IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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| ZACHARY ALAN WHISENHUNT,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-13240<br>Trial Court No. 4FA-16-00872 CR<br><br>MEMORANDUM OPINION<br><br>No. 6977 — November 3, 2021 |

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Douglas L. Blankenship, Judge.

Appearances: Jane B. Martinez, Law Office of Jane B. Martinez, LLC, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. RuthAnne Beach, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Clyde "Ed" Sniffen Jr., Acting Attorney General, Juneau, for the Appellee.

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

Judge TERRELL.

Following a jury trial, Zachary Alan Whisenhunt was found guilty of two counts of second-degree murder — alternate theories of culpability for the death of

Jenessa Kempski — and one count of tampering with physical evidence. Whisenhunt appeals and raises four claims.

First, he argues that the trial court erred in excluding evidence that two other potential suspects — Isaac Horman and William Kraus — kidnapped another woman, Kelli Scott, several weeks after Kempski was killed. Second, he argues that there was insufficient evidence to support his convictions. Third, he argues that the trial court erred in denying his motion for a new trial. Last, he argues that the judgment improperly reflects that the jury's second-degree murder verdicts merged only "for purposes of sentencing" and that the judgment should be corrected to reflect a single conviction for second-degree murder.

Having reviewed the record, we uphold the trial court's decision to exclude evidence of the Scott kidnapping. We also reject Whisenhunt's challenge to the sufficiency of the evidence supporting his second-degree murder and evidence-tampering convictions. We remand Whisenhunt's new trial motion for the trial court to apply the standard for evaluating new trial motions set out in *Phornsavanh v. State*, a decision that it did not have the benefit of when it ruled on the new trial motion.[1] Last, if the court denies the new trial motion, we direct the court to correct the judgment to reflect a single conviction for second-degree murder.[2]

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[1] *Phornsavanh v. State*, 481 P.3d 1145, 1159-60 (Alaska App. 2021).

[2] The State correctly concedes error on this point. *See, e.g.*, *Nicklie v. State*, 402 P.3d 424, 425-26 (Alaska App. 2017).

*Background facts*

*1. The events preceding Kempski's death and the discovery of her body*

On November 2, 2014, a man out cutting firewood discovered the body of Jenessa Kempski off of a trail in the woods near the Chena River in North Pole, Alaska. Her body was mostly intact except that her face and large portions of her throat and neck had been scavenged by animals. The events leading up to her death are set out below.

Video surveillance showed Kempski entering Fairbanks Memorial Hospital at approximately 6:30 p.m. on October 22, 2014, carrying a green duffel bag and a black suitcase. Several hours later, Kempski called her mother and asked her to contact some of Kempski's friends to ask them to either come "hang out with her" or give her a ride. Kempski's efforts to get a ride from friends were apparently unavailing, because the hospital's surveillance video showed Kempski getting into a community service van at approximately 10:15 p.m., carrying the suitcase that was later found near her body.

Kempski was last seen alive at a Holiday gas station where she arrived at approximately 1:30 a.m. on October 23, 2014. The gas station's surveillance video showed Whisenhunt arriving there two minutes later as a passenger in a silver truck.

Whisenhunt and the driver of the truck, his mother's boyfriend, Timothy Horner, entered the gas station's convenience store, purchased cigarettes and coffee, and then left the store. The video then showed Horner standing by the driver's side door of the truck for about fifteen minutes, returning to the store several times to refill his coffee, and then getting back into his truck and leaving the parking lot alone. The surveillance video does not show Kempski or Whisenhunt during the time Horner was waiting by his truck. However, cell phone records showed that Whisenhunt received an incoming text message at the same time that Horner left the gas station without him.

The next day (October 24, 2014), Bradley Kelley was at work reading electric meters when he saw a pair of women's underwear in a tree off of Freeman Road

near the Chena River. Upon further investigation, Kelley also saw personal belongings strewn about along a nearby trail, and a green duffel bag and a black suitcase propped up against a tree trunk. Kelley called Thomas Ruth, a nearby homeowner and friend, and told him what he had found. Ruth later came to check the scene, but, like Kelley, did not venture far enough down the trail to find Kempski's body.

On November 2, 2014, local resident Roger Borash was with his children cutting firewood in that same area off of Freeman Road, when they came across the abandoned clothing, duffel bag, and suitcase. Borash went onto a side trail and saw blood on the ground. He followed the trail further and came upon Kempski's nude body in the snow; her face and throat were badly scavenged. Borash told his children not to enter the area and called 911 on his cell phone.

