IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CHARLES W. GROGAN III, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13475 Trial Court No. 1SI-18-00388 CR MEMORANDUM OPINION No. 7074 — October 11, 2023

Appeal from the Superior Court, First Judicial District, Sitka, M. Jude Pate, Judge.

Appearances: Justin N. Gillette, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Seneca Theno Freitag, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge ALLARD.

A jury found Charles Watson Grogan III guilty of one count of second-degree weapons misconduct, one count of fourth-degree weapons misconduct, and two counts of reckless endangerment.[1] These charges arose after a rifle was fired during an

[1] AS 11.61.195(a)(3)(B), AS 11.61.210(a)(3), and AS 11.41.250, respectively.

argument between Grogan and his ex-girlfriend. Both weapons misconduct charges required the State to prove that Grogan "knowingly" discharged a firearm. Grogan's defense at trial was that his rifle accidentally discharged — *i.e.*, that while he may have handled the rifle negligently or recklessly, he did not "knowingly" pull the trigger and cause the gun to discharge.

During deliberations, the jury sent a note to the superior court asking it to clarify whether "a[n] accidental discharge [can] be covered by 'knowingly.'" Grogan urged the court to respond, "No" — *i.e.*, that an accidental discharge is not knowing conduct. The State asked the court to simply refer the jury to existing instructions, which included the statutory definition of "knowingly." The court decided to follow the State's suggestion, and directed the jury to its previous instructions without addressing the jury's confusion.

On appeal, Grogan argues that it was error for the court not to respond to the jury's question with some form of clarification. We agree. After the jury expressed confusion about a central point of law that was essential to Grogan's defense, the court was required to ensure that the jury was clearly and correctly instructed on that law. While "knowingly" had been defined in another jury instruction, the definition was confusing in the context of Grogan's case because it separately defined "knowingly" when applied both to conduct elements and to circumstance elements — even though "knowingly" only applied to a conduct element in Grogan's case. Faced with the jury's confusion, the superior court should have answered their question or, at a minimum, clarified which of the two definitions of "knowingly" was applicable in Grogan's case.

Because the superior court's failure to clarify the law to the jury created a substantial risk that the jury convicted Grogan under an erroneous legal theory, we reverse Grogan's convictions for weapons misconduct.

Background facts

On September 21, 2018, Charles Grogan went to his ex-girlfriend's house to assist in some home repairs. Grogan's ex-girlfriend, Carmen Ballard, went to work at 5:00 p.m., returning home at 2:00 a.m. After she returned home, Grogan and Ballard began arguing in raised voices about their relationship and about Ballard's new romantic relationship.

During the argument, Grogan walked to Ballard's closet and retrieved a hunting rifle that, unbeknownst to Ballard, he had stored there. According to Ballard, after Grogan returned with the rifle, he commented that he "might as well just kill himself." Ballard was concerned for Grogan's safety and remained near him to try and defuse the situation. At one point, when Ballard was near Grogan but not looking directly at him, Grogan's rifle discharged. When Ballard looked up at Grogan afterwards, she observed that he appeared shocked. Grogan then put down the rifle and apologized to Ballard, saying that he did not mean to do it.

Ballard's upstairs neighbor, Benjamin Dever, woke up at the sound of a gunshot. He went into his kitchen and found debris on the floor and two holes — one in the floor and one in the ceiling — that were consistent with a gunshot. Dever then called 911.

Grogan initially told the police that his rifle accidentally fired while he was cleaning it. But later at the police station, Grogan told officers that it accidentally fired while he was trying to clear a malfunction or jam. Officers looked in Ballard's apartment for tools commonly used to clean or repair firearms, but did not find any.

Grogan was charged with second-degree weapons misconduct, fourth-degree weapons misconduct, and two counts of reckless endangerment.[2] At trial, Grogan did not seriously dispute that he was guilty of reckless endangerment, and he does not challenge those convictions on appeal.[3] Rather, Grogan's defense at trial focused on disputing that he was guilty of weapons misconduct.

To prove second-degree and fourth-degree weapons misconduct, the State was required to prove, *inter alia*, that Grogan "knowingly discharged a firearm."[4] At trial, Grogan defended against the weapons misconduct charges by arguing that his rifle discharged accidentally — *i.e.*, that while he may have handled the rifle negligently or recklessly, he did not "knowingly" pull the trigger and cause the rifle to discharge.[5]

The superior court instructed the jury on the elements of reckless endangerment, second-degree weapons misconduct, and fourth-degree weapons misconduct. Additionally, the court provided the pattern jury instructions for the

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[2] Grogan was additionally charged with third-degree criminal mischief, under AS 11.46.482(a)(1), but this charge was dismissed during trial.

