IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JAMES MARTIN MARQUEZ, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11925 Trial Court No. 3AN-12-03395 CR MEMORANDUM OPINION No. 6819 — September 11, 2019

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack W. Smith, Judge.

Appearances: Callie Patton Kim, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, James E. Cantor, Acting Attorney General, Juneau, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

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

James Martin Marquez was convicted of murder for killing his girlfriend. This Court affirmed Marquez's conviction on direct appeal: *see Marquez v. State*, unpublished, 2019 WL 211490 (Alaska App. 2019). Marquez then petitioned the Alaska Supreme Court to review our decision. (See Supreme Court File No. S-17376.)

In an order dated May 21, 2019, the supreme court directed us to reconsider Marquez's case on two grounds.

First, the supreme court ruled that, contrary to the conclusion reached by this Court, Marquez adequately preserved his claim regarding the proposed discovery of health records pertaining to the deceased, Carla Webb. Thus, the supreme court remanded this issue to us for further proceedings.

Second, with regard to whether a certain portion of the prosecutor's summation to the jury constituted plain error, the supreme court directed us to reconsider this matter using the test for plain error announced by the supreme court in *Adams v. State*, 261 P.3d 758 (Alaska 2011), and *Hess v. State*, 435 P.3d 876 (Alaska 2018).

We now address these two aspects of Marquez's case.

I

With regard to the discovery issue, we conclude that we cannot resolve this issue on the existing record, and that we must remand this issue to the superior court.

On remand, the superior court should give the State an opportunity to respond to Marquez's previously filed motion for discovery of the records; this will make the matter ripe for decision by the superior court.

If, after considering Marquez's motion and the State's response, the superior court concludes that it must determine whether the requested records actually exist, the court is authorized to call for *in camera* production of the records — and, if

such records do exist, to review the records *in camera*. (Any records received by the superior court must be preserved under seal for later appellate review.)

If the records exist, and if (after its *in camera* review) the superior court determines that some or all of these records are relevant to Marquez's heat of passion defense, the court shall disclose the relevant records to the parties. The superior court shall then allow the parties to argue whether, because of these newly disclosed records, Marquez should receive a new trial.

The superior court shall conduct and resolve these proceedings within 120 days from the date of this decision. If further time is needed, the superior court may ask this Court to extend this deadline.

II

The second issue that the supreme court has directed us to reconsider involves certain remarks made by the prosecutor during his summation to the jury at Marquez's trial. In the challenged portion of the prosecutor's summation, the prosecutor mischaracterized the concept of "serious provocation" — *i.e.*, the type of provocation that is legally sufficient to support a defense of heat of passion.

The error in the prosecutor's remarks

Marquez was charged with murdering his girlfriend, Carla Webb. At his trial, Marquez raised a heat of passion defense. Marquez testified that, just before he shot Webb, she revealed to him that she had aborted their child. Marquez's attorney argued to the jury that this disclosure qualified as a "serious provocation", and that Marquez acted in a heat of passion brought on by this provocation. Thus, the defense attorney argued, the jury should find Marquez guilty of manslaughter rather than murder.

During one portion of the prosecutor's rebuttal to the defense attorney's argument, the prosecutor misdescribed the concept of "serious provocation".

Under AS 11.41.115(f)(2), "serious provocation" is defined as "conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, ... under the circumstances as the defendant reasonably believed them to be".

The prosecutor deviated from this definition when he told the jurors that, in order for Webb's statements to Marquez to qualify as a "serious provocation", Webb's statements would have to be of such a compelling nature that Marquez's act of shooting Webb was a "reasonable response" to Webb's statements, and that any reasonable person would have reacted the same way:

> *Prosecutor*: What [the defense attorney] is asking you to do is to say that any person under the circumstances Mr. Marquez faced would act the same way — [that] it was a reasonable response to [Webb's] conduct. ...
>
> Maybe she was mad at him. She probably did say some things to him. Whether there was a pregnancy, or there wasn't, whether — she probably did say something. And so the question for you is: When she said something to him, whatever that was, did that entitle him to be so angry that he could kill her and negate his intent to kill and make it manslaughter?

On appeal, Marquez points out that this passage from the prosecutor's summation misstates the law of "serious provocation". In order for Marquez to prevail on his heat of passion defense, it was not necessary for the jurors to conclude that Marquez's act of killing Webb was a "reasonable response" to what Webb told him, and that any reasonable person would have shot Webb. Rather, it was sufficient if the jurors concluded that there was a reasonable possibility (1) that Webb's statements to him were

"sufficient to excite an intense passion in a reasonable person in [Marquez's] situation", (2) that Webb's statements did, in fact, put Marquez in the throes of intense passion, and (3) that this intense passion led Marquez to kill Webb, even if the killing itself was not reasonable. *See* AS 11.41.115(a) and (f)(2).

As Professor LaFave explains in his treatise on the criminal law, "What is really meant by 'reasonable provocation' is provocation which causes a reasonable man to lose his normal self-control; and, although a reasonable man who has thus lost control over himself would not kill, ... his homicidal reaction to the provocation is at least understandable."[1]

On appeal, the State concedes that, in the above-quoted passage from the prosecutor's summation, the prosecutor misdescribed the "serious provocation" element of the heat of passion defense. But Marquez's trial attorney did not object to the prosecutor's statements. Thus, on appeal, Marquez must show plain error.

