IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JAMES HOWARD WEASE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11400 Trial Court No. 3AN-09-11235 CR MEMORANDUM OPINION ON REHEARING No. 6625 — April 25, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton and Peter G. Ashman, Judges.

Appearances: Phillip Paul Weidner, and A. Cristina Weidner Tafs, Weidner & Associates, Anchorage, for the Appellant. Nancy R. Simel, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

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

James Howard Wease petitions for rehearing of our memorandum opinion denying his appeal from his conviction for second-degree murder and evidence tampering.[1]

First, Wease claims that we failed to recognize that, before his case was submitted to the jury, he gave adequate and timely notice to the judge of a request that the jury be instructed on manslaughter, negligent homicide, and self-defense (instructions that were not given to the jury). Wease further claims that the judge abused his discretion when he denied Wease's motion, filed after jury deliberations were hours underway, to interrupt the jury's deliberations and to provide the jury with these instructions.

Second, Wease argues that we erred in upholding the judge's denial of motions to suppress evidence seized pursuant to two search warrants. Third, he reiterates his argument on appeal regarding an alleged variance between Wease's indictment and the prosecution's theory at trial.

We conclude that Wease's petition for rehearing lacks merit in all but one regard. Wease correctly points out that our memorandum opinion in his case erred when it characterized a motion as a pretrial motion rather than one filed during trial. We will correct this factual error in our memorandum opinion.

Wease did not timely request instructions on lesser degrees of homicide and self-defense

In our decision in this case, we rejected Wease's contention that he had given adequate and timely notice of a request for jury instructions on lesser degrees of

[1] *Wease v. State*, 2017 WL 1379313 (Alaska App. Apr. 12, 2017) (unpublished).

homicide and self-defense before the case was submitted to the jury.[2] Wease now seeks reconsideration of this matter.

Alaska Criminal Rule 30(a) states in relevant part that "[n]o party may assign as error any portion of the [jury instructions] or omission therefrom unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objections."

Our recitation of the relevant factual and procedural background of this jury instruction issue in our decision was cursory, so we now provide a fuller context for our ruling.

The evidence at trial suggested that, when Wease killed his wife by stabbing her multiple times, he either intended to kill her, or to inflict serious physical injury to her, or that he was reckless as to the possibility that he would cause her death. In a motion filed the day before Wease's case went to the jury, Wease nonetheless argued that, given the State's trial presentation, the State should be deemed to have so fully committed itself to a theory of intentional killing that it forfeited any right to an instruction on second-degree murder based on a lesser culpable mental state.

Wease's motion contained a footnote (hereinafter the "query" footnote) that discussed what should occur in the event that the judge *did* instruct the jury on second-degree murder over Wease's objection. The footnote proposed that, in this event, the judge would be obligated to instruct the jury on additional matters:

> Query as to whether the Court would be required, if it rejects the Defendant's insistence on "all or nothing," to wit, no lesser includeds under First Degree Murder/Homicide in this case, to instruct on justification, self defense, and heat of passion. The answer is, if it improperly refuses to dismiss Count II under the Indictment, and give[s] a Second Degree

---

[2] *Id.* at *5-6.

> Murder Instruction over objection, it must instruct on said defenses, which will not cure the error, but the absence of which would be plain error in its own right.

Wease's defense attorney, Phillip Weidner, orally argued this motion to the court on the afternoon after he filed it. Weidner argued for an acquittal on the second-degree murder count: "[T]here is no evidence, on the State's theory, to support a reckless killing. It's intentional or it's all-or-nothing [on first-degree murder]." But Weidner did not announce that, if the judge did instruct the jury on second-degree murder, Weidner would then abandon his "all-or-nothing" stance and request instructions on lesser-included offenses and self-defense.

Superior Court Judge Michael L. Wolverton denied the motion, finding that the second-degree murder charge was supported by sufficient evidence to go to the jury. After the judge made his ruling, the defense attorney did not argue the theory contained in the "query" footnote: that additional jury instructions might somehow be necessary due to this ruling.

