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

RYAN ANGELO SARGENTO,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13283
Trial Court No. 3AN-17-06430 CI

MEMORANDUM OPINION

No. 7078 — November 8, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Dani Crosby, Judge.

Appearances: Cynthia Strout, Attorney at Law, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge TERRELL.

Ryan Angelo Sargento appeals from the dismissal of his post-conviction relief application, which challenged his first-degree murder conviction. Sargento's application asserted two claims of ineffective assistance on the part of his trial counsel.

First, he argued that his trial counsel ineffectively argued for a heat-of-passion jury instruction. Sargento claimed that his trial counsel's assertion that Sargento

was provoked when the victim humiliated him two days before the fatal shooting was a questionable basis for claiming serious provocation under Alaska law. Sargento claimed that his attorney should have argued that he was provoked during an encounter immediately preceding the shooting, when (according to Sargento's trial testimony) the victim reached into his jacket for what Sargento thought was a gun. He argued that this second theory would have merited a jury instruction on heat of passion and could have resulted in a verdict for manslaughter.

Second, Sargento argued that his trial counsel was ineffective for failing to call Khamthene Thongdy to testify. Sargento asserted that Thongdy would have corroborated that the victim had hit Sargento in the head with a pistol in the incident two days before the shooting. Sargento claimed that this testimony would have supported the reasonableness of his belief that his victim was armed and that he needed to use deadly force when the victim approached him immediately preceding the shooting.

The State moved to dismiss Sargento's post-conviction relief application on the basis that it failed to state a *prima facie* claim of ineffective assistance of counsel. The superior court assumed for the sake of argument that counsel's handling of the request for a heat-of-passion instruction and failure to call the witness were incompetent, but found that Sargento had failed to set forth a *prima facie* case that there was a reasonable possibility that these alleged errors contributed to the outcome, *i.e.*, failed to show a reasonable possibility that the jury would have found heat of passion and convicted him of manslaughter instead of first-degree murder. As to the heat-of-passion claim, the court noted that Sargento's "attorney was successful in winning a self-defense instruction, which the jury rejected," and stated that "[t]here is nothing to suggest a heat of passion defense based on the same event (seeing the gun) would have led to a different outcome." As to the failure-to-call-a-witness claim, the court stated that "the witness who was not called was not expected to offer any additional or conflicting testimony; the

prosecutor did not dispute that the incident two days before the shooting occurred as Mr. Sargento had described."

For the reasons set out below, we hold that the superior court correctly concluded — based on the trial record, Sargento's amended post-conviction relief application, and his opposition to the State's motion to dismiss — that Sargento failed to set forth a *prima facie* case showing a reasonable possibility that the trial jury would have accepted a heat-of-passion defense and convicted him of manslaughter instead of first-degree murder. We also hold that the superior court correctly concluded that Sargento failed to show a reasonable possibility that calling Khamthene Thongdy would have affected the outcome at his trial. Accordingly, we affirm the superior court's dismissal of Sargento's post-conviction relief application.

Background facts and proceedings

1. The homicide, the trial testimony of the key witnesses, and the theories of the case presented by the prosecution and defense in closing arguments

In June 2010, Sargento shot and killed a rival drug dealer, John Taylor. A brief recitation of the facts is set out in our decision affirming Sargento's first-degree murder conviction on direct appeal.[1] But because the dismissal of Sargento's post-conviction relief application turns on Sargento's failure to establish a *prima facie* claim that his trial attorney's alleged errors affected the outcome at his trial, we will set out in greater detail both the uncontroverted facts and the areas where Sargento's version of events differed from other witnesses.

Sargento and Taylor were young men who dealt drugs, including methamphetamine. They both knew and socialized with two young women who were

[1] *Sargento v. State*, 2016 WL 936778, at *1 (Alaska App. Mar. 9, 2016) (unpublished).

meth users, fifteen-year-old B.W. and twenty-year-old Suzanne Johnston. Sargento testified that he had known Taylor for only about six weeks before the homicide, and that they had only interacted on a few occasions. B.W. testified that at one of her initial interactions with Sargento, he became angry, stating that he did not have enough drug customers and that Taylor had a cell phone full of customers.

Sargento testified that about four days before the homicide, Taylor called him and asked him if he would come help Taylor in a fight that appeared likely to take place. Sargento declined because he did not want to get into a fight where he had no personal stake in the matter.

Sargento testified that two days later, he received a call to meet Taylor and another drug dealer, Khamthene Thongdy, at a parking lot in front of an apartment building. Sargento drove to the location and parked his truck a distance from a car where Thongdy was in the driver's seat and Taylor was in the rear passenger seat. Sargento walked over to the car and got into the right front passenger seat. Sargento testified that Taylor immediately asked him where his (Taylor's) cell phone was, because Taylor thought Sargento had taken it. Sargento denied knowing anything about where Taylor's cell phone might be located.

Sargento testified that Taylor then jammed a gun in his back, and said "you're a little bitch." Sargento said that he did not understand why Taylor was doing this, and that he thought they were friends. Taylor replied, "I only known you for two minutes, how the fuck are we friends?" Taylor then told Sargento to scream as loud as he could, "I'm a little bitch," promising that if he did so he would let him go. Sargento testified that he did as Taylor demanded because he feared for his life. At this point, several people drove into the parking lot, and Sargento seized the occasion to get out of the car, though Taylor tried to prevent him from doing so.

