IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MATTHEW C. OWENS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13016 Trial Court No. 2NO-11-00276 CI MEMORANDUM OPINION No. 6962 — July 28, 2021

Appeal from the Superior Court, Second Judicial District, Nome, Romano DiBenedetto, Judge.

Appearances: Kelly R. Taylor, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge ALLARD.

Matthew C. Owens appeals the dismissal of his application for post-conviction relief. For the reasons explained here, we affirm the superior court's ruling.

Background facts and prior proceedings

We have previously explained the underlying facts of this case in an unpublished memorandum opinion.[1] In brief: Owens was convicted of the 2003 murder of Sonya Ivanoff. The evidence presented at trial showed that Owens, a police officer in Nome, picked up Ivanoff in the early morning hours of August 11. What happened after that was never conclusively determined, but Ivanoff's body was discovered on August 12 in some bushes down a little-used dirt road just outside of Nome. Her body had been stripped of all her clothes and she had been shot in the head at point-blank range.

There was no trace of physical evidence on Ivanoff's body, such as skin scrapings under her fingernails, hairs, fingerprints, fibers, or DNA evidence. A trooper later testified that the absence of trace evidence and the removal of Ivanoff's clothes indicated an attempt to prevent the police from gathering incriminating evidence. He concluded that Ivanoff's killer had "evidence awareness," such as a police officer would have. Additionally, an acquaintance of Owens, Warren Little, testified that Owens told him, before any of the laboratory reports came back, that there was no DNA evidence and no signs of sexual assault. Little testified that Owens told him that it looked like someone had picked up Ivanoff, possibly for sex, and when she jumped out of the car to escape, the person shot her with a handgun.

The bullet that killed Ivanoff had a rare pattern of lands and grooves, indicating that the gun used in the murder had rare rifling. It was later determined that Owens had access to a pistol with the same rifling pattern.

The State presented evidence that, after Ivanoff was murdered, Owens had gone to an area seventy-five miles from Nome and burned some items in a fire pit. The

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[1] *Owens v. State*, 2010 WL 744248 (Alaska App. Mar. 3, 2010) (unpublished).

police searched the fire pit and found evidence — such as grommets from jeans and eyelets from shoes — that matched the clothes Ivanoff was reportedly wearing on the night she went missing. The police also found a key that was similar to the key from Ivanoff's apartment and also found a key belonging to Owens's uncle. During the murder investigation, Owens told the Nome police chief that he did not know Ivanoff, but the investigation turned up at least seven separate witnesses who later testified at trial that Owens did know Ivanoff.

The State also presented evidence that about a month after the murder, Owens staged the theft of a police car and planted Ivanoff's identification and an anonymous note from the supposed murderer in the car, in an attempt to thwart the police investigation. At the time of the alleged staging, Owens had called in to report that he had located the stolen police car and was being shot at. However, there was no evidence that anyone besides Owens had been in the car or that anyone had actually been shooting at Owens. There were no fingerprints, DNA, or other trace evidence on the note. But analysis of the paper showed that it could have come from a printer to which Owens had access.

Prior to his trial in February 2005, Owens moved to change venue from Nome to Anchorage or Fairbanks. The motion was denied. The jury was unable to reach a verdict and the judge declared a mistrial.

Prior to his second trial in October 2005, Owens moved again to change venue from Nome to Anchorage or Fairbanks. The trial judge partially granted the motion and changed the venue to Kotzebue.

At the second trial, the State presented evidence of which it had only recently become aware. Dealy Blackshear, Owens's former counselor, testified that Owens's landlord and friend (Charlotte Calandrelli) had told Blackshear that she saw Ivanoff's identification and wallet in Owens's living room and Owens told her that it was

evidence that he was going to turn in. Calandrelli also testified and denied having this conversation with Blackshear.

Owens's second trial resulted in convictions for first-degree murder and tampering with evidence.[2]

Owens appealed his convictions to this Court, arguing that: (1) there was insufficient evidence to support his convictions; (2) the trial court erred in not granting a new trial based on the weight of the evidence; and (3) the trial court erred in not changing venue from Kotzebue. We rejected these arguments and affirmed Owens's convictions.[3]

In 2011, Owens filed a *pro se* application for post-conviction relief and was appointed counsel. In 2015, Owens's post-conviction relief attorney filed an amended application, raising five ineffective assistance of counsel claims. The superior court ultimately dismissed all of Owens's claims for failure to state a prima facie case for relief.