[3] *See* AS 11.41.250(a) ("A person commits the crime of reckless endangerment if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.").

[4] *See* AS 11.61.195(a)(3)(B) and AS 11.61.210(a)(3), respectively. Alaska's fourth-degree weapons misconduct statute does not specify a *mens rea* with respect to the conduct element of discharging a firearm, but the parties agree that the State was required to prove that Grogan "knowingly" discharged a firearm. *See* AS 11.81.610(b)(1) ("[I]f a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to . . . conduct is 'knowingly[.]'").

[5] *Cf. State v. Huber*, 789 N.W.2d 283, 292 (S.D. 2010) (discussing expert testimony explaining that accidental discharges can be caused by a variety of factors including sympathetic muscle contractions, loss of balance, the "startle effect," and "reactive grip response" (the "involuntary muscle action [that occurs] when something . . . begins to slip out of [your] hand[s]")).

definitions of "knowingly," "recklessly," and "negligently," which tracked the statutory definitions.

The mental state "knowingly" applied to just one element across the charged offenses — the requirement that Grogan "knowingly" discharged a firearm. The superior court provided the jury with a definition of "knowingly" that closely tracked the statutory definition in AS 11.81.900(a)(2). However, this statutory definition separately defines "knowingly" when a person knowingly engages in conduct, and when a person has knowledge of an attendant circumstance.[6] The court included both definitions, even though just the definition relating to conduct was relevant to Grogan's case.

During the State's closing argument, the prosecutor explained the difference between "knowingly" and "intentionally," even though "intentionally" was not at issue in this case and was not defined for the jury.[7] The prosecutor then emphasized that "intentionally" was a higher mental state than "knowingly." The prosecutor also read the full statutory definition of "knowingly," even though only parts of that definition were applicable to the charges in this case.

During Grogan's closing argument, the defense attorney argued that Grogan was not guilty of weapons misconduct because he "accidentally discharged" the rifle. In other words, the attorney argued that while Grogan may have acted negligently or

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[6] The relevant jury instruction read:

> A person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists. When knowledge of the existence of a particular fact is an element of the offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist.

[7] *See Neitzel v. State*, 655 P.2d 325, 333 (Alaska App. 1982) (explaining that "'intentionally' applies only to results," not to conduct or circumstances).

recklessly in handling the gun, he did not "knowingly" press the trigger and fire the rifle. Somewhat confusingly, the defense attorney used the terms "knowingly" and "intentionally" interchangeably, arguing both that Grogan did not "knowingly" discharge the rifle and that he did not "intentionally" discharge the rifle.[8]

During jury deliberations, the jury asked the superior court a question indicating that it was confused about the definition of "knowingly." Specifically, the jury asked whether it was possible to both accidentally and "knowingly" discharge a firearm:

> We would like clarification — in these circumstances, could a[n] accidental discharge be covered by "knowingly"? i.e. can "knowingly" include an accidental discharge.

Grogan's attorney proposed that the superior court answer, "No" — *i.e.*, that an accidental discharge would not constitute "knowing" conduct. The prosecutor suggested that the court simply direct the jury to the existing instructions.

The court agreed with the State that the "better path" was to refer the jury to existing jury instructions. The defense attorney protested that there could not be a circumstance in which an accidental discharge would be "knowingly," and he expressed fear that "not clarifying that for the jury would lead them to getting to the wrong answer on that legally." The court minimized these concerns, noting that the jury had been adequately instructed on the law and suggesting that if Grogan's attorney wanted to further explain the law, "that maybe should have been done more in closing."

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[8] *Cf. Stoner v. State*, 2016 WL 1394221, at *5 (Alaska App. Apr. 6, 2016) (unpublished) (Mannheimer, C.J., concurring) (noting that colloquially people will use "knowingly" and "intentionally" interchangeably to describe conduct that is witting and non-accidental but Alaska law only recognizes one *mens rea* — "knowingly" — as applied to conduct and therefore "knowingly" is used legally to describe conduct that is witting and non-accidental).

Ultimately, the court instructed the jury, over Grogan's objection: "You have been instructed on the law as to the applicable mental states in this case. You should apply that law to the facts as you determine the facts to be." The jury subsequently convicted Grogan of second- and fourth-degree weapons misconduct, as well as the two charged counts of reckless endangerment. Grogan now appeals the weapons misconduct convictions.

Why we reverse Grogan's convictions for second- and fourth-degree weapons misconduct

On appeal, Grogan challenges the superior court's response to the jury's question. We agree with Grogan that the jury's question showed that it was confused about a critical question of law that went to the core of Grogan's defense, and that the superior court's response failed to adequately dispel this confusion. We therefore reverse Grogan's convictions for second-degree and fourth-degree weapons misconduct.