Sargento walked back to his truck, and Taylor got out of the car and followed him to the truck. Sargento testified that Taylor said that he (Taylor) should just kill Sargento right then and gestured to the gun that was under his jacket.[2] Sargento also claimed that Taylor said, "Next time I see you I'm going to kill you," and that Taylor also said he would kill Sargento's family. But Sargento conceded at trial that he did not tell anyone in his family about this alleged threat to their lives.

Sargento testified at trial that he was humiliated and embarrassed by the gun-in-the-back, "say 'I'm a little bitch'" incident, and that he did not want people to know that he had been caught in a defenseless position. Sargento also testified that Taylor was telling people about the incident, and that Suzanne Johnston had told him that Taylor described the incident to her by saying that "he stuck you with a gun and . . . you screamed like a little bitch."

After the incident, Sargento obtained a gun, a nine-millimeter Luger Hi-Point semi-automatic pistol, with an eight-bullet magazine.

In the hours preceding the early morning shooting on June 2, 2010, B.W. and Johnston picked Sargento up at a hotel. Leaving Sargento's truck parked elsewhere, the group proceeded in a borrowed vehicle and drove to Chugiak High School, where Sargento sold fake meth to a young woman in the parking lot for $300. After that, they drove back into Anchorage and dropped Sargento off at his truck. B.W. and Johnston then drove to the Mountain View apartment of a friend of theirs, Wenonah Lord, as did

---

[2] Thongdy did not testify at trial, nor did he provide an affidavit in Sargento's post-conviction relief case, but Sargento's post-conviction relief investigators interviewed him. The interview report was filed in the superior court and stated that Thongdy heard Taylor say to Sargento "We're not cool . . . I should kill you" when they were in Thongdy's car, in response to Sargento's statement, "I thought we were cool." But Thongdy did not corroborate Sargento's claim that when Taylor followed him to his truck, Taylor threatened to kill him the next time he saw him.

Sargento. At Lord's apartment, the group smoked meth and worked on recording music. Sargento testified that he smoked meth in the hours preceding the shooting. B.W. testified that she saw Sargento at the apartment with Taylor's cell phone, copying the names and phone numbers of Taylor's drug customers. (Sargento denied this at trial.)

After some hours had passed, Taylor called Johnston and asked for a ride, and B.W. and Johnston left Lord's apartment to get him. After they picked him up, Taylor mentioned that his cell phone was missing. One of the women stated that she had seen Sargento in possession of Taylor's cell phone, and that Sargento was at Lord's apartment. (Both women testified that they were the one who said this to Taylor.) Taylor then directed them to drive to Lord's apartment.

When they reached Lord's apartment building, Taylor got out of the vehicle and went up to the door of the apartment, while the women parked the car. Taylor pounded repeatedly on the door of Lord's apartment, stating that he knew that Sargento was there and demanding that he come out. Sargento told the people inside the apartment not to answer the door and to remain quiet. They did so, and eventually Taylor left after no one answered the door. Sargento testified that he waited twenty to thirty minutes, until he thought Taylor was probably no longer around, but that he nonetheless cocked his pistol and chambered a round before leaving Lord's apartment.

Taylor, for his part, after unsuccessfully trying to get Sargento to come out of Lord's apartment, returned to the parking lot where B.W. and Johnston had parked. B.W. and Johnston were outside the vehicle, plugging a laptop into an outside plug in order to charge it.

There are two divergent accounts of the shooting, and we recount first the version of the State's three key eyewitnesses — B.W., Johnston, and a man who lived in a nearby apartment building and who was looking out his bathroom window when the shooting took place. B.W. and Johnston testified that after Taylor came back to the

parking lot, he saw Sargento's truck nearby and concluded that Sargento must still be in the area, and began walking around looking for him. B.W. testified that when Sargento emerged on the scene, near his truck, Taylor began walking towards him shouting "give me back my cell phone." B.W. testified that she did not see Taylor make any gestures as if he were reaching for a weapon. Sargento pulled out his gun. Taylor taunted Sargento, "shoot me, go ahead, do it, see if you can." Sargento obliged, advancing on Taylor while letting loose with a volley of four shots. Taylor, hit by some of the shots, raised his hands and told Sargento to stop. Sargento did not stop, instead pursuing a staggering and weakening Taylor around a vehicle and continuing to fire while Taylor collapsed to his knees with his hands up in the air. Sargento, who by then was behind Taylor, shot him twice more and then hit him in the head with the pistol after he had emptied the clip, causing the pistol to fly out of his hands and hit the ground.

Sargento picked up the pistol and then fled the scene. He told B.W. and Johnston, "run, girls." Sargento next ran to Lord's apartment and pounded on the door, shouting "dude, let me in," and then fell into the apartment when the door was opened (according to the resident of a neighboring apartment).[3] About thirty seconds later, Sargento left the apartment.