Owens now appeals, arguing that the superior court erred when it dismissed four of his ineffective assistance of counsel claims. We address each of these claims in turn.

Owens's claim that his trial counsel was ineffective for failing to remove a juror who was a distant relative of the victim

In his application for post-conviction relief, Owens argued that his trial attorneys provided ineffective assistance of counsel when the attorneys allowed a juror who was distantly related to the victim by marriage to remain on the jury. Owens

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

[3] *Owens*, 2010 WL 744248, at *8.

asserted that a competent defense attorney would have challenged that juror for cause or would have exercised a peremptory challenge to remove that juror.

The juror in question was married to a man who was distantly related to the victim's father, although the juror did not know exactly how. (The juror's husband was also in the jury pool; he was excused during voir dire after he stated that it would be difficult for him to be on the jury due to his connections to the Ivanoff family.) The juror testified during voir dire that she had never met the victim or the victim's immediate family. She testified that her distant relationship to the victim through her husband would not prevent her from being a fair juror in the case.

The juror also testified that there was nothing that would cause her to favor the prosecution over the defense and that she saw herself as a fair person. She acknowledged reading some of the media reports and she stated that the media seemed to paint Owens as guilty. But she was clear that she did not personally have an opinion about Owens's guilt because she had not heard anything first-hand. The juror also agreed with the defense counsel that if there was a reasonable doubt about Owens's guilt, the jury would have to find him not guilty. Neither the defense nor the prosecution challenged the juror for cause and neither side exercised a peremptory challenge against her.[4]

As part of his application for post-conviction relief, Owens submitted affidavits from his two trial attorneys. The affidavits made clear that the decision to keep the juror on the jury was a tactical decision, albeit a tactical decision on which there had been disagreement. According to the affidavits, Owens and one of the defense attorneys, Steven Wells, did not want the juror on the jury because of her connection to the victim's family. However, the lead defense attorney, James McComas, wanted the juror on the

[4] Owens did not use all of his peremptory challenges.

jury because he believed that she was "a strong, verbal woman" whose presence would give the jury the moral authority to acquit. He also hoped that she could help "prevent the overt racial influence, which had been dominant in Nome." And he concluded that she would be better than another juror that would have replaced her if she had been removed.

Despite having what appeared to be clear strategic reasons for keeping the juror on the jury, McComas nevertheless characterized his decision to keep the juror as "ineffective." He asserted that he made this "ineffective decision, because no other effective ones remained" after the judge refused to move the jury trial to Fairbanks or Anchorage. According to McComas's affidavit, his decision to keep the juror on the jury was based on "my client being put in a hopeless situation, where no fair trial was possible."

In addition to providing the affidavits from his trial attorneys, Owens also provided an affidavit from Jeff Robinson, an experienced criminal defense attorney who had been hired as a post-conviction relief expert. Robinson opined that the decision to allow a relative of the victim on the jury was "indefensible" and that it was not a tactical decision that any competent defense lawyer would reasonably make.

The State moved to dismiss this ineffective assistance of counsel claim on the pleadings, arguing that the pleadings showed that the decision to retain the juror was clearly tactical and Owens had not shown that the juror was actually biased. The superior court agreed with this reasoning and dismissed the claim for failure to state a prima facie case for relief. Owens now appeals that ruling.

Whether a defendant's application for post-conviction relief presents a prima facie case for relief is a question of law that we review *de novo*.[5] To establish a prima facie case of ineffective assistance of counsel under Alaska law, a defendant must plead facts that, if proven true, would entitle the defendant to relief under both prongs of the *Risher* test.[6] That is, the defendant's pleadings must show that: (1) the attorney's performance fell below the standard of minimal competence expected of an attorney experienced in criminal law; and (2) but for the attorney's incompetent performance, there is a reasonable possibility that the outcome would have been different.[7]

As a general matter, "[t]he law presumes that an attorney has acted competently, and that the attorney's decisions were prompted by sound tactical considerations."[8] The duty of rebutting those presumptions is therefore part and parcel of the defendant's burden of proof.[9]

Here, the record is clear that Owens's lead trial attorney made a conscious tactical decision to keep the juror on the jury despite her relationship to the Ivanoff family. Owens therefore bore the burden of showing that no competent attorney would

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[5] *State v. Laraby*, 842 P.2d 1275, 1280 (Alaska App. 1992).

