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

DEMARQUS DESHEAN GREEN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12531 Trial Court No. 3HO-12-00410 CR MEMORANDUM OPINION No. 6967 — August 11, 2021

Appeal from the Superior Court, Third Judicial District, Kenai, Anna M. Moran, Judge.

Appearances: Marcelle K. McDannel, Assistant Public Advocate, and Chad Holt, Public Advocate, Anchorage, for the Appellant. Patricia L. Haines, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

Following a jury trial, Demarqus Deshean Green was convicted of second-degree murder for killing Demian Sagerser when Green went to Sagerser's house to buy

marijuana.[1] Green's defense at trial was that he shot Sagerser in self-defense after Sagerser attacked him with a knife. In response, the State argued, *inter alia*, that Green could not rely on the justification of self-defense because Green killed Sagerser while Green was a participant in a felony drug transaction.[2]

Several months after the jury convicted him, Green filed a motion for a new trial. In this motion, Green argued, for the first time, that the jury instruction barring his reliance on self-defense if he used force while a participant in a felony drug transaction was incomplete because it did not require the State to prove a causal connection between his use of a firearm and his participation in the drug transaction. The court denied Green's motion.

On appeal, Green raises three claims of error. First, Green challenges the denial of his motion for a new trial. Second, Green contends that a different jury instruction failed to correctly recite the law of self-defense. Finally, Green argues that the trial court did not adequately redact the presentence report after determining that certain statements should be stricken from the report.

For the reasons we explain in this opinion, we reject Green's challenges to his conviction, and we affirm the judgment of the trial court. But we remand Green's case to the trial court with instructions to completely excise the stricken statements from the presentence report.

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[1] AS 11.41.110(a)(1). Green was also convicted of tampering with physical evidence in violation of AS 11.56.610(a)(1), but he has not appealed that conviction.

[2] AS 11.81.330(a)(4)(B) & AS 11.81.335(a).

Factual and procedural background

The evidence presented at trial established that Green shot and killed Sagerser in July 2012. At that time, Green and some friends were on a camping trip on the Kenai Peninsula. Because Green did not have adequate camping gear, he and his girlfriend, Nancie Modeste, drove to Walmart to buy the gear they needed.

Inside Walmart, Green met Sagerser, who offered to sell him marijuana. Later that day, Green drove with Modeste to Sagerser's home in Anchor Point, and their friends remained behind at the campsite. When Green and Modeste got to Sagerser's cabin, Modeste waited in the car while Green went inside to purchase marijuana. When he entered the cabin, Green had with him a gun that he had brought on the camping trip.

According to Green's testimony at trial, he initially intended to buy an ounce of marijuana. But when Sagerser told him that the price for an ounce was $300, Green decided to buy only half an ounce. Green testified that after Sagerser sold him the marijuana, while he and Sagerser were engaged in an unrelated conversation, Green's cell phone made a beeping noise because the battery was low. At that point, according to Green, Sagerser's demeanor completely changed and "things got crazy."

Sagerser began talking about how people were trying to set him up, and Green testified that when he tried to leave the house, Sagerser pushed him back. According to Green, Sagerser then spun around and swiped at him with something shiny. After a brief struggle in which Sagerser continued to swipe at Green, Green grabbed his gun and fired it in Sagerser's direction. Green testified that he only remembered firing the gun once and then running out of the house; he did not realize that he had fired twice until he learned that Sagerser had two bullet wounds.

According to Green, he left Sagerser bent over but not on the ground. He returned to the car "shaken up," and he claimed that he actually had to stop driving on the way back to the campsite to throw up.

In contrast, Modeste testified that when Green returned to the car, he had "quite a bit" of marijuana and was acting like his normal self. Additionally, one of Green's friends testified that Green had about an ounce of marijuana when he returned to the campsite after the transaction with Sagerser.

A friend of Sagerser's discovered him dead in his cabin. The friend testified that he knew Sagerser had installed a game camera on his front porch "because [Sagerser] was paranoid" and was concerned people might steal from him. The police obtained the game camera recording and were able to use that recording and footage from Walmart's security cameras to identify Green as a suspect. The troopers later interviewed Green in Anchorage. During the interview, Green admitted that he went to Sagerser's home to buy marijuana, but he denied ever firing his gun.

Green was charged with one count of first-degree murder,[3] one count of second-degree murder,[4] one count of first-degree robbery,[5] and one count of tampering with physical evidence (for destroying or suppressing physical evidence, including an item of clothing worn by Green during the incident).[6] At trial, the State argued that Green intentionally shot Sagerser as part of a robbery, while Green claimed that he had acted in self-defense.

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[3] AS 11.41.100(a)(1)(A).

[4] AS 11.41.110(a)(1) and/or (3).

[5] AS 11.41.500(a)(1) and/or (2) and/or (3).

[6] AS 11.56.610(a)(1). Nancie Modeste was initially charged as a co-defendant with respect to the charge of evidence tampering. However, she pleaded guilty to a misdemeanor offense (attempted tampering with physical evidence) prior to Green's trial.

