In the Supreme Court of the State of Alaska

James Martin Marquez,	)	
	)	Supreme Court No. **S-17376**
Petitioner,	)	
v.	)	**Order**
	)	Petition for Hearing
State of Alaska,	)	
	)	
Respondent.	)	Date of Order: **5/21/2019**
	)	

Trial Court Case No. **3AN-12-03395CR**
Court of Appeals No. **A-11925**

Before: Bolger, Chief Justice, Winfree, Stowers, Maassen, and Carney, Justices.
Bolger, Chief Justice, and Stowers, Justice, dissenting.

Having considered the petition for hearing by James Martin Marquez and the opposition by the State of Alaska,

The petition for hearing is GRANTED and summarily resolved as follows:

1. The court of appeals' ruling that Marquez did not preserve his point on appeal regarding discovery is REVERSED, and the matter is REMANDED for further proceedings; and,
2. The court of appeals' ruling on plain error is VACATED, and on remand the court of appeals is directed to revisit the issue based on the plain error analysis set out in *Hess v. State*, ___ P.3d ___, Op. No. 7323, 2018 WL 6718592 (Alaska Dec. 21, 2018).

Entered by direction of the court.

Clerk of the Appellate Courts

M. Montgomery

Meredith Montgomery

BOLGER, Chief Justice, with whom STOWERS, Justice joins, dissenting.

I disagree with the court's order summarily remanding this matter to the court of appeals. On the discovery issue, I agree with the court of appeals' conclusion that Marquez was required to submit a proper motion in the superior court to preserve the issue he argued on appeal.[1]

Marquez's original motion was extremely vague and unsupported by any helpful argument. He did not explain why the *Scott* decision would relieve him of the requirement to serve his motion on opposing counsel. [R. 534-36] An application for a court order must generally be made by motion served on the opposing party.[2] And a defendant is separately required to give notice of a statutory defense like provocation prior to trial.[3]

Moreover, Marquez's motion did not explain why records of the victim's abortion would provide him with a defense to murder.[4] He did not explain the basis for his conclusion that the listed medical providers would have these records. And he did not explain why the superior court should order discovery of such information without considering the victim's privacy interests.[5] Without any adequate explanation, the superior court's denial of Marquez's *ex parte* request was not an abuse of discretion. [R. 534-36]

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[1]*Marquez v. State*, 2019 WL 211490, at *4 (Alaska App. Jan. 16, 2019).

[2]Alaska R. Crim. P. 42(a); Alaska R. Crim. P. 44(a).

[3]Alaska R. Crim. P. 16(c)(5).

[4]*Cockerham v. State*, 933 P.2d 537, 543 (Alaska 1997) (noting that without an adequate explanation the defendant "failed to make a showing sufficient to trigger a right to discovery"); *Booth v. State*, 251 P.3d 369, 377 (Alaska App. 2011) (noting that a discovery motion was "legally deficient" when it was not supported by a factual statement supporting the defense asserted and the relevance of the records requested).

[5]*State v. Doe*, 378 P.3d 704, 706 (Alaska 2016) (requiring trial courts to engage in a balancing test when a party requests discovery implicating a non-party's privacy rights).

Marquez did provide additional arguments in his motion for reconsideration. [R. 543-46] But we have consistently held that issues raised for the first time in a motion for reconsideration are untimely.[6]

Even with the benefit of this unearned opportunity, Marquez provided only an indirect description of the defense he wanted to assert: "The abortion of one's child without consent and over one's objection is an action that, if not disproved by the prosecution beyond a reasonable doubt, could qualify as a 'serious provocation' . . . and reduce Murder 1 and 2 to Manslaughter." [R. 544] In response to this oblique description, it is unsurprising that the superior court responded with an alternative explanation for its denial: "The Court finds that the Defense has not *yet* met its burden of showing how evidence that the victim got an abortion is relevant and material to the preparation of the defense."[7] [R. 602] Consistent with this approach, the operative language of the order also stated this qualification: "the Motion to Reconsider is DENIED *at this time*."[8] [R. 602]

