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, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ALVIN RODRIGUEZ-MOYA,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13268
Trial Court No. 3AN-15-03906 CR

MEMORANDUM OPINION

No. 7081 — December 6, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: Emily L. Jura, Assistant Public Defender, Anchorage, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Clyde "Ed" Sniffen Jr., Acting Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge TERRELL.

Following a jury trial, Alvin Rodriguez-Moya was convicted of first-degree murder, attempted first-degree murder, and first-degree burglary after he broke into the home of his former girlfriend, Juana Garcia-Jimenez, and stabbed her and Paolo Grassi,

the latter fatally.[1] Rodriguez-Moya was also convicted of two counts of third-degree fear assault for brandishing a knife in front of Garcia-Jimenez's relatives.[2] Rodriguez-Moya now appeals and raises three challenges.

In his first two claims, Rodriguez-Moya argues that the superior court erred in declining to instruct the jury on self-defense and heat of passion. For the reasons explained in this opinion, we reject these claims.

In his third claim, Rodriguez-Moya contends that two jury instructions — an instruction discussing the right to use force in defense of premises and an instruction stating that self-defense and heat of passion were not at issue — collectively amounted to a judicial comment on the evidence and suggested that he was guilty of first-degree burglary. We conclude that these instructions were not a comment on the evidence and that, even if they were, any error was harmless beyond a reasonable doubt.

The evidence regarding Rodriguez-Moya's offenses

In 2015, Juana Garcia-Jimenez lived with her extended family in a trailer park in Anchorage. Garcia-Jimenez and Rodriguez-Moya had been in a long-term relationship and were raising a child together, but they had never married. Rodriguez-Moya had lived with Garcia-Jimenez for several years, but in late 2014, Garcia-Jimenez asked him to move out. He did so, moving into a friend's trailer two doors down from Garcia-Jimenez. Garcia-Jimenez testified at trial that she considered their romantic relationship to be over at that point, but Rodriguez-Moya testified that he and Garcia-Jimenez still did things together and were occasionally intimate.

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[1] AS 11.41.100(a)(1)(A), AS 11.41.100(a)(1)(A) & AS 11.31.100(a), and AS 11.46.300(a)(1), respectively.

[2] AS 11.41.220(a)(1)(A).

In the months preceding the fatal stabbing, Garcia-Jimenez had been involved in a relationship with Grassi. Garcia-Jimenez testified that she did not tell Rodriguez-Moya that she was having a relationship with Grassi, but that Rodriguez-Moya had met Grassi once. At that time, Garcia-Jimenez introduced Grassi as her son's friend. The meeting devolved into an argument where Rodriguez-Moya indirectly insulted Grassi (in his presence).

On the evening of Saturday, May 2, 2015, Rodriguez-Moya phoned Garcia-Jimenez and asked her what she was doing that evening; she told him she was going out with a female friend. In fact, she went out to dinner with Grassi and two of his friends. After dinner, the group returned to her trailer. Grassi's friends left after 2:00 a.m., leaving Garcia-Jimenez and Grassi alone in the living room of the trailer. Garcia-Jimenez's family members were asleep in the trailer's bedrooms.

Sometime later, Rodriguez-Moya left his trailer, walked over to Garcia-Jimenez's trailer, and knocked on the front door. Rodriguez-Moya testified that when this did not produce a response, he kicked the door. When this proved unavailing, Rodriguez-Moya left and went back to his own trailer.

Approximately fifteen minutes later, Rodriguez-Moya walked back to Garcia-Jimenez's trailer. His movements were captured by a neighboring trailer's security system. On the recording, a hissing noise can be heard as Rodriguez-Moya passed Grassi's vehicle, which was parked in front of Garcia-Jimenez's trailer. Police later discovered that three of the vehicle's tires had been slashed. (As noted later, Rodriguez-Moya denied slashing the tires.)