Sargento ran about a block-and-a-half away, and hid in a shed in the backyard of a residence. By then, Anchorage Police Department officers, including a canine unit, had quickly responded to the scene and tracked him to the shed, where the dog alerted on the shed. Sargento eventually came out of the shed, but did not comply with police commands to keep his hands up and to get on the ground, resulting in the

---

[3] Sargento testified that, while inside the apartment, he gave the gun to Christopher Rogers. The gun was found outside the building in a freshly hydro-seeded area with no footprints nearby, suggesting that it was either tossed there by Sargento as he was running by that area, or thrown there from Lord's apartment.

officers having to physically subdue him and handcuff him. Even then Sargento did not comply with commands to put his hands behind his back and struggled with the officers. Sargento told the officers, "I didn't know it was a problem to be sitting in a shed, I sit in a shed all the time." Sargento appeared unfazed. One officer described him as "calm, collected, [with] no expression on his face." Another officer testified that "he just seemed kind of nonchalant, indifferent to the situation, like it wasn't a big deal having all these guns . . . pointed at him and . . . people giving him commands."

Sargento presented a different version of events. Sargento testified that as he approached his truck, he saw Taylor sitting in the back seat of a vehicle in the parking lot and that Taylor saw him and got out of the vehicle, making a gesture to Sargento along the lines of "come over here." Sargento conceded that there was some yelling initially and that Taylor might have said "where's my cell phone?" Sargento claimed that Taylor then began to reach into his jacket, for what Sargento believed was a gun, and stated that he then pulled his own gun out and began firing at Taylor. Sargento claimed that in the heat of the moment, he did not know if his shots were actually hitting Taylor and thought that at any moment, Taylor might be able to draw a gun and shoot him. Sargento conceded that he advanced on Taylor and that the two of them went around a vehicle, characterizing this as "following" Taylor rather than as pursuing him. Sargento conceded that Taylor put his hands up and that he fired on a kneeling Taylor. But Sargento asserted that he was in fear for his life because (1) Taylor had told him that he would kill him the next time he saw him, (2) he believed that Taylor was always armed, and (3) Taylor's initial action of reaching towards his jacket made him think Taylor was reaching for his gun. Sargento further claimed that he thought Taylor could draw on him even if injured, and thus in a state of fear, kept firing until the threat from Taylor was neutralized. Sargento testified that he meant to hit Taylor over the head with the gun

after he ran out of bullets, but did not actually hit Taylor in the head because the gun flew out of his hands as he was moving his arm to strike Taylor with it.

The medical examiner testified that Taylor had five separate bullet wounds, meaning that Sargento hit Taylor with five of his eight shots. The examiner testified that the fatal bullet entered the left side of Taylor's chest and went through his heart, a second bullet hit Taylor in the middle of the lower back and came out his right side, a third bullet also entered from the left side of his lower back and came out through his front side, a fourth bullet struck him in the left hip, and a fifth bullet hit him in the arm. He also testified that Taylor had a laceration to the back side of his left knee which was possibly an atypical wound from a bullet which grazed him (meaning that Sargento may have connected on six out of eight shots). The examiner testified that Taylor had significant abrasions to his face, which appeared to be caused by Taylor hitting the surface of the parking lot face-first.

A firearms expert from the Alaska State Crime Lab testified that the trigger pull on Sargento's pistol was 7.5 pounds, an above-average figure compared to the trigger-pull weights of numerous other firearms, and that the firing mechanism in the pistol required the trigger to be pulled for each shot fired.

Based on this testimony, the prosecutor and the defense counsel presented two differing views of events. The prosecutor conceded that the incident where Taylor put a gun in Sargento's back and made him scream "I'm a little bitch" had occurred. But she argued that Sargento's testimony that Taylor had said he would kill Sargento the next time he saw him was pure fiction, designed to support Sargento's self-defense claim. The prosecutor characterized the gun-in-the-back incident as a part of the rough underworld of drug dealing, a rebuke to Sargento for his failure to help Taylor in the fight, but not one that had made Sargento particularly frightened of Taylor.

As to the shooting itself, the prosecutor did not claim that it was a pre-planned act, but rather only that Sargento made a deliberate decision to kill Taylor when he encountered him in the parking lot near Lord's apartment. The prosecutor asserted that Sargento killed Taylor likely either in revenge for his earlier humiliation, or to preserve his reputation in the drug community as a person not to be trifled with or disrespected. And the prosecutor stated that regardless of the cause, the evidence showed that Sargento relentlessly pursued Taylor and gunned him down in cold blood.

Sargento's counsel claimed that the gun-in-the-back incident was pivotal: Taylor had told Sargento he would kill him the next time he saw him, Sargento had good cause to believe that Taylor was always armed, and in the parking lot Sargento saw Taylor reaching into his jacket. Sargento's counsel argued that this caused Sargento to fear for his life, resulting in Sargento quickly and repeatedly shooting Taylor until he was sure Taylor was no longer a threat.

2. The charges, the original defense theory, the defense's end-of-trial request for an instruction on heat of passion, the jury's verdict, and the judge's sentencing remarks

Sargento was tried on charges of first- and second-degree murder and evidence tampering.[4] Near the beginning of the case, Sargento filed a timely notice of his intent to assert that he acted in self-defense. Self-defense was Sargento's defense at trial, and the jury was instructed on self-defense.

However, near the end of trial, after the evidence had closed, Sargento's counsel also asked for a jury instruction on the defense of heat of passion. Counsel argued that the "serious provocation" required for a heat-of-passion defense was Taylor's actions two days prior to the shooting — putting a pistol in Sargento's back and making

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

him scream, "I'm a little bitch" — and that Sargento had not cooled off from the anger caused by this incident. Sargento's counsel argued that despite the lack of timely notice of a heat-of-passion defense, he was entitled to ask for the instruction because the State's evidence had created the basis for him to argue it.