This alternative comment cannot be read to foreclose Marquez from making a properly supported request for this discovery. Indeed, the wording of the order invited the defendant to file a properly supported motion to establish the issue that the court had not *yet* decided *at that time*. But as the court of appeals noted, Marquez did not file a proper motion to secure these records for trial.[9] Marquez did not even request a subpoena, which could

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[6]*Ivy v. Calais Company, Inc.*, 397 P.3d 267, 275 (Alaska 2017) ("An argument is ordinarily not preserved for appeal if it was . . . only raised after the party filed a motion for reconsideration.").

[7]Emphasis added.

[8]Emphasis added.

[9]*Marquez v. State*, 2019 WL 211490, at *3 (Alaska App. Jan. 16, 2019).

have secured the records without a court order.[10] Since Marquez did not make a proper request for these records, it is now impossible to tell exactly how the State and the victim's family would have responded, how the superior court would have ruled, and how the court's ruling would have affected the defense.[11]

Marquez did not appeal the superior court's ruling that he could not bring his motion *ex parte*.[12] The procedural problems with this approach are clearly an adequate and independent ground to affirm the superior court's ruling. Marquez's approach prevented the State and the victim's family from having any input before the superior court's decision.

This court offers no explanation for its summary reversal. But the court's order apparently requires the court of appeals to ignore the substantial reasons supporting the superior court's denial in order to consider whether the superior court correctly observed that it was not *yet* satisfied with Marquez's showing of relevance.

The court's order also summarily remands for the court of appeals to determine whether the superior court committed plain error by failing to strike a portion of the prosecutor's closing argument. Marquez relies on a portion of the argument in which the prosecutor argued that defense counsel was asking the jury to find that "any person under the circumstances Mr. Marquez faced would act the same way" and that his reaction was "a reasonable response to [the victim's] conduct." [Tr. 331] Marquez argues that this argument was improper because the law required the prosecution to prove something slightly different: that the victim's conduct was not "sufficient to excite an intense passion in a reasonable

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[10]*See* Alaska R. Crim. P. 17(a) (requiring subpoenas to be issued by the clerk in blank); Alaska R. Crim. P. 17(b) (allowing subpoenas for documentary evidence).

[11]*Cf. Wagner v. State*, 347 P.3d 109, 113 (Alaska 2015) (holding that a defendant must testify to preserve his objection to use of a pretrial police interview for impeachment).

[12]*Marquez v. State*, 2019 WL 211490, at *3 (Alaska App. Jan. 16, 2019).

person in the defendant's situation . . . under the circumstances the defendant reasonably believed them to be."[13]

Marquez seems to equate this passing misstatement with the recent opinion in *Hess v. State*, where the prosecutor's argument suggested that defense attorneys generally engage in false vilification of victims of domestic violence.[14] But there is a major distinguishing factor here. After the prosecutor's argument, the superior court instructed the jury that it was required to follow the court's instructions if they differed from the attorneys' arguments. [R. 173] And the judge gave the jury a detailed instruction on the heat-of-passion defense and the definition of "serious provocation." [R. 163-64] Both this court and the court of appeals have held that similar instructions will cure any prejudice from minor errors in closing argument.[15]

I would deny the petition for hearing.

cc: Supreme Court Justices
Court of Appeals Judges
Trial Court Judge
Trial Court Appeals Clerk

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

[14]*Hess v. State*, 435 P.3d 876, 882 (Alaska 2018).

[15]*Goldsbury v. State*, 342 P.3d 834, 838 (Alaska 2015) (concluding that the trial court's instructions to jury before and after argument about the defendant's right to not testify were sufficient to cure any harm); *Crawford v. State*, 337 P.3d 4, 28 (Alaska App. 2014) (concluding that any error in prosecutor's phrasing of the law of self defense was cured by court's direction to follow the jury instructions regardless of the arguments of counsel).