[6] *See Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974).

[7] *Id.*

[8] *Newby v. State*, 967 P.2d 1008, 1016 (Alaska App. 1998); *State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988); *see also Miller v. Webb*, 385 F.3d 666, 672-73 (6th Cir. 2004) ("An attorney's actions during *voir dire* are considered to be matters of trial strategy. . . . A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." (alteration in original) (quoting *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001))).

[9] *Newby*, 967 P.2d at 1016; *Jones*, 759 P.2d at 569.

have made that decision under the circumstances as they presented themselves at the time.[10]

Owens argues that he established a prima facie case that no competent attorney would have made the decision McComas did, and he points to his expert's opinion that McComas's decision was "indefensible," and to McComas's own characterization of his decision as "ineffective."

But the record shows that McComas kept the juror for tactical reasons that do not appear unreasonable on their face.[11] Moreover, we do not view McComas's characterization of his own decision as "ineffective" as a concession that his reasons for retaining the juror were objectively unreasonable or incompetent. Rather, McComas's statement is clearly based on his belief that the judge's refusal to change venue meant that there were no better jurors to choose from and there was no way that he could be "effective" without a change in venue. But this claim — the claim that the judge erred in refusing to change venue to Fairbanks or Anchorage — was already rejected by this Court in Owens's direct appeal.[12] McComas's denigration of his own tactical decision therefore appears primarily to be an attempt to relitigate an issue that Owens has already lost.

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[10] *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. . . . [T]hat is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (internal quotations omitted)).

[11] *See Bryant v. State*, 115 P.3d 1249, 1257 (Alaska App. 2005); *Young v. State*, 848 P.2d 267, 270 (Alaska App. 1993).

[12] *Owens v. State*, 2010 WL 744248, at *7 (Alaska App. Mar. 3, 2010) (unpublished).

In any case, even assuming that Owens established a prima facie case that McComas's tactical decision was one no competent attorney would make, Owens would still need to show that he was prejudiced by this decision.[13] And, in order to meet the prejudice prong under Alaska case law, Owens was required to show that the juror was actually biased.[14]

On appeal, Owens argues that prejudice should be presumed in this context because of the juror's connection to the victim's family. But the juror's connection to the victim's family is remote enough that it would not qualify for a challenge for cause.[15] And there is nothing about any of her statements during voir dire that suggested any bias. To the contrary, the juror's clear assertions of impartiality was one of the reasons why McComas believed that she would be a "strong" juror for the defense.

Owens nevertheless asserts that "[w]here a defendant claims a potentially biased juror was improperly seated on his jury, the error analysis largely subsumes the prejudice analysis."[16] In other words, Owens claims that once a defendant has shown that there is a possibility that a juror might be biased, any error in allowing that juror to be seated requires reversal of the defendant's conviction. But this is not the law. A

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[13] *See Bryant*, 115 P.3d at 1257; *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974) (holding that a defendant "has not suffered an unconstitutional deprivation of effective assistance of counsel because of error committed by his attorney which [in] no manner contributed to his conviction").

[14] *Bryant*, 115 P.3d at 1256-57.

[15] *See* Alaska R. Crim. P. 24(c)(9) ("The following are grounds for challenges for cause: . . . That the person is related within the fourth degree (civil law) of consanguinity or affinity to one of the parties or attorneys.").

[16] *See State v. Jones*, 759 P.2d 558, 573 (Alaska App. 1988) ("In some situations, of course, the negative effect of an attorney's incompetence may be obvious from the context in which the incompetence occurred.").

review of cases in Alaska and other jurisdictions confirms that post-conviction relief in this context requires proof of actual bias.[17] However, once actual bias is shown, prejudice *is* presumed and a new trial is required.[18] In other words, a defendant must show that the juror was biased but the defendant need not show that, but for the biased juror, the outcome might have been different. Instead, prejudice is established because the defendant has been deprived of their constitutional right to an impartial jury.[19]

