IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOSHUA K. BLISS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13236 Trial Court No. 1KE-17-00438 CR MEMORANDUM OPINION No. 7012 — June 22, 2022

Appeal from the Superior Court, First Judicial District, Ketchikan, Trevor Stephens, Judge.

Appearances: Megan R. Webb, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Timothy W. Terrell, 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 Harbison, Judges.

Judge ALLARD.

Joshua K. Bliss was convicted, following a jury trial, of first-degree murder and tampering with physical evidence for killing his friend, Richard Branda, with a knife

and then disposing of the weapon.[1] On appeal, he argues that the superior court erred when it granted the State's request to remove the word "intentionally" from the jury instruction on the lesser included offense of manslaughter. For the reasons we explain in this opinion, we reject this argument and we affirm Bliss's conviction.

Background facts and procedural history

The record indicates that Richard Branda suffered from substance use and mental health issues, and that he was homeless at the time of his death. According to Joshua Bliss, Branda said that he was "done with life" and he asked Bliss to kill him "in a brutal way." Bliss complied with Branda's request: He slit Branda's throat, and when Branda did not die immediately, Bliss put his boot on the back of Branda's neck and pressed his face into the ground until he stopped moving. Bliss turned himself in to the police the next day and confessed to the killing. He was subsequently charged with first-degree murder and tampering with physical evidence for throwing the knife he used to stab Branda into the ocean.[2]

At trial, the State did not dispute Bliss's story about how Branda had died. Indeed, various witnesses testified that Branda had previously stated that he wished someone would kill him and had asked some of them to kill him. The police officer who heard Bliss's confession also testified that he believed Bliss's story of what happened. The State argued, however, that Branda's request to be killed did not mitigate Bliss's conduct and Bliss was still guilty of first-degree murder for intentionally causing Branda's death.

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

[2] Bliss does not challenge the tampering conviction on appeal.

Prior to trial, Bliss requested that the jury be instructed on Alaska's assisted suicide statute. This statute provides that a person commits manslaughter if the person "intentionally aids another person to commit suicide."[3]

The State opposed this request, arguing that the provision only applied to a defendant who helped or assisted another person to commit suicide and that it did not apply to a defendant like Bliss who committed the actual act that caused the death. The superior court agreed with the State and refused to instruct the jury on Alaska's assisted suicide manslaughter provision. (Bliss does not challenge this ruling on appeal.)

Bliss then requested that the jury be instructed on the lesser included offense of traditional manslaughter, which provides, "A person commits the crime of manslaughter if the person . . . intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree."[4]

The State agreed that the jury should be instructed on the lesser included offense of manslaughter, but it requested that the word "intentionally" be removed from the jury instruction. The State argued that retaining the word "intentionally" in the manslaughter instruction would be confusing to the jury because, under the facts of Bliss's case, there was no way for the jury to conclude that Bliss intentionally killed Branda under circumstances that did not amount to first-degree murder.

The superior court agreed with the State and deleted the word "intentionally" from the jury instruction on manslaughter. The jury was therefore

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[3] AS 11.41.120(a)(2); *cf.* AS 11.41.100(a)(1)(B) (providing that a person commits first-degree murder if the person "compels or induces any person to commit suicide through duress or deception").

[4] AS 11.41.120(a)(1).

instructed that Bliss could be convicted of the lesser included offense of manslaughter if the jury concluded that Bliss knowingly or recklessly caused the death of Branda.

The jury subsequently convicted Bliss of first-degree murder. This appeal followed.

Why we reject Bliss's claim on appeal

On appeal, Bliss argues that the superior court erred when it deleted the word "intentionally" from the lesser included manslaughter instruction.

Alaska Statute 11.81.900(a)(1) provides, in relevant part, that a person acts "intentionally" with respect to a result "when the person's conscious objective is to cause that result." However, "that intent need not be the person's only objective."[5]

Under AS 11.41.100(a)(1)(A), a person commits first-degree murder if "with intent to cause the death of another person, the person . . . causes the death of any person." In other words, if a defendant causes a person's death while acting with the conscious objective of causing that death, the defendant is guilty of first-degree murder even if the defendant might have been motivated by other objectives as well. This was the theory of prosecution at Bliss's trial. The State argued that Bliss acted with the conscious objective of killing Branda even though it was at Branda's own request and was not anything that Bliss would have done absent such a request.

In contrast to first-degree murder, the lesser included offense of manslaughter is defined in terms of what it is not. A person commits manslaughter under AS 11.41.120(a)(1) if the person "intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree."

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[5] AS 11.81.900(a)(1).

In *Edwards v. State*, we held that the statutory language "under circumstances not amounting to murder in the first or second degree" was not an element of the offense on which the jury should be instructed.[6] Instead, it represented the legislature's intent for manslaughter to be "a residual category of unlawful homicide, encompassing any unlawful killing done with recklessness, knowledge, or intent unless the State proves that the killing constitutes first- or second-degree murder."[7]

The paradigmatic example of a person who intentionally causes the death of another under circumstances that do not amount to first-degree murder is a person who intentionally kills another while acting in the heat of passion.[8] Alaska Statute 11.41.115(a) provides that a person is not guilty of first-degree murder if "the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim." Under Alaska law, the State bears the burden of disproving heat of passion beyond a reasonable doubt if there is "some evidence" to support the defense.[9]

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[6] *Edwards v. State*, 158 P.3d 847, 856 (Alaska App. 2007).