Why we conclude that the prosecutor's remarks did not constitute plain error under the test announced by the supreme court in Adams v. State and Hess v. State

As our supreme court explained in *Adams v. State*, 261 P.3d 758 (Alaska 2011), and more recently in *Hess v. State*, 435 P.3d 876 (Alaska 2018), Alaska uses a five-part test to evaluate claims of plain error.

In both *Adams* and *Hess*, the supreme court described this test as having four parts, but the first part of the *Adams* test actually encompasses two distinct elements. In order to establish plain error under *Adams* and *Hess*, a defendant must show:

---

[1] Wayne R. LaFave, *Substantive Criminal Law* (3rd ed. 2018), § 15.2(b), Vol. 2, pp. 674–75.

(1) that error occurred,

(2) that this error was not the result of the defendant's intelligent waiver or tactical decision not to object,

(3) that the error was "obvious", in the sense that it should have been apparent to any competent judge or lawyer,

(4) that the error affected the defendant's substantial rights — *i.e.*, that it involved an important right that could potentially affect the fundamental fairness of the proceeding, and

(5) that the error was prejudicial.

Adams, 261 P.3d at 772 n. 72 and at 773; *Hess*, 435 P.3d at 880.

With regard to the last element of this test — *i.e.*, whether the error resulted in prejudice to the defendant — the supreme court explained in *Adams* that there are two different tests for prejudice, and different burdens for establishing prejudice, depending on whether the error resulted in a violation of the defendant's constitutional rights.

Under the *Adams* test, "a constitutional violation ... will be prejudicial unless the State proves that it was harmless beyond a reasonable doubt". But if the error did not result in a violation of the defendant's constitutional rights, then the defendant bears the burden of establishing prejudice, and the error will be deemed prejudicial only if "the defendant proves that there is a reasonable probability that [the error] affected the outcome of the proceeding." *Adams*, 261 P.3d at 773; *Hess*, 435 P.3d at 881.

Here, although the prosecutor mischaracterized the test for "serious provocation", the prosecutor's misstatement comprised only a few sentences of the prosecutor's rebuttal argument — a rebuttal argument that primarily focused on the prosecutor's contention that, no matter what Webb might have said to Marquez, Marquez was not actually in the throes of passion when he shot her.

The jury instructions in Marquez's case correctly instructed the jurors on the law relating to heat of passion and "serious provocation". And we note that the jury was also expressly instructed that if a lawyer's arguments "depart from the facts or from the law, you should disregard them."

Thus, even though the prosecutor's remarks, taken in isolation, might potentially have misled the jurors regarding the element of "serious provocation", the record as a whole assures us that the jurors correctly understood the applicable law. We therefore conclude that the prosecutor's mischaracterization of the test for "serious provocation" did not result in a violation of Marquez's constitutional rights.

As our supreme court explained in *Brown v. State*, 601 P.2d 221 (Alaska 1979):

> [W]here [an] error *denies* a constitutional right, ... reversal is required unless the error is found to be harmless beyond a reasonable doubt. However, we have never held that the standard of harmless beyond a reasonable doubt applies merely because a constitutional right is involved. While it is true that a constitutional right, the right to the presumption of innocence, is involved here, we believe that the instructions given by the judge ... were sufficient to ensure that the defendant enjoyed that right[,] and therefore no constitutional right was denied.

Brown, 601 P.2d at 226 (emphasis in the original).

See also *State v. Gilbert*, 925 P.2d 1324 (Alaska 1996), a case where the prosecutor made an isolated comment during summation which suggested that the defendant had the burden of producing evidence of his innocence. The supreme court concluded that this error did not result in a violation of the defendant's constitutional

rights.[2] The court noted that the prosecutor correctly characterized the State's burden of proof in other portions of his summation, and the court further noted that the trial judge instructed the jurors that the sole burden of proof lay with the government to establish the defendant's guilt beyond a reasonable doubt. Based on this record, the supreme court concluded that "[the prosecutor's] reminders, along with the court's jury instructions, were sufficient to ensure that the burden of proof did not shift to the defendant". *Gilbert*, 925 P.2d at 1328 n. 8. Thus, the *Gilbert* court treated the error as non-constitutional, and the court applied the "appreciably affected the verdict" test to evaluate whether the error required reversal of the defendant's conviction.[3]

Based on the record in Marquez's case, and based on the supreme court's analysis in *Brown* and *Gilbert*, we conclude that the prosecutor's challenged remarks did not give rise to a violation of Marquez's constitutional rights.

The remaining question, under *Adams* and *Hess*, is whether Marquez has met the "prejudice" test that applies to non-constitutional error: whether Marquez has shown a reasonable probability that the prosecutor's remarks affected the jury's verdict, given the record as a whole. We conclude that Marquez has not shown this. Accordingly, we hold that the prosecutor's remarks did not constitute plain error under the *Adams/Hess* test.

Conclusion

We reject Marquez's claim of plain error regarding the prosecutor's summation to the jury. But with regard to Marquez's discovery claim, we remand this

---

[2] *Id.* at 1328.

[3] *Id.* at 1328–29.

issue to the superior court so that the court can conduct the additional proceedings described in this opinion.