The trial court denied this request. First, the court noted that Sargento had not given timely notice of intent to rely on this defense, as required by Alaska Criminal Rule 16(c)(5). The court stated that had this issue occurred at the outset of trial, the remedy would be to grant the State a continuance, but that the core problem that notice-of-defense provisions are designed to prevent had occurred, *i.e.*, the State had formulated its case to meet Sargento's self-defense claim and had not taken steps to introduce pertinent evidence regarding heat of passion, and was thereby prejudiced. Second, the court stated that the evidence supported the view that any alleged passions stemming from the gun-in-the-back incident had cooled by the time of the shooting, noting that Sargento had testified that he was recording music and using drugs with his friends in Lord's apartment before he left to go out to the parking lot.

Although the court did not instruct the jury on manslaughter under a heat-of-passion theory, the court granted Sargento's request to instruct the jury on manslaughter as a lesser-included offense of first- and second-degree murder. But Sargento's counsel did not argue in his closing argument that the jury should consider convicting Sargento of manslaughter, and argued that the jury should acquit Sargento entirely because Sargento, in great fear of Taylor, acted in self-defense.

The jury retired to deliberations around 1:30 p.m. and returned with guilty verdicts on all counts the next day at 10:20 a.m.[5] The jury did not send any questions to the judge or ask to review any trial testimony.

---

[5] *Sargento*, 2016 WL 936778, at *1.

Sargento's sentencing memorandum and notice of mitgating factors argued that although the jury had rejected his self-defense theory, the court should nonetheless sentence him based on the view that Sargento reasonably thought that he saw Taylor reaching for a gun. Sargento's counsel reiterated this argument at sentencing. The sentencing judge, who had also presided at trial, emphatically rejected this argument, and characterized Sargento's actions by saying:

> [W]hat we had here was an assassination. I mean, a man was shot repeatedly, he was hit on the head after Mr. Sargento ran out of bullets and left to bleed out in the street when Mr. Sargento hid in a storage shed. This was not a — you know, this was not a "whoops, I was scared, I thought he was armed." This was an assassination.

The court noted that witnesses described Sargento as chasing Taylor. The court stated that "I don't know why he wanted to end the life of Mr. Taylor," whether it was "for revenge [or] to make a showing," but reiterated that "it was clear to me that this was no 'whoops, I thought he was armed, I shot him.'" The court stated, "I find it was a cold-blooded murder, it was an execution."

This Court affirmed Sargento's conviction on direct appeal.[6] The Alaska Supreme Court then denied Sargento's petition for hearing.[7]

3. Sargento's post-conviction relief application

Sargento filed a timely post-conviction relief application in April 2017. After counsel was appointed, Sargento later filed a supplemental pleading in which he outlined the two theories of ineffectiveness of counsel which are at issue in this appeal.

---

[6] *Id.* at *6.

[7] *Sargento v. State*, Supreme Court File No. S-16254 (Order dated May 18, 2016).

First, he argued that his trial attorney was ineffective in the way he framed his request for a jury instruction on heat of passion. Sargento argued that no reasonably competent attorney familiar with Alaska heat-of-passion law would argue that the provocation occurred two days before the murder and that the defendant had not had a reasonable amount of time to cool down. Sargento claimed that his attorney should have instead argued that Sargento was seriously provoked by Taylor's movements immediately preceding the shooting, which Sargento interpreted as Taylor reaching for a gun. Sargento argued that the proper significance of the gun-in-the-back, "say 'I'm a little bitch'" incident was to explain why he viewed Taylor's movements in the parking lot as a threat and why his reaction was reasonable.

Sargento's analysis as to how his trial attorney's performance adversely affected the outcome of his case was set out in a paragraph which stated:

> If the jury had been instructed on heat of passion, they could reasonably have found that this was a heat of passion killing. The pistol-whipping event, if [trial counsel] had presented it properly, would have established that Sargento had every reason to believe that [Taylor] was armed and meant to shoot him. This belief would explain his fear and anger at the time of the shooting. [Trial counsel's] failure to present the defense properly caused the trial judge to reject the request for heat of passion jury instructions. But for this error, the jury could reasonably have found heat of passion applied.

Second, Sargento argued that his trial attorney was ineffective for not calling Khamthene Thongdy as a witness. Sargento claimed that Thongdy's testimony would have corroborated his own testimony that Taylor hit him in the head with his pistol following the gun-in-the-back, "say 'I'm a little bitch'" incident, and that it would also have substantiated the reasonableness of his belief that Taylor was habitually armed and that he needed to use deadly force.

Sargento also later filed an expert report from criminal defense attorney John Cashion outlining why he thought Sargento's trial counsel's performance was deficient as to these two points. As to the heat-of-passion issue, Cashion cited to *Howell v. State* and *Kirby v. State* for the proposition that heat of passion and self-defense are different legal standards, such that a jury may, under a particular set of facts, accept heat of passion while at the same time rejecting self-defense.[8] Cashion's report focused on the fact that heat of passion would have provided a better way to deal with the fact that Sargento fired eight times and that he clubbed Taylor with the pistol after he was out of bullets. As to prejudice, the report stated that if the jury had been instructed on heat of passion, it "could have found that while Mr. Sargento's actions were unreasonable, they were provoked by his reasonable perception of [Taylor's] own actions."