The judge then turned to a discussion of the parties' proposed jury instructions. At no point during this discussion did Weidner alert the judge that he now wished to abandon his oft-repeated insistence that he was running an all-or-nothing defense to murder, and that he was therefore requesting instructions on lesser degrees of homicide. And Weidner never mentioned the "query" footnote — the footnote suggesting that, if the judge instructed the jury on second-degree murder, it would be error not to also instruct the jury on "justification, self defense, and heat of passion." Weidner submitted no proposed instructions on those theories.

During his final argument to the jury, Weidner argued that Wease was not the perpetrator of the murder. Weidner also argued to the jury that "it's all or nothing in this case, and it's nothing. I mean, there is no conviction here. So don't compromise,

and don't horse trade in that jury room, and don't go for this sucker game of Second Degree Murder."

After the jury was excused at 3:51 p.m. to begin deliberations, the court asked if either party had any issues that needed to be addressed. Both parties responded in the negative, and the court went off the record at 3:58 p.m.

At 8:58 a.m. the next morning, the court went on record and discussed with the parties the submission of exhibits to the jury. Then, at 12:09 p.m., the court reconvened to discuss three notes from the jury. Following this discussion, Weidner announced that he had filed a motion to suspend jury deliberations and to instruct the jury on self-defense, heat of passion, and lesser degrees of homicide. The court stated that it would take up the motion at 3:30 p.m.

At the hearing on the motion, Weidner acknowledged that "[a]s we stand here today, the jury is deliberating on First Degree and Second Degree Murder." He then cited the "query" footnote and argued that, based on that footnote, the court should suspend jury deliberations. According to Weidner, this was necessary because the State, during its final argument, discussed trial testimony to the effect that Wease had admitted to a friend that he had engaged in a physical fight with his wife, during which she struck him with a wine bottle before he stabbed her. Weidner argued that the prosecutor's reference to this evidence at trial "raise[d] the issues of self-defense ... heat of passion and manslaughter and negligent homicide." It being late on a Friday afternoon, Weidner suggested that he would file the proposed instructions in writing the following Monday.

The prosecutor responded that the motion for additional jury instructions was untimely under Alaska Criminal Rule 30(a). The prosecutor also argued that a self-defense theory would have affected the way the case was tried, and that instructing the jury on that theory after jury deliberations were underway would therefore be improper.

According to the prosecutor, Wease made a "tactical decision to run a some-other-dude-did-it defense," and to treat the case as an "all-or-nothing case."

The judge denied the motion to further instruct the jury:

> I find the motion wholly without merit, and I agree with the State's position. There was an absolutely clear defense tactical decision made, and it's been made for some time, and no question in anybody's mind about what that is. And the phrase referred to by [the prosecutor] was the one that came to my mind as soon as I read the title and the first two pages of your motion today, which was, if you said it once, you said it half-a-dozen times, "This is an all-or-nothing deal, straight up, straight down" and that's what an attorney does when, together with his client, he determines "I'm going to roll the dice. I don't want any lesser-included [offenses]." ... I understand that decision, and I respect it, and there are many times when that's what you do in your defense and that's what happened here. It was just as clear as could possibly be clear that that's what happened, and to now say that, well, gee, I guess the State's argument was really compelling, I want to run a self-defense case, it is, again, wholly without merit.
>
> I find no legal basis for giving these instructions, and particularly in light of when there was a strenuous objection. For me to have gone ahead and instructed over the objections of the defense on lesser included [offenses] of manslaughter and [negligent homicide] and to have gone into heat of passion when, clearly, that was not the defense, that's reversible error. I mean, that's just running in front of the guns. I wasn't about to do it, and I'm not about to do it now. So the motion is denied.

Wease now argues that the "query" footnote satisfied the requirement in Criminal Rule 30(a) that a party must object to the absence of a particular jury instruction

before the jury retires to deliberate. We disagree. The query footnote was not the equivalent of a request to instruct the jury on additional theories of the case.

In *Mooney v. State*, this Court reaffirmed the majority rule that a trial judge need not instruct on lesser-included offenses unless one of the parties requests such an instruction.[3] By failing to affirmatively propose instructions on lesser-included offenses and self-defense for the court's consideration, or to clearly object before the court instructed the jury, Wease forfeited any right to such instructions; and his change of mind after the jury had begun its deliberations was barred by Criminal Rule 30(a).