The medical examiner was later able to determine that Kempski had suffered blunt force trauma to her head and upper body, resulting in a skull fracture and five broken ribs. Kempski had methamphetamine and smaller amounts of hydrocodeine and hydrocodone in her system. But the medical examiner could not conclusively state the cause of Kempski's death. The medical examiner stated that she could have died of her wounds, of hypothermia, of a heart arrhythmia caused by her drug use, of a combination of all those things, or by strangulation. The animal scavenging to Kempski's face and throat impacted the medical examiner's ability to determine Kempski's cause of death.

*2. The investigation into Kempski's death and Whisenhunt's emergence as a suspect*

After Kempski's death became known to the public, many people came forward claiming to have information about her death, most of whom were from the criminal milieu and hoping to make deals in their own criminal cases. Whisenhunt

became a suspect when he provided information to investigators about the condition of Kempski's body when it was found, as well as other details that had not been publicly released. In one interview with a detective, Whisenhunt said:

> I know that her — I know that she had her throat stomped in. I'm not — something about may — maybe had a broken neck. I know that she was buck-ass naked when they found her, you know. I know that — that it was out on Freeman, you know what I'm saying, out at the end of Freeman where — I mean, shit, I used to live out there, I know Freeman very well. Like I said, never knew the girl.

He provided similar details in an email to the detective, stating: "i kno [sic] a few details on how she was killed like that they choked her and stomped her chest and throat and her nose was broken and I kno [sic] she was killed and left naked where she was found on freeman rd."

He also told another person that the killer was a "junkie" who got Kempski really high and "when she woke up in the middle of what he was doing, she freaked out," and the junkie freaked out and killed her. He also said that Isaac Horman, who was a suspect at the time by virtue of his relationship with Kempski, had nothing to do with her murder, adding: "I know details about that shit that nobody knows. But the fucking medical examiner and the police didn't investigate that shit."

As the Alaska State Troopers began to investigate Whisenhunt as a suspect, they determined that his cell phone was at the location where Kempski's body was found. Cell phone records show his cell phone was in the area for over an hour — between 2:33 a.m. and 3:44 a.m. — an hour after Kempski was last seen alive at the Holiday gas station. When investigators asked if he knew Kempski, Whisenhunt told them he had never met her and never had sex with her. However, several DNA samples were collected from Kempski's clothing, fingernails, and body, and Whisenhunt's DNA

matched DNA found under Kempski's fingernails and on her belt (the latter being DNA from semen).

*3. Whisenhunt's charges and trial proceedings*

Whisenhunt was indicted on one count of first-degree murder, two counts of second-degree murder (under two different theories), and one count of tampering with physical evidence.[3]

On the eve of trial, Whisenhunt filed a notice indicating that he wished to introduce evidence suggesting that four other men — Issac Horman, Guy Hines, William Kraus, and Shad Wood — might have killed Kempski. The chief alternative suspect was Horman. Horman's former roommate, Peter Clark, testified at trial that Horman and Kempski were in a sexual relationship and that he heard the two fighting the last time he saw Kempski. Clark testified that, during the fight, he heard Horman call Kempski a "fucking piece of shit" and say that "he should have just killed her." Horman's semen was found inside Kempski's vagina.

Whisenhunt also sought to introduce statements and evidence pointing to Hines, Kraus, and Wood as suspects. Last, Whisenhunt sought to introduce evidence that in November 2014, several weeks after Kempski's death, Isaac Horman and William Kraus went to a drug house to retrieve the property of Guy Hines and, in the process, kidnapped Kelli Scott and held her for a small ransom. Whisenhunt sought to introduce this evidence in support of his other-suspects defense.

The trial court considered Whisenhunt's request to present other-suspect evidence at a two-day hearing. The court ruled that Whisenhunt could introduce

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[3] AS 11.41.100(a)(1)(A), AS 11.41.110(a)(1), AS 11.41.110(a)(2), and AS 11.56.610(a)(1), respectively.

evidence of Isaac Horman as an alternate suspect. But the court ruled that Whisenhunt could not present evidence of Hines, Kraus, or Wood as other suspects. And the court ruled that Whisenhunt could not introduce evidence of the Scott kidnapping, concluding that the facts of the Kempski murder and Scott kidnapping were not sufficiently similar and that the Scott kidnapping thus amounted to improper propensity evidence.

