IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RALPH ELDON NAYOKPUK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12590 Trial Court No. 3AN-14-07073 CR MEMORANDUM OPINION No. 6784 — April 10, 2019

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

Appearances: Margi A. Mock, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Joannides and Smith, Senior Superior Court Judges.[*]

Judge Allard.

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

On August 6, 2014, Ralph Eldon Nayokpuk killed his uncle by stabbing him twelve times in the back and chest with a kitchen knife. A jury convicted Nayokpuk of second-degree murder for this conduct and he was sentenced to 60 years of imprisonment with no time suspended.

Nayokpuk argues that the superior court committed reversible error by refusing to instruct the jury on the heat of passion defense.[1] He also argues that his sentence of 60 years to serve is excessive.

For the reasons explained here, we find no merit to these claims and affirm the decisions of the superior court.

Nayokpuk's claim that he was entitled to a heat of passion defense instruction

Alaska's heat of passion defense is set out in AS 11.41.115(a). Under the statute, a defendant is entitled to raise a heat of passion defense if he presents "some evidence"[2] that (1) he killed the victim while in a heat of passion, (2) the heat of passion was the result of "serious provocation by the intended victim", and (3) a reasonable person in the defendant's circumstances would not have cooled down during the interval between the provocation and the homicide.[3] "Serious provocation" is defined for these purposes as conduct "sufficient to excite an intense passion in a reasonable person in the

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[1] Under AS 11.41.115(e), a successful claim of heat of passion cannot absolve the defendant of guilt but will reduce the homicide from first- or second-degree murder to manslaughter (or another crime not specifically precluded).

[2] *See Dandova v. State*, 72 P.3d 325, 332 (Alaska App. 2003) (defining "some evidence" in this context as "evidence which, if viewed in the light most favorable to the defendant, is sufficient to allow a reasonable juror to find in the defendant's favor on each element of the defense") (citing *Lacey v. State*, 54 P.3d 304, 308 (Alaska App. 2002)).

[3] *See Wilkerson v. State*, 271 P.3d 471, 473 (Alaska App. 2012).

defendant's situation, other than a person who is intoxicated, under the circumstances as the defendant reasonably believed them to be."[4]

Nayokpuk's claim in this appeal relates to the second element: he argues that the superior court erred by finding that he did not present enough evidence of "serious provocation by the intended victim" to entitle him to raise the heat of passion defense.

At the time of the stabbing, Nayokpuk and his uncle, Ronald Mullins, lived together in a house owned and occupied by Alma Mullins, Mullins's mother and Nayokpuk's grandmother. Ronald Mullins's girlfriend and her niece were also staying in the house. With the exception of Mullins's girlfriend, who was employed, everyone in the household relied on Alma Mullins's social security and retirement benefits for their living expenses.

On the morning of August 6, 2014, Alma Mullins told Nayokpuk that she did not have enough money to support everyone in the household and that he or Ronald Mullins would have to get a job. Later, she gave Nayokpuk ten dollars to buy some food for himself, and she asked him to mail some bills for her. When Nayokpuk returned to the house a couple of hours later he had no food and he threw the undelivered mail in her face. Nayokpuk said he had a "terrible headache," but Alma Mullins thought he might be "on something." Nayokpuk asked her for more money for food, but she refused to give him any. She told him he needed to start supporting himself and she observed that her younger grandson was able to take care of himself and he was only nine years old.

Over the course of the evening, Alma Mullins became concerned enough about Nayokpuk's anger that she decided to call the police. But when she picked up the phone there was no dial tone, and she thought Nayokpuk might have knocked the phone

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[4] AS 11.41.115(f)(2).

cords from the wall. She called upstairs to Ronald Mullins. After she explained the trouble with the phone, Ronald Mullins asked her if she wanted him to call the police for her. She answered, "it's up to you," and then said "yes, you could . . . call the police for me." Ronald Mullins walked toward the kitchen where Nayokpuk was making dinner. Within moments, Alma Mullins looked over and saw Nayokpuk on top of Ronald Mullins stabbing him with a butcher knife. Nayokpuk stabbed Mullins twelve times in his chest and back and he died from the wounds.

Nayokpuk concedes that Ronald Mullins's question immediately before the stabbing — asking Alma Mullins if she wanted him to call the police — did not, on its own, amount to "serious provocation" entitling him to a jury instruction on the heat of passion defense. Instead, he argues that the court should have found "serious provocation" based on the cumulative effect of Ronald Mullins's conduct that night and on prior occasions. Specifically, Nayokpuk points to evidence that Mullins had stolen engine parts from Nayokpuk's vehicle and sold them for alcohol. He also points to evidence that, about a month before the stabbing, Nayokpuk told a relative that if Mullins "was going to put his hands on him again, he was going to kill him." Nayokpuk argues that this latter testimony was evidence that Mullins had either assaulted him or engaged in mutual combat with him.