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[17] *See Bryant*, 115 P.3d at 1256-57; *Davis v. State*, 2012 WL 3055018, at *2 (Alaska App. July 25, 2012) (unpublished); *see also Smith v. Phillips*, 455 U.S. 209, 216 (1982) ("A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible. . . . Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." (internal citation omitted)); *Johnson v. Luoma*, 425 F.3d 318, 328 (6th Cir. 2005) (holding that counsel's failure to strike a possibly biased juror was not ineffective assistance because the defendant could not show that the juror was actually biased); *Miller v. Webb*, 385 F.3d 666, 674 (6th Cir. 2004) (concluding that a defendant, in an ineffective assistance of counsel claim, must prove that counsel's failure to strike a juror was prejudicial only by showing "that the juror was actually biased against him"); *Hughes v. United States*, 258 F.3d 453, 458 (6th Cir. 2001) ("Petitioner's claim of ineffective assistance of counsel is grounded in the claim that counsel failed to strike a biased juror. To maintain a claim that a biased juror prejudiced him, however, [Petitioner] must show that the juror was actually biased against him." (alteration in original) (internal quotation omitted)); *Peterson v. State*, 154 So.3d 275, 281 (Fla. 2014) ("[W]here a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased. The actual bias standard requires a showing that the questionable juror was not impartial, that is, 'was biased against the defendant, and the evidence of bias must be plain on the face of the record.'" (alteration in original) (internal citations omitted)).

[18] *See United States v. Martinez-Salazar*, 528 U.S. 304, 316-17 (2000) (recognizing that the seating of any juror who should have been dismissed for cause requires reversal of the conviction); *see also Hughes*, 258 F.3d at 457 (holding that, when a biased juror is impaneled, "prejudice under *Strickland* is presumed, and a new trial is required").

[19] U.S. Const. amend. VI; Alaska Const. art. I § 11.

We note that Owens is partially correct in viewing the incompetency and prejudice prongs as interrelated. Certainly, one way to prove that a trial attorney was incompetent is to show that the trial attorney failed to strike a biased juror.[20] As the Sixth Circuit has noted, "There is no sound trial strategy that could support what is essentially a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury."[21] But this reasoning does not obviate the need to show that the juror was actually biased.

The federal courts have defined "actual bias" as "bias in fact" — "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality."[22] Bias can be revealed through a prospective juror's express statements or through circumstantial evidence.[23] For example, courts have found actual bias in circumstances such as when a juror makes a statement that she thinks she can be fair, but immediately qualifies it with a statement of partiality and there is no further juror rehabilitation or juror assurances of impartiality.[24]

Here, there are no statements by the juror that would give rise to a reasonable inference of partiality. And although the juror was related by marriage to the victim's family, the connection was relatively remote and she was not acquainted with

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[20] *See, e.g.*, *Hughes*, 258 F.3d at 462 ("When a venireperson expressly admits bias on *voir dire*, without a court response or follow-up, for counsel not to respond [to the statement of partiality] in turn is simply a failure to exercise the customary skill and diligence that a reasonably competent attorney would provide." (internal quotation omitted)).

[21] *See Miller*, 385 F.3d at 675-76 ("[T]he decision whether to seat a biased juror cannot be a discretionary or strategic decision." (citing *Martinez-Salazar*, 528 U.S. at 316)).

[22] *Hughes*, 258 F.3d at 463 (quoting *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997) (citing *United States v. Wood*, 299 U.S. 123, 133 (1936))).

[23] *Id.* at 459 (citing *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977)).

[24] *Miller*, 385 F.3d at 675.

the victim or the victim's immediate family. Given this record, we agree with the superior court that Owens failed to establish a prima facie case of actual bias and his ineffective assistance of counsel claim was therefore properly dismissed.

Owens's claim that his trial counsel was ineffective for failing to object to the testimony of the State's rebuttal witnesses

As already mentioned, the State presented evidence that Owens had staged the theft of a police car about a month after the murder, as well as evidence that the victim's wallet and identification were found in that car. The prosecutor argued that Owens had planted the victim's wallet and identification in the "stolen" police car in an effort to thwart the police investigation into the victim's death.

This evidence was introduced at both trials. However, in the middle of the second trial, Dealy Blackshear contacted the police to tell them that he had previously had a conversation with Charlotte Calandrelli, Owens's friend and landlord, in which she told him that she had seen the victim's wallet and identification in Owens's house. According to Blackshear, Calandrelli said that she asked Owens about the identification, and Owens claimed that he was bringing it to the police station as evidence. Blackshear told the police that Calandrelli had told him that she was going to tell the lawyers about her conversation with Owens. But Blackshear found out during the second trial that she had not done so, after he asked a Nome police officer about the evidence.