After the presentation of evidence, the trial court and the attorneys discussed the proposed jury instructions. Two parts of that discussion are relevant to this appeal.

First, the prosecutor requested that the self-defense instructions include language from AS 11.81.330(a)(4), which declares that the defense of self-defense is not available to someone who uses a deadly weapon or dangerous instrument while acting in furtherance of a felony, or while participating in a felony drug transaction or purported transaction, or in immediate flight therefrom. The defense attorney did not object to the inclusion of this language in the instruction.

Second, the State proposed a jury instruction on self-defense that read:

> Even in circumstances when a person is permitted to use deadly force in self-defense, the law requires that the force used be no greater than necessary to avert the danger.

The defense attorney objected to this language, but the court gave the instruction over this objection.

At the close of the case, the jury found Green guilty of second-degree murder and tampering with physical evidence, and it found him not guilty of first-degree murder and first-degree robbery.

Approximately three months later, Green filed a motion for a new trial, arguing that the jury had been misinstructed on the requirements of AS 11.81.330(a)(4), which prohibits a person from asserting self-defense if the person's use of force was the result of using a dangerous instrument while a participant in a felony drug transaction. The superior court denied Green's motion.

Green now appeals his conviction for second-degree murder.

Why we uphold the trial court's denial of Green's motion for a new trial

Alaska Statute 11.81.330(a)(4)(B) precludes a person from raising self-defense if their use of force is the result of using a deadly weapon or dangerous instrument while a participant in a felony drug transaction or purported felony drug transaction. The statute provides, in relevant part, that the justification of self-defense is not available if

> the force used was the result of using a deadly weapon or dangerous instrument the person claiming self-defense possessed while . . . a participant in a felony transaction or purported transaction or in immediate flight from a felony transaction or purported transaction in violation of AS 11.71.[7]

As we have just described, the trial court instructed the jury at Green's trial on this statutory preclusion without any objection from Green's attorney. In his motion for a new trial, however, Green argued that this instruction was incomplete and that the error required reversal of his murder conviction. Green based his motion on a concurrence by Judge Mannheimer in an unpublished decision.

In that case, *Gates v. State*, the defendant was convicted of attempted murder after he shot a man who came to his house trying to sell him wet marijuana.[8] Gates was also convicted of several other offenses, including fourth-degree controlled substance misconduct (for possession of one ounce or more of marijuana with intent to distribute) and second-degree weapons misconduct (for possessing a firearm in furtherance of a drug felony), based on evidence that Gates was a drug dealer who had

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[7] AS 11.81.330(a)(4)(B).

[8] *Gates v. State*, 2015 WL 4387384, at *1 (Alaska App. July 15, 2015) (unpublished).

four ounces of dry marijuana in his house and a loaded .45 revolver under a cushion of the couch in his living room.[9]

On appeal, Gates argued that there was insufficient evidence to convict him of possessing marijuana with the intent to distribute it.[10] Gates also argued that there was insufficient evidence to convict him of the weapons misconduct charge because, according to Gates, the State had not shown the required nexus between the firearm and the felony drug offense.[11] Lastly, Gates argued that *if* the evidence was insufficient on these two counts, his attempted murder conviction should also be reversed because the jury may have erroneously assumed that the statutory preclusion under AS 11.81.330(a)(4) applied to his case when it actually did not.[12]

This Court rejected these arguments, concluding that the evidence was sufficient to support the felony drug distribution charge and the weapons misconduct charge and that Gates had conceded that there was no error in applying the statutory preclusion to his case if there was sufficient evidence to support those two charges.[13]

Judge Mannheimer filed a separate concurrence, suggesting that Gates's concession was "problematic" given the unique facts of his case.[14] Judge Mannheimer expressed concern about the "seeming lack of connection between Gates's felony drug offense and his use of force," noting that the shooting had occurred as a result of the

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at *1-2.

[13] *Id.* at *2.

[14] *Id.* at *6 (Mannheimer, J., concurring).

victim's attempted drug transaction involving wet marijuana, a transaction in which Gates had affirmatively declined to participate.[15] (The evidence was undisputed that Gates did not want to buy the wet marijuana.) In contrast, the felony drug distribution and weapons misconduct charges were based on Gates's intent to distribute the four ounces of dry marijuana that Gates possessed in his home before the victim ever arrived and his keeping a loaded revolver under his couch cushion.

Judge Mannheimer reasoned that, under these circumstances, the prosecutor was not justified in arguing that Gates was precluded from raising self-defense under AS 11.81.330(a)(4)(B) because Gates's use of the deadly weapon against the victim who wished to sell him wet marijuana did not arise out of Gates's "participation" in a felony drug transaction.[16] Judge Mannheimer further opined that the statutory preclusion under AS 11.81.330(a)(4)(B) should not apply unless the State proves "(1) that the defendant was a willing participant in a felony drug transaction, and (2) that the defendant's use of the deadly weapon arose from the defendant's willing participation in the drug transaction."[17]

In his motion for a new trial, Green seized on this quoted language, and he argued that his jury should have been instructed on these two requirements. He also argued that the failure to provide those supplemental requirements meant there was a substantial possibility that the jury rejected his self-defense claim under a mistaken view of the law and that his murder conviction should therefore be reversed.