[7] *Id.*

[8] *See Pfister v. State*, 425 P.3d 183, 188 (Alaska App. 2018) ("[A]n unlawful intentional killing in the heat of passion is not murder, it is manslaughter under AS 11.41.120."); *Walsh v. State*, 677 P.2d 912, 917 (Alaska App. 1984) ("In order for an intentional or knowing killing to qualify as manslaughter rather than murder it must be substantially mitigated by heat of passion caused by serious provocation from the victim.").

[9] *Howell v. State*, 917 P.2d 1202, 1207 (Alaska App. 1996); *see also* AS 11.41.115(a) (defining heat of passion as a "defense"); AS 11.81.900(b)(19) (providing that, after "some evidence" of a defense is admitted, the State has "the burden of disproving the existence of the defense beyond a reasonable doubt").

But Bliss did not argue heat of passion in this case. And the court declined to instruct the jury on Alaska's assisted suicide statute.[10] The State therefore argued that the word "intentionally" should be deleted from the lesser included manslaughter instruction because there was no way, under the facts of Bliss's case as they were argued to the jury, that the jury could find that Bliss intentionally killed Branda under circumstances that did not amount to first-degree murder. The superior court agreed.

On appeal, Bliss argues that the deletion of the word "intentionally" was error because, according to Bliss, the word "intentionally" means something different in Alaska's manslaughter statute than it does in Alaska's first-degree murder statute. Bliss provides no support for this proposition from the plain language or legislative history of Alaska's homicide statutes. Instead, Bliss relies on our description in *Pfister v. State* of the government's burden of proof in a manslaughter case.[11]

In *Pfister*, we were asked to decide whether a person could be convicted of manslaughter based on the unintentional deaths of his two accomplices during a burglary and robbery. We addressed this question (and answered it in the affirmative) by explaining the history of manslaughter and felony murder in Alaska.[12] In discussing that history, we quoted the current version of Alaska's manslaughter statute — *i.e.*, that a "person commits the crime of manslaughter if the person . . . intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to

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[10] *See* AS 11.41.120(a)(2) (providing that a person commits manslaughter if the person "intentionally aids another person to commit suicide"); *cf.* AS 11.41.100(a)(1)(B) (providing that a person commits first-degree murder if the person "compels or induces any person to commit suicide through duress or deception"). As already noted, Bliss does not appeal the superior court's ruling prohibiting him from arguing the assisted suicide manslaughter statute.

[11] *Pfister*, 425 P.3d at 187.

[12] *Id.* at 184-88.

murder in the first or second degree."[13] But we also paraphrased the elements of the statute, stating that it meant that "the government would have to prove that the defendant acted either intentionally, knowingly, or recklessly with regard to the possibility that their conduct might cause the death of another human being."[14]

Seizing on this language, Bliss argues that manslaughter only requires that the person acted intentionally "with regard to the possibility" that his conduct would cause the death of another, whereas first-degree murder requires that the person intentionally caused the death of another. He therefore argues that there is a critical distinction between intentional manslaughter and intentional murder and that by removing the word "intentionally" from the manslaughter instruction, the superior court prevented the jury from considering that distinction in its deliberations.

But the distinction Bliss purports to draw is difficult to understand. What does it mean to say that a person acts intentionally with regard to the *possibility* that death might occur? Does that still qualify as *intentional* action? In his briefing on appeal, Bliss does not explain how one can *intend* a possibility; nor does he provide any examples of how the distinction he is drawing would operate in practice.

In context, it is clear that *Pfister* was addressing *unintentional* killings, and its imprecise language was simply an attempt to paraphrase the statutory language in order to highlight the difference between the common law misdemeanor-manslaughter rule (which did not require the State to prove any *mens rea* with regard to the death) and the legislative revision to the manslaughter statute (which now required the State to prove that the defendant acted "at least recklessly" with regard to the risk that death

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[13] *Id.* at 187 (quoting AS 11.41.120(a)(1)).

[14] *Id.* at 187. We used nearly identical language to describe manslaughter in two cases issued more than a decade earlier. *Carlson v. State*, 128 P.3d 197, 202 (Alaska App. 2006); *Smith v. State*, 28 P.3d 323, 326 (Alaska App. 2001).

would occur).[15] The language was not intended to suggest that the word "intentionally" meant something different in the manslaughter statute than it meant in the first-degree murder statute. Nor is there any case law or statutory authority that would support such a distinction. The relevant distinction between intentional manslaughter and first-degree murder is not contained in the definition of "intentionally," but rather in the fact that intentional manslaughter is limited to "circumstances not amounting to [first-degree murder]."[16]

Because Bliss has provided no factual or legal theory upon which the jury could have concluded that he intentionally caused the death of Branda under circumstances not amounting to first-degree murder, we find no error in the superior court's removal of the word "intentionally" from the jury instruction on the lesser included offense of manslaughter.

Conclusion

The judgment of the superior court is AFFIRMED.

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[15] *Pfister*, 425 P.3d at 184-87.

[16] *See* AS 11.41.120(a)(1).