Rodriguez-Moya testified that he walked up onto a deck on the side of the trailer and looked through a window next to the side of the deck. He saw Garcia-Jimenez and Grassi sitting together at the kitchen counter. They were clothed, and Rodriguez-Moya did not see them kissing or engaged in sexual activity. But they were

sitting close together and Garcia-Jimenez was wearing what Rodriguez-Moya characterized as "inappropriate" clothing. He believed "something was going to happen" between them.

Rodriguez-Moya told the jury that he knocked on the window and that Garcia-Jimenez and Grassi ignored him even though they recognized his presence. Rodriguez-Moya testified that being ignored made him angry, and that he broke the window with his fist and entered the living room of the trailer through the broken window. Garcia-Jimenez testified that when Rodriguez-Moya came through the window, she moved to stop him from attacking Grassi, and Rodriguez-Moya stabbed her several times.

Garcia-Jimenez testified that she fled the living room and went towards the bedrooms where her family members were sleeping. Her granddaughter, Mariela, testified that at that point she woke up and called 911. Another granddaughter, Pamela, testified that looking out her bedroom, she saw Rodriguez-Moya holding a knife. Pamela watched as Rodriguez-Moya stood over and repeatedly "punched" Grassi, who was on the couch or floor with his hand up in a defensive posture. She could not see whether Rodriguez-Moya had anything in his hands as he "punched" Grassi.

Garcia-Jimenez and her daughter, Margarita, both testified that Margarita came out of one of the back bedrooms to help her mother. Margarita testified that Rodriguez-Moya chased them, but they made it into the back bedroom and barricaded the door. Margarita and Mariela testified that Rodriguez-Moya then kicked in the bedroom door, tearing it off its hinges. Garcia-Jimenez testified that while Rodriguez-Moya was standing in the doorway holding a knife, he said that he would not kill her "because of the girl." Margarita testified that Rodriguez-Moya told Garcia-Jimenez, "Go look over there. I killed him for you."

At trial, Rodriguez-Moya conceded that he did not have permission to enter the trailer in the manner and time that he did — *i.e.*, by breaking a window and coming through it at 3:00 a.m.

Rodriguez-Moya's testimony otherwise varied in key respects from the testimony of other witnesses. Rodriguez-Moya stated that he saw an unknown car in Garcia-Jimenez's driveway and concluded that she must have a visitor but did not know her visitor was Grassi. Rodriguez-Moya denied taking a knife with him to Garcia-Jimenez's trailer and slashing Grassi's tires. Rodriguez-Moya conceded that seeing Garcia-Jimenez and Grassi sitting intimately together and being ignored when he knocked on the window made him angry. But he claimed that he did not intend to hurt either Garcia-Jimenez or Grassi when he entered the trailer, and that he did so only to confront them about their behavior.

According to Rodriguez-Moya, right after he came through the window, Grassi hit him in the forehead with a vase (or perhaps the base of a candlestick).[3] He claimed that Garcia-Jimenez was converging on him at that moment, trying to separate him from Grassi. Rodriguez-Moya said that he was temporarily dazed and that Grassi continued to attack him, so he grabbed a knife from Garcia-Jimenez's kitchen counter to defend himself. He said that Grassi's wounds were incurred during their struggle over the knife, but he denied that he intended to kill Grassi. According to Rodriguez-Moya, he was just doing what he had to do to ward off Grassi's attack. Rodriguez-Moya said that he stopped fighting with Grassi when Grassi stopped fighting him.

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[3] Rodriguez-Moya had a cut over his left eye, along his eyebrow, and abrasions underneath that eye. Photographs of the scene show a lamp base on the living room floor, which appears consistent with Rodriguez-Moya's description of being hit with something that seemed like a vase or candlestick holder. At trial, the State did not concede that Grassi hit Rodriguez-Moya, but noted in closing argument that if he did, it was most likely with this lamp base. We will follow Rodriguez-Moya's first description and refer to it as a vase.

