

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

JOHNNY DARNELL DEGRATE II,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12648  
Trial Court No. 3AN-15-01281 CR

MEMORANDUM OPINION

No. 6809 — July 24, 2019

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Kevin M. Saxby, Judge.

Appearances: Laurence Blakely, Assistant Public Defender, and  
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.  
RuthAnne B. Bergt, Assistant Attorney General, Office of  
Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney  
General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and E. Smith,  
Senior Superior Court Judge.\*

Judge HARBISON.

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\* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Johnny Darnell Degrate II was charged, along with his co-defendant, Robert Potts, with four counts of robbery in the first degree and one count of conspiracy to commit robbery in the first degree.<sup>1</sup> Both men were charged alternatively as a principal or an accomplice. Degrate was convicted by a jury of all four counts of robbery in the first degree but was acquitted of the conspiracy count.<sup>2</sup>

The first robbery committed by Degrate and Potts, which was charged as Count II of the indictment, took place in the parking lot of an apartment complex. During that robbery, Degrate and Potts took money and a pizza at gunpoint from a Pizza Hut delivery driver. The other three robberies were committed approximately one month later, on three separate days over the course of the same week, and they all took place in shopping center parking lots and involved the use of a gun. During those robberies, Degrate and Potts took items such as purses and cellphones from shoppers who had just returned to their vehicles.

On appeal, Degrate argues that joinder of Count II with the other three robbery counts was improper under Alaska Criminal Rule 8(a)(1) and (a)(3).<sup>3</sup> Because all of the counts charged Degrate with the same offense — robbery — and because evidence of one robbery was admissible to prove Degrate’s plan to commit the others, we reject Degrate’s improper joinder claim.

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<sup>1</sup> AS 11.41.500(a)(1), AS 11.31.120 & AS 11.16.110(2)(a) and/or (b), respectively.

<sup>2</sup> Degrate was also charged with assault in the third degree and theft in the second degree. Those charges were dismissed before trial.

<sup>3</sup> Degrate did not argue below, nor does he argue on appeal, that the counts should have been severed pursuant to Alaska Criminal Rule 14 because he was prejudiced by improper joinder.

### *Underlying offenses*

We address the underlying facts of each count in turn.

#### *Count II: The apartment complex parking lot robbery*

On January 19, 2015, a Pizza Hut delivery driver named Michael Savage was robbed at gunpoint in the parking lot of a large apartment complex in Anchorage.

On the night of the robbery, a person calling from a telephone number associated with Robert Potts ordered pizza for delivery to 4545 Reka Drive. When Savage arrived at the scheduled delivery address, he was directed to a neighboring apartment complex located around 200 feet away. Degrate's address at the time was nearby.

When Savage arrived at the new delivery address, three young men robbed him — one popped up from behind a car wielding a handgun and ordered Savage to give the two other individuals the money and the pizza. Then the three individuals fled the scene and Savage called 911.

Police officers responded and contacted both Savage and another person, Melody Lowe, who was in a car parked nearby. Degrate had told Lowe to wait for him and, while waiting, she saw Degrate running with three people. Based on this information, officers showed Savage a photographic lineup containing Degrate's photo; Savage identified Degrate from the lineup.

A few weeks after this robbery, and just a few days before the next robbery, Potts purchased a purple PT Cruiser and a nine-millimeter Ruger pistol. On the purchase forms, Potts listed his address as 4650 Reka Drive. Both the PT Cruiser and the pistol were implicated in the three robberies that followed in February, which were charged as Counts III, IV, and I.

*Count III: The Dimond Center parking lot robbery*

On February 8, 2015, Arlene Wood was in her car getting ready to leave the parking lot of the Dimond Center Mall when her purse was taken from her by a man who brandished a gun. Wood later tentatively identified Degrate as the armed robber in a photographic lineup.

Officers investigated the robbery and contacted a witness who saw a man running toward a car near the location of the robbery. The police then reviewed a security video which showed that the car the man ran to was a purple PT Cruiser. Later that week, officers showed the witness photographic lineups that included Degrate and Potts. The witness did not identify Degrate in the lineup, nor did she identify Degrate in the courtroom. But she did identify Potts as the driver of the car, both in the lineup and again at trial.

*Count IV: The Walmart parking lot robbery*

On February 11, 2015, Mary Ann Morahan was loading her purchases into her car in the Walmart parking lot when a man ran up to her car. The man opened the door, placed a gun on the passenger seat, and demanded that she give him her purse and cellphone.

Morahan was later shown photographic lineups. She did not identify anyone from the lineups, but she did identify Degrate as the robber at trial. Additionally, footage from the security video showed that a purple PT Cruiser was used in the robbery.