Whisenhunt's defense was that he did not kill Kempski, did not participate in her death, and did not tamper with her body or other evidence. He argued at length in his opening statement and closing argument that Horman killed Kempski.

During the trial, after the State rested, Whisenhunt moved for a judgment of acquittal on all counts. The court denied the motion.

The jury acquitted Whisenhunt of first-degree murder but found him guilty of both counts of second-degree murder and evidence tampering. (As noted earlier, the second-degree murder verdicts merged into a single conviction.)

After trial, Whisenhunt filed a combined motion for a judgment of acquittal and motion for a new trial. The trial court denied the motion.

This appeal followed.

*The trial court did not abuse its discretion in excluding evidence of the Scott kidnapping*

As noted earlier, Whisenhunt sought to introduce evidence that identified Issac Horman, Guy Hines, William Kraus, and Shad Wood as other suspects, and identified several dozen hearsay statements in the form of text messages and out-of-court statements supposedly made by these men or their associates, statements which he claimed implicated them in Kempski's death or in trying to cover it up. On appeal, however, Whisenhunt does not challenge the trial court's rulings excluding these hearsay statements. Rather, Whisenhunt raises only a single narrow challenge: he argues that

the trial court abused its discretion in excluding evidence of Horman and Kraus's November 2014 kidnapping of Kelli Scott.

The basic facts of the Scott kidnapping are as follows.[4]

Guy Hines was arrested in early November 2014 and had left some of his property behind at a kind of "drug flophouse." Horman and Kraus went to this location to retrieve Hines's property, but when they got there, they instead drew their weapons and forcibly removed Scott and another woman from the residence.

Once outside the residence, they let the other woman go but took Scott across town to another location, where they made phone calls to several people demanding $1,100. Eventually, Scott's boyfriend agreed to pay. Kraus drove Scott to the proposed meeting place, but Kraus crashed into a nearby ditch. When Scott's boyfriend arrived, he rescued Scott, and they left Kraus and his vehicle in the ditch and called the police. Kraus and Horman were arrested on November 8, 2014, and both were subsequently convicted for offenses arising out of this incident.

At trial, Whisenhunt argued that the Scott kidnapping was admissible under Evidence Rule 404(b)(1) because, due to the purported similarities between the two crimes, it could show motive, intent, modus operandi, preparation, plan, or absence of mistake or accident. Whisenhunt argued the crimes were similar because they were committed close in time, both involved situations in which women were kidnapped and held hostage, and Scott had told the police that Horman and Kraus threatened to rape and kill her.

The prosecutor disputed Whisenhunt's claim that the offenses were similar. She noted that Scott was abducted at gunpoint in front of several witnesses at a drug

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[4] The facts of this case are also discussed in Horman's appeal. *Horman v. State*, 2019 WL 994513, at *1 (Alaska App. Feb. 27, 2019) (unpublished).

house, while in Kempski's case, there was no evidence that she was taken to the location of her death against her will, much less at gunpoint. She noted that Scott was not harmed, whereas Kempski was subject to a brutal physical assault. She noted that Scott was the subject of ransom demands, while there was no evidence that anyone had ever sought a ransom for Kempski. The prosecutor argued that given the lack of similarity, the Scott kidnapping amounted to propensity evidence.

In response, Whisenhunt's counsel argued that, despite the various unknown aspects of Kempski's case — whether a ransom call occurred, whether she was threatened, and whether she was raped — one could infer that Kempski was taken against her will to the location where her body was found.

The trial court denied Whisenhunt's request to introduce evidence of the Scott kidnapping. The court stated that the events were not sufficiently similar for purposes of Alaska Evidence Rule 404(b)(1).

On appeal, Whisenhunt renews his claim that the Scott kidnapping was similar to the circumstances of Kempski's death and argues that the trial court erred in concluding otherwise. We disagree. The similarities that Whisenhunt claims are speculative. Whisenhunt asserts that the Kempski homicide was like the Scott kidnapping in that it was an instance of drug-debt collectors from the criminal milieu kidnapping a woman to enforce payment of a drug debt. But there is no evidence that Kempski was abducted from the Holiday gas station or otherwise forcibly removed to the location where she was killed. There is no evidence that anyone made ransom demands while holding Kempski hostage, or afterwards. There were superficial similarities, in that both Kempski and Scott were young women involved with the drug milieu. But the trial court did not abuse its discretion in finding that the offenses were not sufficiently similar to support admission of the Scott kidnapping.

