

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

MARK STEPHIN HORTON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12320
Trial Court No. 3AN-12-7722 CR

MEMORANDUM OPINION

No. 6634 — May 23, 2018

Appeal from the Superior Court, Third Judicial District,
Anchorage, Jack W. Smith, Judge.

Appearances: Laurence Blakely, Assistant Public Defender, and
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
Timothy W. Terrell, Assistant Attorney General, Office of
Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney
General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

Mark Stephin Horton was convicted of attempted murder and first-degree assault for repeatedly stabbing his girlfriend, Sharon Collins. Horton was also convicted

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

of two other crimes: third-degree assault, for threatening to stab a person who tried to end Horton's assault on Collins, and reckless endangerment, for endangering the other people who held Horton on the ground to prevent him from renewing his assault on Collins.

In this appeal, Horton challenges only his attempted murder conviction. He asserts that the trial judge committed error by refusing to instruct the jury on the defense of heat of passion — a defense which, if successful, would have reduced Horton's offense to attempted manslaughter (*i.e.*, attempted voluntary manslaughter) rather than attempted murder.

For the reasons explained here, we agree with Horton that the trial judge should have instructed the jurors on the defense of heat of passion, and we therefore reverse Horton's conviction for attempted murder. The State may, at its option, either retry Horton for attempted murder or, instead, agree to the entry of an amended conviction on that count for attempted manslaughter. (The error does not affect Horton's other convictions.)

Underlying facts

Mark Horton and Sharon Collins had known each other for a number of years, but they began a romantic relationship in late 2011 and into the summer of 2012.

Horton lived in the home of Collins's older sister, Bridgette. Bridgette knew Horton because she had previously been married to Horton's brother.

Horton's feelings for Collins were apparently stronger than Collins's feelings for him. When Collins visited Louisiana in the summer of 2012 (the state where she and Horton were originally from), she decided to look up an ex-boyfriend — and they ended up getting back together. Shortly before Collins returned to Anchorage,

Collins spoke to Horton on the telephone and told him that she no longer wanted to be in a relationship with him.

Nevertheless, when Collins returned to Anchorage, she continued to see Horton, and she stayed with Horton in the room that Horton occupied in Bridgette's house.

On July 30, 2012 — the day of the assault — Horton, his brother, and Collins ran errands, and Horton drank rum throughout the day. After they were done shopping, Horton's brother dropped Horton and Collins off at her sister Bridgette's house.

Upon arriving at the house, Collins visited with Bridgette in Bridgette's bedroom. Collins showed Bridgette a ring that she had just purchased — a ring that she bought for the Louisiana boyfriend whom she had just gotten back together with.

While Collins and Bridgette were talking, Horton entered Bridgette's bedroom. He asked Collins to come to his bedroom to speak with him, and she agreed. In the bedroom, Horton asked Collins to tell him whom she planned to marry. Collins lied and told Horton that she intended to marry him.

According to Collins's later testimony, Horton then left the bedroom, but he soon returned. Horton closed the bedroom door, and then he told Collins that he was going to "fuck [her] up". Collins didn't see any weapon in Horton's hand, but she became worried that he was going to hurt her, so she told him that she had to use the bathroom. She grabbed her purse and left the room — but instead of going to the bathroom, she went to Bridgette's room. Collins told Bridgette that Horton had threatened to hurt her.

Horton soon followed Collins into Bridgette's room. Horton told Collins he was not finished talking to her, and he asked her to leave the room with him. Collins declined. She remained in Bridgette's room until, through the window, she saw her son-

in-law pull up outside the house in his vehicle. Collins called her son-in-law on her cell phone and asked him to come into the house, so that he could walk her out. (Collins wanted to be escorted out of the house because she was afraid of Horton.) Horton, in the meantime, left to smoke a cigarette.

Collins's son-in-law came upstairs to Bridgette's bedroom, and then he and Collins went downstairs to walk out of the house together. But while the son-in-law was walking through the front door to leave the house, Horton (who was outside) stepped behind him, got between him and Collins, and then pushed him outside. As soon as Horton had pushed Collins's son-in-law outside the house, Horton closed and locked the door — thus trapping Collins inside the house, and locking her son-in-law outside.

Horton punched Collins in the face, and then he began stabbing her with a large kitchen knife. When Horton began stabbing Collins, she put up her hand to protect herself, and she yelled for help. Bridgette and two other women who were in the house intervened and tried to stop Horton's assault. Although Horton threatened to stab Bridgette if she interfered, Bridgette threw a baby stroller at Horton, and she hit him over the head with a ceramic figurine. Bridgette's daughter grabbed a wooden bed slat and began hitting Horton with it.

The blows from the wooden slat finally began to affect Horton: Bridgette was able to grasp Horton's hands and drive the blade of the kitchen knife into the wall. While Bridgette and Horton continued to struggle for control of the knife, the other two women held Horton down — allowing Collins to get free of Horton's grasp.

Collins was able to leave the house, and her son-in-law took her to the emergency room. Back inside the house, Horton finally let go of the knife after he realized that Collins had left the scene.