The State moved to dismiss Sargento's application for failure to state a *prima facie* claim. The motion to dismiss argued that Sargento had failed to show "that the jury would have been convinced by this [heat-of-passion] defense" had the jury been instructed on heat of passion. Additionally, the State argued that Sargento had failed to establish that (1) his trial attorney lacked a valid tactical reason for failing to call Thongdy, and (2) Thongdy's testimony would have contributed additional helpful facts.

Sargento's opposition to the motion to dismiss addressed the issue of prejudice regarding the heat-of-passion issue in a paragraph which stated:

> If [trial counsel] had properly framed the heat of passion issue, and obtained the requested jury instructions, a trial jury could have found that Sargento acted out of fear and anger when he shot the decedent, and that this mitigated the charge to manslaughter.

---

[8] *Howell v. State*, 917 P.2d 1202, 1210-11 (Alaska App. 1996); *Kirby v. State*, 649 P.2d 963, 968-69 (Alaska App. 1982).

As to the claim regarding failure to call Khamthene Thongdy as a witness, Sargento claimed that his trial counsel had "no explanation for failing to offer corroborating witnesses to the decedent's assault upon Sargento, his character for violence and for carrying a weapon."

The superior court granted the State's motion to dismiss, concluding that:

> Even if Mr. Sargento's counsel was ineffective in not preserving the heat-of-passion defense, and in not calling a witness, Mr. Sargento has not met his burden to establish these errors would have changed the outcome of his case. His attorney was successful in winning a self-defense instruction, which the jury rejected. There is nothing to suggest a heat-of-passion defense based on the same event (seeing the gun) would have led to a different outcome.
>
> In addition, the witness who was not called was not expected to offer any additional or conflicting testimony; the prosecutor did not dispute that the incident two days before the shooting occurred as Mr. Sargento had described.

This appeal followed.

Why we affirm the dismissal of Sargento's post-conviction relief action

1. The superior court correctly applied the standards applicable to the first phase of a post-conviction relief action

Under Alaska law, claims of ineffective assistance of counsel are governed by the two-prong standard set out in *Risher v. State*: the claimant must first show that no reasonably competent counsel would have performed in the manner that counsel did with respect to the conduct at issue (the performance prong), and second must establish that the deficient performance contributed to the outcome of the case (the prejudice

prong).[9] The prejudice prong requires a showing of a reasonable possibility that counsel's error affected the outcome of the case.[10] We review *de novo* a superior court's conclusion as to whether a post-conviction relief application (or particular claim therein) stated a *prima facie* claim.[11]

We recognized in *State v. Jones* that the litigation of post-conviction relief actions generally takes place in three phases: (1) the pleadings phase, where the court must evaluate whether the post-conviction relief application has set out a *prima facie* claim for relief, (2) if that requirement is met, a discovery phase, where either party retains the option to move for summary judgment if they conclude that there are no genuine issues of material fact, and (3) if the court determines that there are genuine issues of fact, an evidentiary hearing phase where those issues can be resolved, and which is concluded by the issuance of findings of fact and conclusions of law.[12]

Sargento's case was resolved at the pleadings phase, and he first argues that the superior court's order dismissing his case was erroneous in that it failed to comply with the legal standards applicable to the pleading phase. Sargento cites to our case law stating that at the pleadings phase of a post-conviction relief action, trial courts are obliged to accept as true all well-pleaded assertions in a post-conviction relief application. Sargento cites *Vizcarra-Medina v. State*, where we stated that in the post-conviction relief context, "a judge has no authority to grant summary judgement based on the judge's pre-trial assessments of witness credibility or pre-trial assessments of the

---

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

[10] *Ahvakana v. State*, 475 P.3d 1118, 1125 (Alaska App. 2020).

[11] *David v. State*, 372 P.3d 265, 269 (Alaska App. 2016).

[12] *State v. Jones*, 759 P.2d 558, 565-66 (Alaska App. 1988).

comparative strength of the parties' cases."[13] Sargento argues that in concluding that he had failed to show a reasonable possibility that the jury would have found that he acted in the heat of passion had the jury been instructed on that defense, the superior court erred by engaging in fact-finding (rather than accepting his allegations as true). Sargento also argues that the superior court was obliged to accept his expert's report on this issue as sufficient to meet his burden of establishing a *prima facie* case.

Sargento's first argument misperceives a key aspect of post-conviction relief law. When a motion to dismiss for failure to state a *prima facie* claim is filed in an ordinary civil action, the ultimate facts as to the plaintiff's case have not been conclusively resolved by the fact-finder, and the court must construe all well-pleaded allegations, and the reasonable inferences to be drawn from them, in the plaintiff's favor as to the entire case.[14] But when a motion to dismiss is filed in a post-conviction relief action, it occurs against the backdrop of a completed case where the defendant was convicted. To the degree that the post-conviction relief applicant seeks to have their conviction assessed in light of new facts not part of the existing record in the criminal case, such as allegations of ineffective assistance of counsel, a court in evaluating whether the post-conviction relief application states a *prima facie* claim must accept well-pleaded assertions regarding those new facts as true.[15] However, the facts of the applicant's criminal case are the subject of a conviction and the presumption of innocence no longer controls.[16] In evaluating the effect of a claimed legal error (such as

---

[13] *Vizcarra-Medina v. State*, 195 P.3d 1095, 1099 (Alaska App. 2008).