After the encounter, Rodriguez-Moya left the trailer and fled to a nearby park. He turned himself in to the police later that day. In the hours after the incident, Rodriguez-Moya posted "Mate un . . . honbre [sic] por reco" on Facebook, which translates from Rodriguez-Moya's Dominican dialect as either "I killed a man for being disrespectful" or "I killed a man for being fresh." Rodriguez-Moya conceded at trial that he wrote this post.

When police and paramedics arrived, they found Grassi's body face down in the living room on top of a broken glass table. Garcia-Jimenez was taken to the hospital where it was determined that she had four stab wounds, two in the abdomen and two on her backside; she had surgery to repair the damage and was in the hospital for several weeks. A medical examiner later determined that Grassi had been stabbed over twenty-eight times and that he bled to death from multiple stab wounds to his head, neck, trunk, buttocks, and extremities.

Course of proceedings

The State charged Rodriguez-Moya with first- and second-degree murder for killing Grassi, attempted first-degree murder and first-degree assault for stabbing Garcia-Jimenez, first-degree burglary for breaking into Garcia-Jimenez's trailer with intent to commit assault, and two counts of third-degree assault for placing Garcia-Jimenez's daughter and granddaughter in fear of death or serious physical injury when he brandished the knife at them.[4]

Prior to trial, Rodriguez-Moya filed a notice of his intent to rely on the defenses of self-defense and heat of passion. After the close of the State's case, the State

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[4] AS 11.41.100(a)(1)(A), AS 11.41.110(a)(1)-(2), AS 11.41.100(a)(1)(A) & AS 11.31.100(a), AS 11.41.200(a)(1), AS 11.46.300(a)(1), and AS 11.41.220(a)(1)(A), respectively.

filed a written opposition to the request for a heat-of-passion instruction. The court tentatively declined to give the requested instructions. But the court did not conclusively rule at that time, recognizing that it was appropriate to permit Rodriguez-Moya to renew his request for instruction on these defenses after presentation of the defense case.

After the defense rested, Rodriguez-Moya renewed his request for heat-of-passion and self-defense instructions. Rodriguez-Moya conceded that he was jealous and enraged by seeing Garcia-Jimenez and Grassi together, and by their ignoring him when he knocked on the window. But he argued that the "serious provocation" for purposes of AS 11.41.115(f)(2) came when Grassi hit him on the head with a vase after he came in through the window. Rodriguez-Moya also claimed that he was fighting for his life and was acting in self-defense. The superior court declined to give either instruction.

The jury found Rodriguez-Moya guilty on all counts. The court subsequently merged the two murder counts involving Grassi into a single conviction for first-degree murder and merged the first-degree assault count for stabbing Garcia-Jimenez into the conviction for attempted first-degree murder.

This appeal followed.

Why we reject Rodriguez-Moya's challenges to the superior court's refusal to instruct the jury on self-defense and heat of passion

On appeal, Rodriguez-Moya argues that the superior court erred in declining to instruct the jury on self-defense and heat of passion. Under Alaska law, Rodriguez-Moya was entitled to a jury instruction on each of his proposed defenses if he presented "some evidence" of each element of the defense.[5] In this context, "some evidence" refers to "evidence which, if viewed in the light most favorable to the

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[5] *Lacey v. State*, 54 P.3d 304, 308 (Alaska App. 2002).

defendant, is sufficient to allow a reasonable juror to find in the defendant's favor on each element of the defense."[6]

We first consider whether the court should have given a self-defense instruction. Under AS 11.81.335, a person is justified in using deadly force when and to the extent the person reasonably believes that the use of deadly force is necessary to defend themself against death or serious physical injury, as long as they also would be justified in using non-deadly force under AS 11.81.330. And under AS 11.81.330, "A person is justified in using nondeadly force upon another when and to the extent the person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the other person[.]"