In our memorandum decision, we referred to Wease's motion containing the "query" footnote as a pretrial motion, when it was actually filed the day before the case was submitted to the jury.[4] We will correct this error in our memorandum opinion, which will now read:

> Wease contends that he in fact *had* requested these jury instructions. First, he argues that a footnote in his motion to dismiss the second-degree murder charge at the close of the State's case suggested that the court would be required to instruct on self-defense and heat of passion if it denied his motion to dismiss. This footnote was not an adequate substitute for the express request that is required by Alaska Criminal Rule 30(a).

But this error makes no difference to our conclusion. Regardless of when the motion was filed, its "query" footnote did not amount to a request for particular jury instructions. We accordingly deny Wease's petition for rehearing on this ground.

---

[3] *Mooney v. State*, 105 P.3d 149, 155 (Alaska App. 2005) (reaffirming the majority rule that a trial judge need not instruct on a lesser-included offense unless one of the parties requests such an instruction).

[4] *Wease v. State*, 2017 WL 1379313, at *6 (Alaska App. Apr. 12, 2017) (unpublished).

Wease's challenges to two search warrants are meritless

Wease argues in his petition for rehearing that we erred when we upheld the trial court's denial of a defense motion to suppress evidence seized pursuant to two search warrants. The first warrant was issued after the police presented a magistrate with an affidavit setting forth circumstantial evidence that Wease was involved in his wife's disappearance and her subsequent death. In his petition for rehearing, Wease disputes that this affidavit supplied probable cause to search his residence, but he offers no new argument and cites no case law. We accordingly reject Wease's conclusory assertion that the affidavit in support of the first warrant was deficient.

Wease also asks us to reconsider our ruling upholding a subsequent search warrant. That second warrant authorized a search for "[b]lood both visible and microscopic" within Wease's residence. Wease asks us to hold that the second warrant was overly broad — because, according to Wease, the police in their search warrant affidavit only sought authority to search for evidence of blood on a particular wall of the condo, and nowhere else in the condo. (When the police executed the second warrant, they found blood on a carpet pad adjoining the wall mentioned in the search warrant affidavit as the locale of previously observed blood droplets.)

In *Namen v. State*, we explained that a search warrant must describe with particularity the place to be searched and the items to be seized, but that the degree of particularity required in a given case must be determined with practicality and common sense.[5] We further noted that, in certain limited instances, a search warrant affidavit can cure a failure of particularity on the face of the warrant. But we held that for a search

[5] *Namen v. State*, 665 P.2d 557, 566 (Alaska 1983).

warrant affidavit to cure an overly general description on the face of a warrant, the warrant must specifically reference the content of the affidavit.[6]

In his petition for rehearing, Wease does not urge that the search warrant's identification of either the place to be searched (Wease's condo) or the item to be seized (evidence of microscopic or visible blood) was not described with particularity on the face of the search warrant. Rather, Wease observes that in their second search warrant affidavit, the police explained to the judge that they had observed blood droplets on a wall during their initial search of the condo, but that they had failed to collect a sample of that blood.

Because of this explanation, Wease claims that the police request to enter the condo a second time should be interpreted as limited to a search of the wall where the police saw the blood droplets, and nowhere else in the condo — and that, under this interpretation of the search warrant affidavit, the description of the place to be searched in the actual warrant itself, while adequately particular, was fatally overbroad.

In practical effect, Wease argues that, even though the search warrant affidavit supplied probable cause to search the entire condo for blood, and even though the warrant signed by the judge expressly authorized a search of the entire condo for that purpose, the judge should have discerned from a close reading of the search warrant affidavit that the police were actually seeking a more limited authority.

We agree with Wease that, in the search warrant affidavit, the police acknowledged their failure to collect the initially observed blood droplets. But in our earlier opinion, we parsed the affidavit's language describing the scope of the proposed

---

[6] *Id.* at 564.

remedial search, and we concluded that, from a grammatical standpoint, Wease's reading of this request was too narrow.[7] Wease does not now convince us otherwise.

Moreover, Wease's interpretation of the affidavit makes little practical sense. In their search warrant affidavit, the police requested not only authority to search for blood, but also authority to search for cleaning products with which Wease might have cleaned evidence of blood. Then, when the police re-entered the condo, they found that Wease had painted over the blood droplets. It seems implausible that the police intended in their search warrant affidavit to convey that, in the event that Wease tampered with the blood droplets before the police returned under the authority of the second search warrant, the police would then not wish to look elsewhere in the condo for other evidence of blood.