After receiving this information, the police obtained a *Glass* warrant to record a telephone conversation between Blackshear and Calandrelli. In the telephone conversation, Blackshear referred to Calandrelli's previous statements about seeing the victim's identification in Owens's house, and Calandrelli did not deny making those statements. But she also did not admit that they were true.

Soon thereafter, the prosecutor informed the defense of Blackshear's statements and provided a copy of the *Glass* recording. At this point, the State's case-in-chief was complete and the defense had begun their case. The trial court gave Owens a short continuance to evaluate the statements and recordings. Owens's attorneys objected to the prosecution being allowed to reopen its case-in-chief to introduce this new evidence, and they argued that the defense case should not be interrupted. The trial court agreed.

Owens subsequently testified in his own defense. In his testimony, he denied killing the victim or possessing her clothes or identification.

In rebuttal, the prosecution called Calandrelli and Blackshear as witnesses. The prosecutor also played the recorded conversation between Blackshear and Calandrelli. Blackshear testified that Calandrelli told him that she saw the victim's identification in Owens's house and Owens told her that it was evidence that he was going to turn in. Blackshear also testified that Calandrelli told him that she was going to tell the police. Calandrelli denied making any of these statements. Owens's trial attorneys attacked Blackshear's credibility on cross-examination, noting Blackshear's bias and obvious animosity towards Owens.

In his application for post-conviction relief, Owens alleged that his trial attorneys should have objected to Blackshear's testimony as inadmissible hearsay, and he asserted that they were ineffective for having failed to do so. Owens also alleged that his attorneys should have sought suppression of the recording and Blackshear's testimony as a remedy for the discovery violation that Owens asserted had occurred.

These claims were not supported by the attorney's affidavit. In his affidavit, McComas stated that he did not object to Blackshear's rebuttal testimony because, contrary to Owens's claim, it was not inadmissible hearsay. McComas also stated that there had been no discovery violation because the State had turned over the

evidence relatively soon after it became aware of it. McComas further explained that there was ample material with which to attack Blackshear's credibility, and he asserted that Calandrelli's testimony and the recording "painted [Blackshear] as a lying, manipulative weasel."

The superior court ruled that Owens had failed to show a discovery violation and had failed to show that an objection on hearsay grounds would have been granted.[25] The court therefore dismissed the ineffective assistance of counsel claim for failure to show either incompetence or prejudice.

On appeal, Owens does not argue that the trial court erred when it concluded that his proposed objections under the discovery and hearsay rules would not have been successful. Instead, Owens argues that the trial court misconstrued his argument. He claims that he did not mean to rely on specific objections, but instead "argued more broadly that [his] trial counsel was ineffective by failing to make *any* objection to Blackshear's testimony."

But this argument is based on a misunderstanding of Owens's burden in a post-conviction relief application. A defendant cannot succeed on an ineffective assistance of counsel claim simply by asserting, as Owens does here, that any reasonable attorney would have made *some* sort of objection. Instead, the defendant must specify which objection or objections should have been made, and must then demonstrate that those objections would have been successful.[26] Because Owens failed to do so here, we affirm the superior court's dismissal of this ineffective assistance of counsel claim.

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[25] We note that Owens's statements to Calandrelli were admissible as admissions of a party opponent, *see* Alaska R. Evid. 801(d)(2), while Calandrelli's statements to Blackshear were admissible as prior inconsistent statements. *See* Alaska R. Evid. 801(d)(1)(A).

[26] *State v. Steffensen*, 902 P.2d 340, 342 (Alaska App. 1995).

Owens's claim that his trial attorneys were ineffective for failing to request a specific limiting instruction regarding Blackshear's opinion that Owens was a "cold-blooded killer"

As already mentioned, Owens's defense attorneys attacked Blackshear's credibility on cross-examination by showing, among other things, that Blackshear was biased against Owens and openly hostile to him. At one point during cross-examination, McComas asked Blackshear if he remembered telling a defense investigator that Owens was a "killer." Blackshear denied making the statement, and McComas then called the defense investigator, who testified that Blackshear had indeed told him that he believed Owens was a "cold-blooded killer." McComas later explained that he pursued this line of questioning to demonstrate Blackshear's bias and lack of credibility.