*Count I: The second Dimond Center parking lot robbery*

On February 12, 2015, Bobbi Waters was robbed after she returned to her car in the parking lot of the Dimond Center Mall. A man walked up to her vehicle,

opened the door, and demanded her wallet and cellphone. When she resisted, the robber flashed a gun at her.

After Waters reported to a security guard that she had been robbed, the police were called and immediately began a search for a purple PT Cruiser due to the “serial” nature of the crimes. Police then stopped a purple PT Cruiser. Degrate and Potts were both inside the vehicle. Potts gave the police officer his contact telephone number, which was the same phone number that had been used to order pizza prior to the apartment complex robbery.

Waters was brought to the location of the PT Cruiser. She identified Degrate as the man who robbed her, and she also saw her cellphone in the back seat of the car. The vehicle was impounded, and both Degrate and Potts were arrested.

*Why we conclude that joinder of the offenses was proper under Alaska Criminal Rule 8(a)(1)*

Prior to trial, Degrate filed a “Motion for relief from illegal joinder,” asking the court to sever Count II, the January 19 apartment complex parking lot robbery, from the other counts. The trial court denied the motion, finding that Count II was properly joined under both Alaska Criminal Rule 8(a)(1) and 8(a)(3). Degrate now argues that this was error.

Criminal Rule 8(a) describes when offenses may be joined in the same indictment. It indicates, in relevant part, that two or more offenses may be joined when the offenses charged:

- (1) are of the same or similar character and it can be determined before trial that it is likely that evidence of one

charged offense would be admissible to prove another charged offense.<sup>[4]</sup>

Degrade argues on appeal that, although all four of the joined offenses charged violations of the same statute, the offenses were not of “the same or similar character” for purposes of Rule 8(a)(1).

Offenses are of “the same or similar character” for purposes of joinder under Alaska’s joinder rule if they are separate instances of the same statutory offense, even when the offenses were committed at distinct times and places and not as part of a single scheme.<sup>5</sup>

Here, the first clause of Rule 8(a)(1) was satisfied because all four offenses charge Degrade with robbery. But, as we have noted, joinder of these offenses was proper under Rule 8(a)(1) only if the second clause, requiring that evidence of one offense would likely be admissible to prove another charged offense, was also satisfied. Degrade argues on appeal that the later three robberies were so dissimilar to the first robbery that evidence of them was not admissible. We disagree.

Evidence of one offense is admissible to prove another charged offense under Alaska Evidence Rule 404(b)(1) for the purpose of proving plan or preparation. The trial court found that evidence of the later three robberies would likely be admissible to show that Degrade and Potts prepared and planned for the robbery charged in Count II.

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<sup>4</sup> Alaska R. Crim. P. 8(a)(1).

<sup>5</sup> See *Demoski v. State*, 2012 WL 4480674, at \*5 (Alaska App. Sept. 26, 2012) (unpublished) (citing 5 Wayne R. LaFave et al., *Criminal Procedure* § 17.1(b), at 7-9 (3d ed. 2007)).

In this case, the State's theory was that Degrate and Potts, each acting as either principal or accomplice, planned together to rob individuals at gunpoint and then committed the four robberies. According to the State's theory, the January 2015 apartment complex robbery was committed near the location of their residences because neither of them had access to a vehicle until Potts purchased the PT Cruiser in early February 2015.

Although the first robbery was conducted in an apartment complex parking lot while the others were conducted in shopping center parking lots, and although the first robbery did not involve the PT Cruiser, the crimes were conducted in a manner that was much more similar than different. In each instance, Degrate and Potts worked together to rob a person who was in a car in a public parking area. In each instance, they used a gun to obtain compliance from the victim. And in each instance, the victim was a single individual who was likely to be in possession of money and a cellphone at the time of the robbery. And in each instance, Degrate and Potts had a car waiting nearby that could be used to leave the scene. Because the manner in which Degrate and Potts carried out the shopping center robberies was very similar to the way they carried out the apartment complex robbery, evidence of the robberies was admissible to show preparation and plan under Evidence Rule 404(b)(1).

Furthermore, the similarities between the first robbery and the subsequent robberies provided evidence of Potts's involvement in the first crime beyond the fact that he lived nearby and his phone number was used to order the pizza. Similarly, evidence that the two men planned the robberies together provided evidence that Degrate was not merely present in the area of the first robbery but was actually one of the men who committed that crime.

We conclude that the trial court did not err in finding that evidence of one offense would likely be admissible to prove another charged offense. Because the offenses were properly joined under Criminal Rule 8(a)(1), we need not separately analyze whether joinder was also proper under Criminal Rule 8(a)(3).

*Conclusion*

The decision of the superior court is AFFIRMED.