We conclude that the facts cited in the second search warrant affidavit provided the judge issuing the search warrant with probable cause to authorize a search anywhere in Wease's condo for the presence of microscopic or visible blood. Speculation that the police seeking this warrant may have subjectively intended to ask for a narrower search authority does not undermine the validity of the search warrant as actually issued.

The State's theory of the case at trial was not at variance with the evidence presented to the grand jury

Wease also seeks rehearing of our conclusion that there was no fatal variance between the State's case at grand jury and the State's theory of prosecution at Wease's trial.

---

[7] *Wease v. State*, 2017 WL 1379313, at *3 (Alaska App. Apr. 12, 2017) (unpublished).

At grand jury, the prosecutor argued that Wease should be indicted under three theories: first, that Wease knowingly stabbed his wife with intent to kill her (first-degree murder under AS 11.41.100(a)(1)); second (and alternatively), that Wease knowingly stabbed his wife with intent to cause serious physical injury to her, and that as a consequence she died (second-degree murder under AS 11.41.110(a)(1)); and third (again alternatively), that Wease stabbed his wife while acting with extreme indifference to the value of human life, and that as a consequence she died (second-degree murder under AS 11.41.110(a)(2)). These three theories are stated in Counts I and II of the indictment, respectively.

These are the three legal theories that were presented to the jury at the conclusion of Wease's trial. Accordingly, there would seem to be no variance.

Wease argues that the variance arose because, at grand jury, the medical examiner testified that whoever stabbed Wease's wife did so "intentionally." Wease argues that the medical examiner's testimony amounted to an assertion that Wease intended to kill his wife, and that the examiner ruled out the possibility of a reckless killing.

But when the medical examiner testified to the grand jury, he clearly meant that whoever repeatedly stabbed Wease's wife did so "knowingly," and not by accident. Nothing in his testimony excluded the possibility that Wease stabbed his wife with an intent to seriously injure her, or with reckless disregard that death might ensue.

In everyday English, we speak of someone acting "intentionally" or "recklessly." But for purposes of our criminal code, this language is imprecise. As we explained in *Neitzel v. State*, under our criminal code, "knowingly" is the only culpable

mental state that applies to conduct. It means that the conduct — for example, the act of repeatedly stabbing someone — was purposeful as opposed to accidental.[8]

In our criminal code, the words "intentionally" and "recklessly" do not refer to a person's conduct, but rather to a person's mental attitude toward the *results* of their conduct. Thus, if a defendant knowingly stabs someone and that person dies as a result, the defendant would be guilty of first-degree murder if they *intended* to cause the person's death. The defendant would be guilty of second-degree murder if they intended only to inflict serious physical injury, or (alternatively) if they acted with the kind of extreme recklessness that qualifies as "extreme indifference to the value of human life."[9]

In Wease's case, all three of the State's theories of murder were based on the assertion that Wease knowingly stabbed his wife. The three theories differed with regard to Wease's expectation or attitude toward whether his wife would die as a result of his assault.

Wease argues that, at the end of the trial, the prosecutor suggested that Wease could be guilty of second-degree murder even if he accidentally stabbed his wife during a fight. But the portions of the transcript that Wease cites for this proposition simply do not support his argument.

In these pages of the transcript, the prosecutor argued that, even if Wease did not consciously intend to kill his wife when he stabbed her, Wease would still be guilty of second-degree murder if he intended to cause serious physical injury to his wife, or if he knew that the stabbing was substantially certain to cause his wife's death, or if the stabbing demonstrated extreme indifference to the value of human life. But the

---

[8] *Neitzel v. State*, 655 P.2d 325, 326, 329-30 (Alaska App. 1982).

[9] *See Jeffries v. State*, 169 P.3d 913, 916 (Alaska 2007).

prosecutor never suggested that Wease's repeated stabbing of his wife was anything but purposeful.

Conclusion

As to all but the factual error in our memorandum opinion described on page seven of this opinion, we DENY Wease's petition for rehearing.