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.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STEVEN R. MARSHALL, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11705 Trial Court No. 1WR-11-144 CR MEMORANDUM OPINION No. 6405 — December 14, 2016

Appeal from the Superior Court, First Judicial District, Wrangell, William B. Carey, Judge.

Appearances: Andrew Steiner, Attorney at Law, Bend, Oregon, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

Steven R. Marshall's ex-girlfriend alleged that he physically abused her and forced her to have sex with him on three occasions. Based on these allegations, Marshall

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

was indicted on three counts of first-degree sexual assault,[1] one count of attempted first-degree sexual assault,[2] one count of first-degree assault,[3] and two counts of third-degree assault.[4]

Marshall's case proceeded to trial in Wrangell, the location of the alleged incidents. Marshall did not object to his trial being held in Wrangell.

During jury selection, the court summoned fifty-four venire persons — nineteen of whom were later dismissed for cause based either on exposure to pre-trial publicity or on their relationships to people involved in the case. Marshall used ten of his eleven peremptory challenges to remove additional venire persons. But Marshall did not use his final peremptory challenge, and he did not request any additional peremptory challenges. A final jury panel of thirteen jurors (twelve jurors plus one alternate) was ultimately empaneled without incident.

At the conclusion of the trial, the jury acquitted Marshall of all of the sexual assault charges and convicted him of one count of first-degree assault and one count of third-degree assault. These convictions were later merged and Marshall received a sentence of 15 years with 5 years suspended (10 years to serve) on the merged count.

On appeal, Marshall contends that the jury pool was tainted by outside knowledge of the case and he argues that the trial court should therefore have *sua sponte* ordered a change of venue, even though Marshall never requested one. Because Marshall never moved to change venue in the trial court proceedings, our review is limited to plain error. "[P]lain error is an error that (1) was not the result of intelligent

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1 AS 11.41.410(a)(1).

2 AS 11.41.410(a)(1) & AS 11.31.100.

3 AS 11.41.200(a)(1).

4 AS 11.41.220(a)(1)(A).

waiver or a tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial."[5]

We have previously reviewed a trial court's failure to change venue for plain error.[6] But those cases have typically involved circumstances in which the defense attorney filed a motion for change of venue pre-trial and then failed to renew the motion after jury selection occurred.

Here, in contrast, Marshall's attorney never made *any* motion to change venue and never argued that the jury was tainted by its outside knowledge. In addition, Marshall's attorney did not use all of his peremptory challenges and never requested any additional peremptory challenges.[7] The record also shows that the venire persons who had formed opinions of the case and/or the people involved were not seated on the jury. Moreover, we have reviewed the jury voir dire in detail, and we disagree with Marshall's claim of obvious jury taint.

Given these circumstances, we find no plain error in the trial court's failure to *sua sponte* order a change of venue in the absence of any defense request.

Accordingly, we AFFIRM the judgment of the superior court.

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[5] *Moreno v. State*, 341 P.3d 1134, 1136 (Alaska 2015) (internal quotation marks omitted).

[6] *See, e.g.*, *West v. State*, 923 P.2d 110, 114 n.10 (Alaska App. 1996); *Kelly v. State*, 2008 WL 612807 at *2 (Alaska App. Mar. 5, 2008) (unpublished); *Lewis v. State*, 2007 WL 293079 at *1 (Alaska App. Jan. 31, 2007) (unpublished).

[7] *Cf. West*, 923 P.2d at 114 n.10 (concluding that jury voir dire where defendant did not use up all his peremptory challenges and a jury was ultimately seated was "not conducive to a finding of plain error, even assuming [the defendant's] failure to renew the change of venue motion was not tactical").