Rodriguez-Moya asserts that he presented some evidence at trial to establish that he reasonably believed he needed to use deadly force to protect himself from Grassi's alleged attack. He argues that Grassi's use of the vase constituted "deadly force" because Grassi knew that his use of the vase created a substantial risk of death or serious physical injury to Rodriguez-Moya.[7]

Rodriguez-Moya was required to present "some evidence" that he reasonably believed that Grassi's use of force was unlawful. The statute relevant to determining whether Grassi's alleged use of force was lawful is AS 11.81.350, which provides in relevant part:

> (c) A person in possession or control of any premises, or a guest or an express or implied agent of that person, may use

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[6] *Id.*

[7] AS 11.81.900(b)(16) ("'[D]eadly force' means force that the person uses with the intent of causing, or uses under circumstances that the person knows create a substantial risk of causing, death or serious physical injury[.]").

> (1) nondeadly force upon another when and to the extent the person reasonably believes it is necessary to terminate what the person reasonably believes to be the commission or attempted commission by the other of criminal trespass in any degree upon the premises;
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> (2) deadly force upon another when and to the extent the person reasonably believes it is necessary to terminate what the person reasonably believes to be a burglary in any degree occurring in an occupied dwelling or building.

Thus, under this statute, Grassi was entitled to use force upon Rodriguez-Moya — including deadly force — to the extent Grassi reasonably believed such force was necessary to terminate the burglary of Garcia-Jimenez's home.

Here, Rodriguez-Moya admitted that Grassi and Garcia-Jimenez were ignoring his efforts to enter the residence, that this made him angry, and that he then broke through a window in order to get inside the trailer. Rodriguez-Moya testified at trial that he only intended to confront them about their behavior, not to assault them. But he never claimed that he thought that Grassi would know that he was only there to talk to them about their conduct. In other words, ample evidence established that Grassi would have reasonably believed that a person breaking a window at 3:00 a.m. and bursting in through it was doing so in order to commit a burglary in the home — *i.e.*, that Rodriguez-Moya unlawfully entered Garcia-Jimenez's home with the intent to commit a crime (assault). But, *no* evidence established that Grassi would have believed that Rodriguez-Moya was doing so only to talk to him about his conduct with Garcia-Jimenez. And by extension there is no evidence that Rodriguez-Moya reasonably believed that Grassi's use of force was unlawful.

Moreover, even assuming the trial court should have given Rodriguez-Moya's requested instructions, we conclude that any error in failing to do so was

harmless beyond a reasonable doubt because the jury also convicted Rodriguez-Moya of first-degree burglary.

First, in finding Rodriguez-Moya guilty of first-degree burglary, the jury found that the State proved beyond a reasonable doubt that Rodriguez-Moya entered the trailer intending to commit an assault. Given this determination, the jury necessarily would have determined that Grassi's alleged use of deadly force against Rodriguez-Moya was lawful. The jury's finding that Rodriguez-Moya committed a home-invasion burglary is therefore inconsistent with a finding that Rodriguez-Moya would have reasonably believed that Grassi's use of force was unlawful.

Second, the jury's finding that Rodriguez-Moya had the intent to commit an assault when he broke into the trailer shows that the jury rejected Rodriguez-Moya's claim that he stabbed Garcia-Jimenez and Grassi *because* he was provoked by Grassi hitting him in the head with the vase after he broke through the window into the trailer. As one leading treatise stated in describing the causation requirement of heat of passion, "There is no mitigation [down to manslaughter] . . . if the intent to kill was formed before the provocation was received . . . because in such a case, the provocation, no matter how adequate, was not the cause of the fatal act."[8] In *Wilkerson v. State*, we upheld the rejection of a heat-of-passion claim on this basis.[9] We stated that "the undisputed facts show that Wilkerson acted deliberately; he was preparing to assault Gregory even before

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[8] Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, at 102 (3d ed. 1982); *see also id.* at 89 ("There is no mitigation in favor of the original assailant if he intended in the beginning to kill or to inflict great bodily injury[.]").

[9] *Wilkerson v. State*, 271 P.3d 471, 474 (Alaska App. 2012).