Under Alaska law, trial judges have a "duty to instruct the jurors on all matters of law that they need to make their decision."[9] In *Des Jardins v. State*, the Alaska Supreme Court explained that the scope of the judge's discretion in how to respond to a jury question depends on the preexisting jury instructions.[10] When the jury asks a question "about a matter on which it has received adequate instruction, the judge may in his or her discretion refuse to answer, or may refer the jury to the earlier instruction."[11] But when "the jury appears to be confused about a legal issue, and the resolution of the question is not apparent from an earlier instruction, the trial judge has

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[9] *Roth v. State*, 329 P.3d 1023, 1026 (Alaska App. 2014); *see also* Alaska R. Crim. P. 30(b).

[10] *Des Jardins v. State*, 551 P.2d 181, 190 (Alaska 1976).

[11] *Id.*

a responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."[12]

Here, the jury's question indicated that it was confused about a legal issue that was central to Grogan's defense — whether an accidental discharge can be done "knowingly." Under *Des Jardins*, if the meaning of "knowingly" was clear from the court's previous instructions, it was within the superior court's discretion to refer the jury to those instructions. But if the meaning of "knowingly" was not apparent from previous instructions, then the court was required to dispel the jury's confusion.

The superior court provided Grogan's jury with the pattern jury instruction for "knowingly" which closely tracked the statutory definition. But while this definition was legally correct, we conclude that it was confusing in the context of Grogan's case.

In *Moffitt v. State*, a similar situation arose where the jury instruction was confusing, despite being a legally accurate statement of the law.[13] In *Moffitt*, the superior court provided the jury an instruction defining "knowingly" that was nearly identical to the instruction in Grogan's case. The instruction in *Moffitt* provided:

> A person acts "knowingly" with respect to conduct or to a circumstance described by the law when the person is aware that the conduct is of that nature. When knowledge of the existence of a particular fact must be proved by the state, that knowledge is established if a person is aware of a substantial probability of the existence of the fact, unless the person actually believes that it does not exist.[14]

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[12] *Id.* (internal quotations omitted) (quoting *Bollenbach v. United States*, 326 U.S. 607, 612 (1946)).

[13] *See Moffitt v. State*, 207 P.3d 593 (Alaska App. 2009).

[14] *Id.* at 599.

While this Court acknowledged in *Moffitt* that this instruction "faithfully tracked" the statutory definition, we nevertheless found it to be "crucially ambiguous in the context of Moffitt's case."[15] We explained:

> [U]nder the Alaska Criminal code, the culpable mental state of "knowingly" describes two concepts[: conduct and circumstance]. . . . In Moffitt's case, there was no dispute concerning his awareness of the circumstance that he had a court appearance scheduled . . . . The sole dispute at Moffitt's trial was whether his *conduct* — his failure to attend that scheduled court date — was "knowing". . . . The problem with [the jury instruction] is that the majority of the instruction (the instruction's lengthy second sentence) focused on Moffitt's knowledge of the surrounding circumstances . . . . [T]his was a non-issue in Moffitt's case[.][16]

The same reasoning applies here. Grogan's jury had to determine whether Grogan "knowingly" engaged in conduct — *i.e.*, whether he knowingly discharged a firearm. Like in *Moffitt*, Grogan's jury was *not* asked to determine whether Grogan had knowledge of a surrounding circumstance. The overinclusive definition of "knowingly," which contained a superfluous sentence, may therefore have contributed to the jury's confusion. Moreover, any confusion caused by the overinclusive definition of "knowingly" was likely worsened by the parties' closing arguments — specifically, the prosecutor and defense attorney's divergent use of the term "intentionally" even though that particular mental state was not at issue in this case.

Ultimately, given the jury's obvious confusion about a core component of Grogan's defense, it was incumbent on the trial court to address and dispel that

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[15] *Id.* at 600.

[16] *Id.*

confusion. Like *Moffitt*, Grogan's case "presents a situation where one or two sentences of plain English would have served far better than the several paragraphs of technically accurate — but misleading — legal principles that the jury received."[17] Because the record shows that Grogan had a viable defense to second-degree and fourth-degree weapons misconduct under the facts of this case, we further conclude that the court's failure to answer the jury's question undermined Grogan's defense and created a substantial risk that the jury convicted Grogan based on an erroneous understanding of the law. Grogan is therefore entitled to a new trial on both weapons misconduct charges.

Conclusion

We REVERSE Grogan's convictions for second- and fourth-degree weapons misconduct and REMAND this case for further proceedings consistent with this decision.

[17] *Id.* at 602.