*There was sufficient evidence to support Whisenhunt's convictions*

On appeal, Whisenhunt argues that the evidence was insufficient to support any of his convictions. He raises two main contentions regarding the sufficiency of the evidence to support the jury's second-degree murder verdicts. First, he argues that there was insufficient evidence connecting him to the murder. Second, he argues that, even if there was sufficient evidence connecting him to the murder, there was insufficient evidence that he caused Kempski's death while acting with intent to cause serious physical injury or knowing that his conduct was substantially certain to cause death or serious physical injury, as charged in Count II, or with extreme indifference to the value of human life, as charged in Count III. Separately, he also argues that there was insufficient evidence to support his evidence-tampering conviction.

When reviewing a sufficiency of the evidence claim, this Court views all the evidence presented at trial, and the reasonable inferences to be drawn from that evidence, in the light most favorable to upholding the jury's verdict.[5] Viewed in this manner, the evidence is sufficient if a "fair-minded juror exercising reasonable judgment could conclude that the State had met its burden of proving guilt beyond a reasonable doubt."[6] We do not reweigh the evidence or determine the credibility of witnesses.[7]

Viewing the evidence in this light, we conclude that there was sufficient evidence linking Whisenhunt to Kempski's murder. The Holiday gas station surveillance video, the last known record of Kempski being seen alive, shows both Whisenhunt and

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[5] *Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).

[6] *Dailey v. State*, 65 P.3d 891, 898 (Alaska App. 2003).

[7] *See, e.g.*, *Ratliff v. State*, 798 P.2d 1288, 1291 (Alaska App. 1990) ("[T]he weight and credibility of evidence are matters for the jury to consider in reaching a verdict, not for the reviewing court to decide in ruling on the legal sufficiency of the evidence.").

Kempski. Whisenhunt's semen was found on Kempski's belt, and his DNA was found under her fingernails. And, only a few hours after they were both last seen at the Holiday gas station, Whisenhunt's cell phone (and thus presumably Whisenhunt) was in the area where Kempski's body was found.

There was also sufficient evidence to show that Whisenhunt committed the murder in a manner that satisfied the elements of the two theories of second-degree murder for which he was found guilty. Count II charged Whisenhunt under AS 11.41.110(a)(1), *i.e.*, causing the death of a person while acting "with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury[.]" Count III charged Whisenhunt under AS 11.41.110(a)(2), *i.e.*, "knowingly engag[ing] in conduct that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life." The Alaska Supreme Court has recognized that "extreme-indifference murder is intended to allow actors to be convicted of murder if their actions, while not purposeful or knowing with regard to the resulting death, demonstrate equivalent indifference to the value of human life."[8]

Viewed in the light most favorable to the verdicts, the evidence was sufficient to show that Kempski was killed in a manner that satisfied the elements of these offenses. The medical examiner testified that Kempski had a skull fracture and five broken ribs, and had been subjected to substantial blunt-force trauma to her upper body. Moreover, her face and part of her neck were eaten away, and a wildlife expert testified that scavenging animals will typically start in on an area where there is blood and wounds, thus suggesting that Kempski suffered blunt-force trauma to her face and neck.

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

Moreover, Whisenhunt made statements suggesting awareness of these injuries and how they were inflicted. In a recorded prison phone call, he said that the man who killed Kempski "got her really high, and then when she woke up in the middle of what he was doing, she freaked out, and then he freaked out" and killed her. And in an email to an investigator with the Alaska State Troopers, Whisenhunt stated: "I kno [sic] a few details on how she was killed like that they choked her and stomped her chest and throat and her nose was broken and I kno [sic] she was killed and left naked where she was found on freeman rd." Jurors could reasonably conclude that Whisenhunt was describing his own actions. The evidence thus supported the jury's verdicts on the alternative theories of second-degree murder.

We likewise reject Whisenhunt's sufficiency of the evidence challenge to his evidence tampering conviction. A jury convicted Whisenhunt of evidence tampering under AS 11.56.610(a)(1) for concealing Kempski's body by leaving it in a location where it was unlikely to be found, and where its evidentiary value would be destroyed over time due to degradation.

On appeal, Whisenhunt makes the conclusory assertion that "[t]he state presented insufficient evidence that Whisenhunt is the individual who 'tampered' or had anything to do with Kempski's body." But a reasonable juror could infer that Whisenhunt dragged Kempski's body off the trail to a location where it was unlikely to be found (or would at least be substantially altered by exposure to animals or the elements by the time it was found). We therefore reject Whisenhunt's challenge to the sufficiency of the evidence to support his evidence tampering conviction.