Gregory uttered the words that supposedly triggered the passion in Wilkerson."[10] We reached the same conclusion as to a self-defense claim in *Baker v. State*.[11]

For these reasons, even if the court had given the requested instructions on self-defense and heat of passion, the jury would necessarily have found that the State had disproved these defenses.

Why we conclude that the superior court did not improperly comment on the evidence

The jury was given a defense-of-premises instruction which stated:

> A person in possession or control of any premises, or an express or implied agent of that person, may use deadly force upon another person when and to the extent the person believes it is necessary to terminate what the person believes to be the commission or attempted commission by the other person of burglary in any degree occurring in an occupied dwelling or occupied building. The person's belief must be reasonable under the circumstances.

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[10] *Id.*

[11] *Baker v. State*, 1995 WL 17220761, at *3 (Alaska App. Apr. 5, 1995) (unpublished). In *Baker*, we stated:

> By convicting Baker of burglary, the jury necessarily found that Baker acted with specific intent to assault [the victim] when he kicked down her door. The jury's verdict therefore rules out any possibility that Baker's assault on [the victim] might have been prompted by the situation he encountered once he had kicked down the door.

Id. at *3.

Rodriguez-Moya argued that this instruction was unnecessary and stated that "it's prejudicial . . . to have this instruction here that Paolo Grassi had every right to do what he needed to do."

The jury was also given a separate instruction that stated, "Defenses of Heat of Passion and Self-Defense do not apply in this case as a matter of law." Rodriguez-Moya argued that this second instruction would preclude him from arguing what his mental state was when he entered Garcia-Jimenez's trailer and was prejudicial for that reason. The superior court disagreed, noting that Rodriguez-Moya was free to argue that he lacked the intent to assault or kill when he broke through the window. The court maintained that the instruction helped to alleviate the danger that jurors would attempt to apply an idiosyncratic understanding of the law on self-defense and heat of passion.

On appeal, Rodriguez-Moya argues that these instructions in combination amounted to the judge telling the jury that he thought that Rodriguez-Moya was guilty of burglary. Rodriguez-Moya claims that, through the combination of these instructions, "the trial court informed the jury that Rodriguez-Moya . . . was not entitled to self-defense . . . because Grassi, when he struck Rodriguez-Moya, reasonably believed he needed to defend the premises against Rodriguez-Moya's burglary." Rodriguez-Moya did not raise this argument in the superior court, and he fails to show plain error.[12]

First, as the State notes, the defense-of-premises instruction did not state that Rodriguez-Moya had committed a burglary, nor did it suggest that Grassi was using a lawful amount of force to terminate a burglary. Rather, the instruction was framed in neutral terms, stating that a person "may" use force if he reasonably believes that certain

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[12] *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011) (holding that a defendant's failure to object to an alleged error in the trial court requires the defendant to show plain error, which is "an error that (1) was not the result of intelligent waiver or a tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial").

conditions — *i.e.*, an ongoing burglary — have been met. This instruction explained the law but left it to the jury to find the facts and apply the law to those facts.

Second, the jury instructions as a whole made it clear that the jury had to decide whether Rodriguez-Moya had committed a burglary, a criminal trespass, or neither. The jury instructions laid out the elements of both offenses and explained that it was up to the jury to decide whether the elements had been satisfied.

Under these circumstances, there is little reason to conclude that the jurors would have understood the defense-of-premises instruction — either alone or in combination with the instruction stating that self-defense and heat of passion did not apply — to suggest that the court was implying that Rodriguez-Moya had committed burglary. Moreover, the superior court gave an instruction stating:

> During the trial, I did not mean to suggest what you should find to be the facts of the case or that I believe or disbelieve any witness. If anything I did or said seems to suggest otherwise, you will disregard it and form your own opinion. You, the jury, will decide the verdict in this case.

Given all of the above, there is no reasonable possibility that the jury would have understood the challenged instructions as implying that the superior court believed that Rodriguez-Moya's guilt on the burglary charge had been established.

Conclusion

For the reasons explained in this opinion, we AFFIRM the judgment of the superior court.