[14] *See Caudle v. Mendel*, 994 P.2d 372, 374 (Alaska 1999) (quoting *Kollodge v. State*, 757 P.2d 1024, 1025-26 (Alaska 1988)).

[15] *See LaBrake v. State*, 152 P.3d 474, 480-81 (Alaska App. 2007).

[16] *See Brown v. State*, 601 P.2d 221, 225 (Alaska 1979) ("It is clear that the presumption (continued...)

a failure to obtain a jury instruction on a defense), the court is not required to revert back to a presumption of innocence, to assume that all evidentiary disputes would have been resolved in the applicant's favor, and to assume that the jury would have been convinced by the applicant's defense absent the claimed error.

In evaluating whether an applicant's pleadings and motion work have shown a reasonable possibility that the outcome of the trial would have been different absent the alleged error, a post-conviction relief court is not engaged in fact-finding. Indeed, we have repeatedly upheld superior court orders dismissing a post-conviction relief action for failure to establish a *prima facie* claim showing a reasonable possibility that the alleged legal errors contributed to the outcome of the case, where the superior court evaluated the probable effect of the alleged error in light of the record from the criminal case and concluded that the applicant's showing fell below the "reasonable possibility" standard.[17]

Sargento's second procedural claim is that the superior court erred in not treating his expert's report as conclusive at the first phase of a post-conviction relief action. He provides no legal analysis of the effect of an expert's report. We note that we have not treated such reports as binding on trial judges in deciding a post-conviction

---

[16] (...continued)
of innocence remains with the defendant until a guilty verdict is reached.").

[17] *See Burton v. State*, 180 P.3d 964, 971 (Alaska App. 2008); *Billy v. State*, 5 P.3d 888, 889 (Alaska App. 2000); *Nashookpuk v. State*, 2023 WL 4921131, at *1 (Alaska App. Aug. 2, 2023) (unpublished summary disposition); *Olsen v. State*, 2023 WL 1809028, at *1 (Alaska App. Feb. 8, 2023) (unpublished summary disposition); *Kowalski v. State*, 2022 WL 1664317, at *2-3 (Alaska App. May 25, 2022) (unpublished summary disposition); *Gates v. State*, 2021 WL 5918396, at *1-2 (Alaska App. Dec. 15, 2021) (unpublished); *Russell-Durant v. State*, 2018 WL 3583034, at *2 (Alaska App. July 25, 2018) (unpublished); *Deremer v. State*, 2015 WL 7201207, at *4 (Alaska App. Nov. 12, 2015) (unpublished); *Tegoseak v. State*, 2015 WL 3822374, at *2-3 (Alaska App. June 17, 2015) (unpublished).

relief action, and have affirmed the dismissals of post-conviction relief applications for failure to state a *prima facie* claim despite the existence of expert's reports.[18] Although we express no opinion, an argument can be made that an expert's report might be sufficient to withstand a motion to dismiss when the case involves the relatively rare situation where expert testimony is needed to establish for the judge the standard of performance of competent counsel with respect to a particular issue. But even if that were the case, this would only be true as to the performance prong of an ineffective assistance claim. The prejudice analysis — in this case, how jury instructions might have affected the outcome of the case — is something that trial judges are competent to evaluate without need of expert testimony, and such a report is not binding on the judge in evaluating whether an application has set forth a *prima facie* claim of prejudice. The court did not err in independently analyzing this issue.

2. The superior court correctly concluded that Sargento had failed to show a reasonable possibility that the jury would have found that he acted in the heat of passion had it been instructed on heat of passion and that the outcome of the trial would have been different if Khamthene Thongdy was called as a witness

We turn now to Sargento's substantive claims — that his trial attorney was ineffective in his handling of the request for an instruction on heat of passion, and in failing to call a witness who would testify that the victim was known to always carry a gun. We, like the superior court, will assume that his trial attorney was ineffective and instead resolve the case on the prejudice prong. We affirm the superior court on that basis.

---

[18] *See, e.g.*, *Sherwood v. State*, 2012 WL 1889323, at *1-2 (Alaska App. May 23, 2012) (unpublished).

Sargento argues that the superior court's dismissal of his post-conviction relief application was fundamentally flawed. He claims that the court based its ruling on the legally erroneous view that the elements of self-defense and of heat of passion are co-extensive — *i.e.*, the view that, because the jury rejected self-defense, the court could conclude, as a matter of law, that the jury would also have rejected heat of passion had it been instructed on that defense. Sargento is correct that self-defense and heat of passion have different contours and that a jury's conclusion as to one does not necessarily mean that it would have similarly found as to the other.[19] But judges are presumed to know the law,[20] and Cashion's expert report correctly highlighted our cases recognizing that a jury may in some cases accept heat of passion while rejecting self-defense. We thus see no basis to conclude that the superior court misunderstood the differences between the elements of self-defense and those of heat of passion. Rather, in light of the dismissal order's focus on the key fact of Sargento's defense — his claim that he thought he saw Taylor reaching for a gun — we interpret the order as focusing on whether Sargento had shown that, in light of the existing trial record, there was a reasonable possibility that the jury would have credited a heat-of-passion claim. We agree with its conclusion that he did not make such a showing.