McComas did not ask for a limiting instruction with regard to this specific testimony. However, McComas did request a limiting instruction with regard to similar statements that Blackshear made in the *Glass* warrant. The trial court instructed the jury, *inter alia*, that "Mr. Blackshear's statements of opinion or [belief] are absolutely no evidence of anyone's guilt." In addition, prior to deliberations, the jury received a general instruction on opinion testimony by a non-expert. This instruction told the jury that "suspicions, accusations or statements of opinion by any witness that any person may be or is guilty of the crimes charged" are "absolutely no evidence of the person's guilt [and] you must not treat them as such."

In his application for post-conviction relief, Owens alleged that his trial attorneys were ineffective for failing to request an additional limiting instruction specifically related to Blackshear's opinion that Owens was a "cold-blooded killer." According to Owens, the limiting instruction should also have informed the jury that Blackshear's opinion could only be used as evidence of Blackshear's bias, not as substantive evidence of Owens's guilt.

In his affidavit, McComas agreed that, in hindsight, he should have requested such an instruction.

The superior court dismissed this claim for failure to state a prima facie case, concluding that the instructions the jury received were sufficient and that the jury would likely have understood that the statement was elicited to show bias rather than as proof of substantive guilt because it was elicited by the defense attorney and then argued that way by the defense attorney at closing argument. The superior court also concluded that Owens had failed to show a reasonable possibility that the outcome of the trial would have been different if a more specific limiting instruction had been given.

We agree with these rulings, and we therefore affirm the dismissal of this ineffective assistance of counsel claim.

Owens's claim that his trial attorneys were ineffective for failing to file a motion for a new trial based on the weight of the evidence

After the State completed its case-in-chief in Owens's second trial, Owens's trial attorneys moved for a judgment of acquittal, arguing that the evidence was legally insufficient.[27] The trial court denied the motion, ruling that the evidence presented in the State's case-in-chief was sufficient to support a conviction for first-degree murder and evidence tampering beyond a reasonable doubt. The defense attorneys then proceeded with the defense case, in which Owens testified. The State's rebuttal case, in which Calandrelli and Blackshear testified, followed. Following deliberations, the jury convicted Owens of first-degree murder and tampering with evidence.

Owens appealed his convictions to this Court, arguing that the evidence was legally insufficient. Owens also argued that the guilty verdicts were contrary to the

[27] *See* Alaska R. Crim. P. 29(a).

weight of the evidence and the trial court should have granted Owens a new trial in the interests of justice, even though his attorneys did not file a motion for a new trial based on the weight of the evidence.[28] This Court rejected both claims, concluding that the evidence was sufficient and that the verdicts did not amount to a miscarriage of justice.[29]

In his application for post-conviction relief, Owens argued that his trial attorneys were ineffective for failing to file a motion for a new trial based on the weight of the evidence. The State moved to dismiss this ineffective assistance of counsel claim, arguing that this claim had already been resolved in Owens's direct appeal when this Court found no manifest injustice on direct appeal. The superior court agreed, and dismissed the claim.

We agree with the superior court that our prior determination of no manifest injustice is dispositive of this claim.

Conclusion

The judgment of the superior court is AFFIRMED.

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[28] *See* Alaska R. Crim. P. 33; *see also Phornsavanh v. State*, 481 P.3d 1145, 1158 (Alaska App. 2021) (explaining that, unlike a judgment of acquittal, when deciding on a motion for new trial, "a court may set aside a verdict as unjust even when the evidence is otherwise legally sufficient to support the verdict" (citing *Hunter v. Philip Morris USA Inc.*, 364 P.3d 439, 447 (Alaska 2015))).

[29] *Owens v. State*, 2010 WL 744248, at *5 (Alaska App. Mar. 3, 2010) (unpublished). In a separate concurrence, Judge Mannheimer argued that Owens was not entitled to ask this Court to grant him a new trial based on the weight of the evidence because Owens had not raised this issue in the trial court. Judge Mannheimer noted that motions for new trial based on the weight of the evidence are committed to the "sound discretion" of the trial court because, unlike an appellate court, the trial court is "in a position to meaningfully evaluate the credibility of the witnesses and the weight or convincing power of their testimony." *Id.* at *8-12 (Mannheimer, J., concurring).