*Why we remand for reconsideration of Whisenhunt's motion for a new trial*

On appeal, Whisenhunt argues that the trial court erred in denying his motion for a new trial.

In evaluating a new trial motion where the defendant claims that the verdict is against the weight of the evidence, a trial court is required to place itself in the position of a juror and personally evaluate the weight and credibility of the evidence to determine whether a new trial is necessary "in the interest of justice."[9]

Here, the trial court correctly recognized that it was required to independently assess the witnesses and evidence and not defer to the jury's assessment of witness credibility or the jury's weighing of the evidence. In its order, the court engaged in a lengthy review of the evidence, noting that the evidence against Whisenhunt was largely circumstantial and that some of the facts pointed to other suspects. The trial court then concluded that in its estimation, *i.e.*, had the judge been voting as a juror at trial, "the evidence was insufficient to prove the case beyond a reasonable doubt." The court followed this finding of insufficiency with the statement: "But the court cannot conclude that the evidence is so one-sided that the jury's contrary view of the case is plainly unreasonable and unjust." The court then denied the motion for a new trial.

We recently addressed the legal standard that applies to motions for a new trial based on the weight of the evidence. In *Phornsavanh v. State*, we noted that an appellate court should reverse a trial court's denial of a motion for a new trial based on the weight of the evidence only if the appellate court concludes that "the evidence is so slight and unconvincing as to make the verdict plainly unreasonable and unjust."[10] We clarified, however, that this is not the standard that trial courts should apply in the first instance.[11] Instead, when deciding whether a motion for new trial based on the weight

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[9] *Phornsavanh v. State*, 481 P.3d 1145, 1157-59 (Alaska App. 2021).

[10] *Id.* at 1159 (quoting *Ahlstrom v. Cummings*, 388 P.2d 261, 262 (Alaska 1964)).

[11] *Id.* at 1157-61.

of the evidence should be granted, a trial court must take a "personal view of the evidence" and independently weigh the evidence.[12] The trial court must then "use its discretion to determine whether a verdict is against the weight of the evidence — not merely whether the trial court disagrees with the verdict — and whether a new trial is necessary 'in the interest of justice,' that is, 'to prevent injustice.'"[13]

Here, the record is ambiguous as to whether the trial court actually exercised its discretion and made an independent finding about "the interest of justice." It is possible that the trial court found that the jury's verdict was not unjust, even though the trial court personally disagreed with it. But it is also possible that the trial court simply deferred to the jury's verdict because an evidentiary basis for that verdict existed.[14] We therefore conclude that a remand for clarification is required. On remand, the court shall clarify why, after independently weighing the evidence, it found that the evidence was "insufficient." And the court shall further clarify whether, given that apparent insufficiency, a retrial is needed in the "interest of justice."[15]

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[12] *Id.* at 1159 (quoting *Hunter v. Philip Morris USA Inc.*, 364 P.3d 439, 447 (Alaska 2015)).

[13] *Id.* at 1159 (quoting *Hunter*, 364 P.3d at 448).

[14] *Id.* at 1158 (noting that a verdict may be set aside as unjust even when the evidence is otherwise legally sufficient to support the verdict); *see also Kava v. Am. Honda Motor Co.*, 48 P.3d 1170, 1176 (Alaska 2002) (noting that a court may set aside a verdict as against the weight of the evidence even when substantial evidence supports it).

[15] *Phornsavanh*, 481 P.3d at 1159 (holding that a new trial should be granted if the judge has "a real concern that an innocent person may have been convicted") (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)); *see also United States v. Morales*, 910 F.2d 467, 468 (7th Cir. 1990), *amending* 902 F.2d 604 (7th Cir. 1990) (noting that "[i]f the complete record, testimonial and physical, leaves a strong doubt as to the defendant's guilt, even though not so strong a doubt as to require a judgment of acquittal, the district judge may be obliged to grant a new trial").

Accordingly, we remand this case for reconsideration of the new trial motion in light of the standard set out in *Phornsavanh*. In doing so, we suggest no position on the merits of that motion.

*Conclusion*

This case is REMANDED to the superior court for reconsideration of the motion for a new trial on the ground that the verdicts were against the weight of the evidence. We retain jurisdiction. The superior court shall hold a hearing and transmit its findings to this Court within 120 days of this decision. This deadline may be extended by the superior court for good cause and notification to this Court.

We reject Whisenhunt's remaining claims on appeal.