Collins survived Horton's assault, but she suffered five lacerations to her neck, a laceration to her forearm, a laceration on her breast, and a laceration to her finger, which also cut a tendon. (Horton nearly cut her finger off.)

At trial, Horton took the stand. He testified that, after Collins left Bridgette's bedroom and was walking toward the front door, she attacked him with a knife. Horton claimed that when Collins attacked him with the knife, he blacked out and went into "defense mode". He claimed to have no memory of what happened after he saw Collins with the knife — no memory of his assault on Collins, and no memory of how he himself was injured.

Horton gave pre-trial notice that he intended to rely on two defenses: self-defense and heat of passion.

At the conclusion of the evidence, based on Horton's testimony that Collins came at him with a knife, the trial judge granted the defense attorney's request to instruct the jury on self-defense. But the judge ruled that Horton had not presented sufficient evidence to justify an instruction on heat of passion.

The judge conceded that, if the jury believed Horton's claim that Collins attacked him with a knife, this could constitute the "serious provocation" required for heat of passion under AS 11.41.115(a) and (f)(2). But the judge ruled that, because Horton claimed to have been in a state of blackout, there was no evidence that he assaulted Collins in a state of passion. Here is the pertinent portion of the defense attorney's colloquy with the judge:

Defense Attorney: [With regard to] the law of heat of passion, [I would direct the Court's attention to] *Howell v. State*, ... 917 P.2d 1202 (1996). And in that [case], the Court of Appeals says ... that, in the context of the heat of passion statute, the word "passion" encompasses more than anger or rage. It includes fear, terror, or other intense emotions. And

that is exactly what Mr. Horton described in his [testimony] — basically, going into defensive mode.

... He testified that, when he saw that knife, what he went into was a “defensive mode”. And so ... Mr. Horton, through his testimony, has established fear, terror, or other intense emotions. ...

The Court: ... I understand that it’s any intensely held emotion, including, as you’ve indicated, fear. ... The Court is also aware that ... it’s a very low [evidentiary] bar. But in this case, I don’t think that bar has been met — because the defendant himself has indicated that ... he saw the knife, he went into defense mode, then he blacked out. So I’m not sure where I find passion. He went from defense mode to blackout is the evidence that’s in front of the Court. To me, ... intense passion, which is the requirement for heat of passion to be given, doesn’t exist on the evidence in front of the Court. I — There’s just no way to get there from here. So I won’t give heat of passion.

Why the trial judge’s ruling was error

The crux of the trial judge’s ruling is the judge’s conclusion that, because Horton testified that he “went into defense mode” and then “blacked out”, there was no evidence that Horton was in the throes of intense passion. In essence, the judge ruled that Horton’s heat of passion claim failed, as a matter of law, because Horton testified that he was not consciously aware of his actions and his emotional state.

This ruling is contrary to this Court’s decisions on this issue.

In *Howell v. State*, 917 P.2d 1202, 1206-07 (Alaska App. 1996), *Blackhurst v. State*, 721 P.2d 645, 649 (Alaska App. 1986), and *Kirby v. State*, 649 P.2d 963, 968-69 (Alaska App. 1982), this Court recognized that the same facts that give rise to a claim of

self-defense may often also support a finding of heat of passion — if, for example, the defendant’s asserted act of self-defense was not reasonable, or if the defendant’s use of force exceeded what was reasonably necessary, but if the circumstances would support an inference that the defendant was attacked and acted out of panic.

Moreover, in *LaPierre v. State*, 734 P.2d 997, 1001 (Alaska App. 1987), this Court explained that “so long as the totality of the circumstances might fairly have given rise to an inference of heat of passion,” it is not necessary for a defendant “to claim explicitly that he [was] overwhelmed with fear.”

Here, Horton testified that Collins attacked him with a knife and that, as a consequence, he “went into defense mode” and “blacked out” — leaving him with no memory of events until the police arrived. Thus, Horton could not describe his mental state at the time he stabbed Collins, or when he threatened to stab Collins’s sister, Bridgette, and fought with the other two women who helped to subdue him.

But the evidence of Horton’s frenzied attack on Collins, as well as the number of people and the kind of force that was required to subdue him, reasonably support an inference that Horton was in the throes of emotion and out of control when he repeatedly stabbed Collins. And, viewing the evidence in the light most favorable to Horton’s heat of passion claim, it was at least reasonably possible that Collins attacked him with a knife, and that his overwhelming emotion was engendered by this attack.

We therefore conclude that the trial judge committed error by failing to grant the defense attorney’s request for a jury instruction on heat of passion.

Conclusion

Horton’s other convictions (first-degree assault, third-degree assault, and reckless endangerment) are not affected by this error, because heat of passion is not a

defense to these three crimes. But Horton's conviction for attempted murder must be reversed.

The State may retry Horton for attempted murder. Alternatively, the State may consent to the entry of a conviction for attempted manslaughter — for this is the crime that Horton would have been convicted of, had the jury found in his favor on the issue of heat of passion.