We have previously addressed the legal claim that a defendant is entitled to raise a heat of passion defense based on the cumulative effect of a "series of provocations" over time.[5] But we found it unnecessary under the facts of those cases to resolve that legal question.[6] We reach the same conclusion here, for two reasons.

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[5] *See Wilkerson*, 271 P.3d at 473-74; *Dandova*, 72 P.3d at 334-37.

[6] *See Wilkerson*, 271 P.3d at 474; *Dandova*, 72 P.3d at 337.

First, Nayokpuk failed to raise this claim below. In his argument to the superior court, Nayokpuk's attorney noted that there had been tension in the household stemming from the crowded house, financial difficulties, jealousy, and certain conduct by Ronald Mullins that angered Nayokpuk (namely, Mullins driving drunk and parking too many cars on the property). The attorney then urged the court to find that when Ronald Mullins asked Alma Mullins if she wanted him to call the police, Ronald Mullins was in effect threatening to remove Nayokpuk from the house, and this threat was sufficient "serious provocation" by Mullins to entitle Nayokpuk to raise the heat of passion defense. The defense attorney never argued that Nayokpuk was entitled to raise a heat of passion defense based on a "series of provocations" by Ronald Mullins; nor did the attorney mention the specific "provocations" Nayokpuk relies on in this appeal. Because Nayokpuk did not ask the superior court to rule on this legal claim, he failed to preserve it for our review.[7]

Moreover, even if we were to find that AS 11.41.115(a) entitles a defendant to raise a heat of passion defense based on the cumulative effect of a series of provocations over time, no reasonable juror would have found that the evidence Nayokpuk relies on in this appeal met the definition of "serious provocation." As we have emphasized in previous decisions, heat of passion is not available as a defense to all killings driven by strong emotions.[8] "Rather, heat of passion applies when the defendant is subjected to a serious provocation that would 'naturally induce a reasonable [person] in the passion of the moment to lose self-control and commit the act on impulse

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[7] *See Mahan v. State*, 51 P.3d 962, 966 (Alaska App. 2002) ("To preserve an issue for appeal, an appellant must obtain an adverse ruling.").

[8] *See Wilkerson*, 271 P.3d at 474.

and without reflection.'"[9] The evidence Nayokpuk points to falls far short of this standard.

Nayokpuk's claim that his sentence was excessive

Nayokpuk also argues that the superior court was clearly mistaken in imposing a sentence of 60 years of imprisonment, with no time suspended, for his second-degree murder conviction. He argues that this sentence violates the benchmark sentencing range this Court established for second-degree murder in *Page v. State*.[10]

In *Page*, we established a benchmark range of 20 to 30 years for a typical first felony offender convicted of a typical second-degree murder,[11] even though by statute, courts in Alaska have discretion to impose a term of imprisonment of up to 99 years for second-degree murder.[12]

Nayokpuk argues that he should have received a sentence within the *Page* benchmark. But, as the superior court found, Nayokpuk was not a first felony offender. This was Nayokpuk's third felony conviction; he had prior convictions for second-degree burglary and attempted second-degree sexual abuse of a minor. Nayokpuk also

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[9] *Dandova*, 72 P.3d at 332 (quoting *LaLonde v. State*, 614 P.2d 808, 810 (Alaska 1980)).

[10] *Page v. State*, 657 P.2d 850, 855 (Alaska App. 1983).

[11] *Page*, 657 P.2d at 855; *see also Carlson v. State*, 128 P.3d 197, 203-04 (Alaska App. 2006); *Brown v. State*, 4 P.3d 961, 964 (Alaska App. 2000); *Sam v. State*, 842 P.2d 596, 603 (Alaska App. 1992). "The legal effect of the *Page* benchmark range is that sentencing judges who wish to impose more than 30 years to serve for the crime of second-degree murder must explain why they view the defendant as having a worse background than that of a typical first felony offender, or why they view the defendant's crime as worse than a typical second-degree murder." *Carlson*, 128 P.3d at 203.

[12] AS 11.41.110(b); AS 12.55.125(b).

had six prior misdemeanor convictions. And he performed exceptionally poorly on supervised release, amassing nine probation or parole revocations (six of them in his felony cases). Nayokpuk does not explain why we should apply *Page* in the context of a third felony conviction, and he does not make any argument why *Page* applies by analogy.

The sentencing court relied on a number of factors to support the sentence it imposed: Nayokpuk's extensive criminal history, his demonstrably poor prospects for rehabilitation, his ongoing alcohol abuse, and the largely unprovoked violence he exhibited in this case. The court concluded that it was important to impose a sentence that expressed the view of the community that you cannot kill someone just because you have "a bad day." The court also found, based on Nayokpuk's conduct in this case, that Nayokpuk was dangerous and unpredictable, and that a very lengthy term of incarceration was necessary to protect the public. The record supports the court's findings and those findings justify the sentence the court imposed. Having independently reviewed the sentencing record, we conclude that Nayokpuk's sentence is not clearly mistaken.[13]

Conclusion

The judgment of the superior court is AFFIRMED.

[13] *See McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).