Heat of passion is a defense with origins in the common law and which mitigates murder down to manslaughter.[21] Alaska has codified this defense in AS 11.41.115(a). The statute provides in relevant part that "[i]n a prosecution under

---

[19] *See Gray v. State*, 2019 WL 1057395, at *5 & n.21 (Alaska App. Mar. 6, 2019) (unpublished) (citing *Howell v. State*, 917 P.2d 1202, 1206-07 (Alaska App. 1996), *Blackhurst v. State*, 721 P.2d 645, 648-49 (Alaska App. 1986), and *Kirby v. State*, 649 P.2d 963, 969 (Alaska App. 1982)).

[20] *Lambrix v. Singletary*, 520 U.S. 518, 532 n.4 (1997).

[21] *Dandova v. State*, 72 P.3d 325, 332 (Alaska App. 2003).

AS 11.41.100(a)(1)(A) or AS 11.41.110(a)(1), it is a defense that 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."[22] The statute defines "serious provocation" as:

> conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a person who is intoxicated, under the circumstances as the defendant reasonably believed them to be; insulting words, insulting gestures, or hearsay reports of conduct engaged in by the intended victim do not, alone or in combination with each other, constitute serious provocation.[23]

And this Court has "consistently recognized that, in the context of the heat-of-passion statute, the word 'passion' encompasses more than anger or rage; it includes fear, terror, and other intense emotions."[24]

As we have previously noted, "[T]he definition of the heat of passion defense has always been the product of an uneasy marriage between psychology and social policy."[25] Historically, the heat-of-passion defense has been the product of the common law courts' understanding of human behavior and attempts to accommodate competing policy concerns in setting the contours of the defense,[26] and in Alaska, where the defense is now set by statute, it is the result of the legislature's balancing of these considerations.

---

[22] AS 11.41.115(a).

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

[24] *Howell*, 917 P.2d at 1206 (citations omitted).

[25] *Dandova*, 72 P.3d at 337.

[26] *Id.*

As such, the defense has aspects that are subjective, aspects that are objective, and aspects that combine subjective and objective features. It is subjective in that the serious provocation must have actually caused the defendant to personally experience a "heat of passion," rather than being a situation where the defendant simply took advantage of the provocation to carry out a previously formed intention to assault the victim.[27] But heat of passion also involves an objective aspect, in that the perception that one has been subject to "serious provocation" is one that an objectively reasonable person could have given the facts as the defendant perceived them to be.[28] And the standard is also a hybrid of objective and subjective, in that we imbue the reasonable person with the "defendant's knowledge, experience, and physical situation" in evaluating whether an objective person in the defendant's situation could perceive that they have been subject to serious provocation.[29]

However, although the defendant's perception of events must be reasonable, and their reaction within the bounds of proportionality, their reaction need not be entirely reasonable. The essence of the heat-of-passion defense is that it mitigates murder to manslaughter in those situations where "the defendant is subjected to a serious

---

[27] *See Ha v. State*, 892 P.2d 184, 196-97 (Alaska App. 1995).

[28] However, as with self-defense, the heat-of-passion defense can be invoked by a person who was mistaken in their perception of events in concluding that they were subject to "serious provocation," so long as that mistaken perception constitutes an objectively reasonable mistake. *Howell*, 917 P.2d at 1208-09.

[29] *Ha*, 892 P.2d at 198. But this reasonable-person standard does not take into account any mental abnormality specific to the defendant, nor does it take into account the perspective of a person who is intoxicated. AS 11.41.115(f)(2); AS 11.81.900(b)(35) ("intoxicated means intoxicated from the use of drugs or alcohol").

provocation that would 'naturally induce a reasonable [person] in the passion of the moment to lose self-control and commit the act on impulse and without reflection.'"[30]

In this case, to establish a *prima facie* case of prejudice, Sargento had to plead facts and legal arguments showing a reasonable possibility that the jury would have been convinced of the heat-of-passion defense, and he had to do so in light of the existing record and findings in the criminal case. Here, the jury rejected the option of manslaughter and convicted Sargento of first-degree murder — the intentional killing of Taylor — in line with the prosecution's theory that this was a cold-blooded killing. This view of the facts was strongly supported by eyewitness testimony and the physical evidence. Moreover, Sargento's consciousness of guilt was demonstrated in his flight from the scene. His apparent nonchalance in the face of a police manhunt, use of police canine units, and guns trained on him also strongly undercut his portrayal of himself as a frightened person who could not control his reaction to perceived threats or danger. And at sentencing, the trial court characterized the killing as "an assassination" and expressly rejected Sargento's claim that he shot Taylor multiple times because he was scared: "this was not a 'whoops, I was scared, I thought he was armed.' This was an assassination."[31]

---

[30] *Wilkerson v. State*, 271 P.3d 471, 474 (Alaska App. 2012) (quoting *Dandova*, 72 P.3d at 332).

[31] We have noted that in post-conviction relief actions is it appropriate to "defer to the [trial] judge's factual observations of how that underlying trial was conducted — *e.g.*, the tenor of the evidence, how the witnesses presented themselves to the jury, and how the trial attorneys litigated the case." *Curry v. State*, 2013 WL 6169308, at *3 (Alaska App. Nov. 20, 2013) (unpublished). Indeed, because a judge who tried the case is in the best position to evaluate post-conviction relief claims that different trial strategy, tactics, or performance by defense counsel might have affected the outcome of the trial, post-conviction relief actions are normally assigned to the judge who tried the criminal case. *Plyler v. State*,
(continued...)

