursuing the "same animal by just a different name." The court denied Smith's motion and refused to consider any further motions. The parties then submitted the case to the court on a written stipulation of facts.

We conclude that the court did not abuse its discretion in denying Smith's request to pursue further motion practice on his claim of "medical necessity." At that point, the court had already denied Smith's entrapment defense and resisted prior attempts by his attorney to relitigate the same claim under the guise of a statutory necessity defense. Additionally, Smith had already waived his right to the very jury trial at which his attorney now sought to present this defense. Smith's attorney provided no legal support or citation to authority for the proposed defense and only vaguely referenced a "constitutional basis" for his claim. The trial court had no obligation to continue the trial at that late stage for further motion practice on a claim Smith's attorney had yet to clearly define or distinguish from the defenses that the court had previously rejected.

Why we reject Smith's challenge to the grand jury instructions

Prior to Smith's grand jury proceeding, the superior court instructed the grand jury as to its powers and duties.[29] Part of the two-page grand jury charge advised the grand jurors:

> Once you have heard the State's evidence, along with any additional evidence presented at the request of the grand jury, you must decide whether that evidence, if unexplained or uncontradicted, would warrant conviction of the defendant. If at least ten of you believe the evidence has met that standard, the indictment should be endorsed a "true bill" and signed by your foreperson.

Based on this language, Smith moved to dismiss the indictment. In particular, Smith argued that the use of the words "should be endorsed a 'true bill'" obligated the grand jury to indict if it concluded that the evidence was sufficient to support the charges. Smith argued that this language was contrary to the grand jury's absolute discretion to refuse to indict.

Smith urged the trial court to follow the reasoning of another superior court judge, who had recently decided that the use of the word "should" in the grand jury instructions was improper and failed to convey the grand jury's discretion to refuse to return an indictment.[30] Smith noted that the jury instruction in that case, *State v. Leighton*, was identical to the instruction given in Smith's case. (In fact, Smith's memorandum tracked the defendant's memorandum in *Leighton* almost verbatim.)

The superior court denied Smith's motion to dismiss, rejecting the notion that "should" was tantamount to "shall." Smith renews his challenge to the indictment on appeal.

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[29] *See* Alaska R. Crim. P. 6(a) & (e)(2).

[30] *See State v. Leighton*, 336 P.3d 713, 715 (Alaska App. 2014).

Article I, section 8 of the Alaska Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment.

Alaska Statute 12.40.050 provides that a "grand jury may indict or present a person for a crime upon sufficient evidence, whether that person has been held to answer for the crime or not."

During the pendency of Smith's appeal and before Smith filed his opening brief, this Court considered the trial court's decision in *State v. Leighton*, and we reversed it.[31] We rejected the notion that the word "may" — as used in Article I, section 8 of the Alaska Constitution and AS 12.40.050 — conferred an absolute right on the grand jury to refuse to return an indictment.[32] And we held that even if grand juries in Alaska have a right of nullification, the language in the grand jury charge stating that "the indictment should be endorsed 'a true bill'" adequately conveyed this concept.[33]

Smith maintains that this Court's decision in *Leighton* is "narrow" and is based solely on the meaning of "should" without regard to the other instructions the grand jury did, or did not, receive. We agree. But Smith's claim in the trial court was similarly narrow.

In light of our decision in *Leighton*, Smith now broadens his challenge to include other instructions that he claims imposed an obligation on the grand jury to return an indictment if the evidence was sufficient to support the charge. He also argues

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[31] *Id.* at 714.

[32] *Id.* at 715-16.

[33] *Id.*

that the superior court was required to affirmatively instruct the grand jury that it had the absolute discretion to consider the wisdom of the laws being enforced and to decline to indict, regardless of the evidence presented.

Underlying Smith's claim is the assumption that the Alaska Constitution contains a right of grand jury nullification. The State suggests that we rejected this premise in *Leighton*. We disagree. In *Leighton*, we expressly declined to decide whether Alaskan grand juries have a right of nullification.[34] We held only that nothing in the language or history of a single provision of Article I, section 8 — the "may return an indictment" language — implied such a right.[35]

But even assuming that Alaskan grand juries possess the right to nullify,[36] an issue we do not decide, Smith failed to preserve the broader challenge to the grand jury charge that he now raises on appeal. And he does not present any argument that *Leighton* — which resolved the claim he did raise in the trial court — was wrongly decided.

We note that this is not a situation where the grand jury was affirmatively instructed that it could *not* consider the wisdom of the laws or offenses with which Smith was charged. Indeed, there are portions of the grand jury charge that appear to convey

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[34] *Id.* at 715.

[35] *Id.*

[36] *See, e.g.*, *State v. Markgraf*, 913 P.2d 487, 487 (Alaska 1996) (Matthews, J., joined by Eastaugh, J., dissenting from order dismissing petition for hearing as improvidently granted) (citing *Vasquez v. Hillery*, 474 U.S. 254, 263 (1985)); *see also Wassillie v. State*, 411 P.3d 595, 608 & n.87 (Alaska App. 2018) (declining to decide whether the grand jury has the discretion to decline to indict when the evidence supports the changes as framed by the prosecution).

to the grand jury its dual function "as both a shield and sword of justice."[37] Smith does not discuss this language in his briefing; rather, he focuses only on certain words, untethered from the instructions as a whole.

Additionally, Smith fails to meaningfully brief where the right to nullification is grounded in Alaska law. He conclusorily cites Article I, section 8 of the Alaska Constitution, without any discussion of the history or meaning of this provision. And, even assuming such a right exists, Smith fails to explain why that right necessarily required an instruction beyond the one that was given here.[38]

Under these circumstances, we reject Smith's challenge to the indictment.

Conclusion

The judgment of the superior court is AFFIRMED.

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[37] *See Cameron v. State*, 171 P.3d 1154, 1156 (Alaska 2007). For example, the grand jury was instructed that it had an obligation "to compel persons charged with serious criminal conduct to answer for that conduct if there are just grounds for the charge." The grand jury was also instructed that "[a]t the same time, however, grand jurors have an obligation to every individual to ensure that no one is subjected to criminal prosecution without good cause."

[38] For a discussion of the traditional function of the federal grand jury and differing views about whether that function includes the right to nullify and what, if anything, grand jurors should be told regarding their authority to nullify, see generally the majority and dissenting opinions in *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir. 2005) (en banc).