Sargento had the burden of establishing a reasonable possibility that, despite this view of the evidence, the jury would have accepted his heat-of-passion defense if it was squarely before them. The problem is that there was little to support that alternative view of the case. In order for the jury to credit the heat-of-passion defense, the jury had to believe — as they would to credit self-defense — that Sargento was telling the truth and that he reasonably, albeit mistakenly, thought that Taylor was reaching for a gun in his jacket. But Sargento's testimony was not well-supported and was against the weight of the evidence. No other witnesses described Taylor as making a movement to reach into his jacket, or otherwise believed that Taylor was reaching for a gun. No gun was found on Taylor, or at the scene (other than Sargento's gun). Sargento admitted that he never saw a gun on Taylor's person or in his hand at the scene of the shooting, but testified that he saw Taylor make a movement that he *thought* was reaching into his jacket for a gun. And no other witness supported Sargento's claim that, when Taylor followed him back to his truck after the gun-in-the-back, "say 'I'm a little

---

[31] (...continued)
10 P.3d 1173, 1174-75 (Alaska App. 2000). The sentencing statements of a judge who presided over trial are thus properly looked to as part of the picture that a post-conviction relief applicant may need to rebut or overcome in showing that there is a reasonable possibility that the alleged errors of trial counsel affected the outcome. For example, in *David S. v. State, Dep't of Health & Soc. Services*, 270 P.3d 767, 786 (Alaska 2012), a case applying ineffective-assistance analysis with respect to a termination of parental rights trial, the supreme court noted the trial judge's observation that "this is not a close case" in conjunction with the point that David had not specified how the case would have come out differently if his counsel had taken a different approach. *See also United States v. Palmer*, 902 F. Supp. 2d 1, 19-20 (D.D.C. 2012) (in federal habeas case, relying on trial judge's sentencing remarks in noting that defendant had not sufficiently established prejudice as to his ineffective assistance of counsel claim).

bitch'" incident, Taylor told Sargento that he would kill him the next time he saw him.[32] The essence of Sargento's self-defense claim was the same as his heat-of-passion claim, *i.e.*, that he shot Taylor because he feared for his life, and in rejecting his self-defense claim jurors likely rejected the basis for his heat-of-passion claim.

To establish a *prima facie* case of prejudice, Sargento needed to adequately explain why there was a *reasonable* possibility that the jury *would have* viewed his actions as occurring under the heat of passion rather than the deliberate killing that it appeared to be.[33] But all Sargento offered was conclusory assertions that the jury *could have* found heat of passion if it had been instructed on that defense. This was insufficient. We agree with the superior court that Sargento's pleadings and motion work failed to demonstrate a reasonable possibility that the jury would have credited Sargento's proposed heat-of-passion defense.

We turn to Sargento's claim that his trial attorney was ineffective for not calling Khamthene Thongdy as a witness. Thongdy was interviewed by an investigator in Sargento's post-conviction relief action, and the investigator's report stated that Thongdy was present in the car with Sargento and Taylor when Taylor put a gun in Sargento's back and made him say "I'm a little bitch." Thongdy also stated, "After that he tried to hit [Sargento] in the back of the head with the gun. He connected on the third try." Sargento's supplemental post-conviction relief pleading stated that this report was

---

[32] As previously noted in footnote two on page five, even if Thongdy had been called at trial, his statements to post-conviction relief investigators showed only that Taylor had said "I should kill you" while the three of them were in Thongdy's car, *i.e.*, meaning that he should do so at that moment, and did not support Sargento's claim that when they were outside his truck, Taylor threatened to kill Sargento the next time he saw him.

[33] *See, e.g.*, *Geisinger v. State*, 498 P.2d 92, 102 (Alaska App. 2021); *Lord v. State*, 489 P.3d 374, 377 (Alaska App. 2021); *State v. Carlson*, 440 P.3d 364, 389 (Alaska App. 2019).

important because "it corroborated Sargento's testimony about the pistol whipping" and it "verified [Taylor's] character for usually being armed."

The first assertion is meritless. Sargento did not testify that Taylor hit him in the head with a gun during the gun-in-the-back, "say 'I'm a little bitch'" incident in Thongdy's car, so there was no need for corroboration for a claim that Sargento never made. And neither did Sargento's trial counsel assert in his opening statement that the evidence would show that Taylor had hit Sargento with a gun two days prior to the shooting, so this is not a case where counsel could be viewed as ineffective for making promises in the opening statement that were not supported by the evidence at trial.

The second assertion, that Thongdy's testimony would have verified that Taylor was usually armed, likewise failed to state a *prima facie* claim of prejudice in light of the trial record. Suzanne Johnston testified that she had told police that Taylor carried a gun most of the time, and B.W. said the same thing (and also testified that Taylor carried his gun in his waistband). Sargento's counsel emphasized this aspect of their testimony in his closing argument. And the prosecutor conceded that the gun-in-the-back, "say 'I'm a little bitch'" incident occurred, *i.e.*, that Sargento knew that Taylor had possessed a gun only two days before their fatal confrontation. Indeed, the jury was read a stipulation that both the State and Sargento conceded that that incident took place. Any testimony from Thongdy that Taylor was habitually armed would have been cumulative to the testimony of Johnston and B.W., and would not have changed the outcome of the trial.

Conclusion

The order of the superior court dismissing Sargento's post-conviction relief application for failure to state a *prima facie* claim is AFFIRMED.