The trial court rejected these arguments and denied Green's motion for a new trial. As an initial matter, the court questioned the precedential value of a

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[15] *Id.*

[16] *Id.*

[17] *Id.* at *7.

concurrence in an unpublished memorandum decision. The court also found that, even assuming the test proposed by Judge Mannheimer applied, Green was not prejudiced by the failure to instruct the jury on the test, because — unlike in *Gates* — "the evidence showed [that] Green was both a willing participant to an intended felony drug transaction and [that] his use of a deadly weapon arose from his willing participation in that transaction."

On appeal, Green argues that the jury in his case was not adequately instructed on AS 11.81.330(a)(4)(B) because the jury was not told that the State was required to prove that Green was a willing participant in the felony drug transaction and that there was a nexus between the drug transaction and the shooting.

Having reviewed the record, we conclude that there is no reasonable possibility that the jury convicted Green under an erroneous legal theory.[18] We therefore find no abuse of discretion in the trial court's denial of Green's motion for a new trial.

First, we note that it was undisputed that Green was a willing participant in the drug transaction. In fact, the evidence showed that Green and Sagerser were strangers to each other, and the only reason Green was at Sagerser's house was for the express purpose of purchasing marijuana. Moreover, the plain language of AS 11.81.330(a)(4)(B) — language on which the jury was instructed — required the jury to find that Green was a "participant" in a felony drug transaction as a prerequisite to concluding that self-defense did not apply on this ground.

On appeal, Green nevertheless argues that he was not a willing participant in a *felony* drug transaction because (according to Green) he only purchased half an

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[18] *See Moffitt v. State*, 207 P.3d 593, 602 (Alaska App. 2009) (holding that the trial court abused its discretion in denying a motion for a new trial when the record revealed a "substantial possibility that the jury convicted Moffitt under an incorrect legal theory").

ounce of marijuana, which at that time was a misdemeanor offense.[19] But the evidence on this issue was disputed. Green himself testified that he went to Sagerser's residence intending to buy an ounce of marijuana (a felony amount); Modeste stated that Green was carrying several bags of marijuana when he returned to the car, which she estimated at an ounce or more; and Green's friend testified that Green had about an ounce of marijuana when he returned to the campsite after the transaction with Sagerser. Furthermore, the instruction provided to the jury made it clear that the transaction at issue had to be a felony transaction. The jury was also instructed as to what comprised a felony-level offense. These instructions were sufficient to ensure that if the jury rejected Green's self-defense claim under AS 11.81.330(a)(4)(B), the jury did so because it found that Green possessed a deadly weapon while participating in a *felony* drug transaction.

Green also argues that his use of a deadly weapon did not *arise* from his participation in that transaction because (according to Green) at the time Sagerser attacked him, the drug transaction had finished and they had moved on to a different topic of conversation. But even under Green's version of events, Sagerser reacted violently to Green's phone beeping because he was worried about "people trying to set him up." In other words, Sagerser's paranoia about being "set up" was related to the drug transaction that had just occurred. Indeed, defense counsel acknowledged this obvious connection when he told the jury during opening statements that "Mr. Sagerser was an incredibly paranoid person. He was [] someone that fashioned himself as a pretty big time marijuana dealer. . . . He was soliciting customers, and he was dealing with some bad folks . . . ."

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[19] *See* former AS 11.71.050(a)(1), (b) (2012).

Moreover, as already noted, Green and Sagerser had no relationship outside the drug transaction; they were both there for the express purpose of participating in that transaction. Indeed, Green was inside Sagerser's house for only about seven minutes before he emerged with the marijuana.

Thus, in contrast to *Gates*, in Green's case, there was a well-established nexus between Green's use of force and his willing participation in a drug transaction.[20] Given this record, we find no abuse of discretion in the trial court's denial of Green's motion for a new trial.

Why we conclude that Green's additional challenge to the self-defense instructions does not constitute reversible error

Green next argues that the trial court improperly instructed the jury on the law of self-defense. In particular, Green challenges Jury Instruction No. 44, which the court gave over defense counsel's objection. This instruction read:

> Even in circumstances when a person is permitted to use deadly force in self-defense, the law requires that the force used be no greater than necessary to avert the danger.

Green argues that this instruction is contrary to the law because it implies that the jury should evaluate the reasonableness of a defendant's conduct in hindsight, rather than considering whether the defendant's use of force was objectively reasonable under the circumstances known to the defendant at the time.

We considered a similar instruction in *Jones-Nelson v. State*.[21] There, we concluded that the instruction "failed to unambiguously recite the concept of

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[20] *See Gates*, 2015 WL 4387384, at *6-7 (Mannheimer, J., concurring).

[21] *Jones-Nelson v. State*, 446 P.3d 797, 802-04 (Alaska App. 2019).

'reasonableness' that is central to the law of self-defense."[22] Instead of informing the jury that it must assess the defendant's use of force from the perspective of a reasonable person in the defendant's circumstances, the instruction incorrectly suggested that the jury should retrospectively evaluate the defendant's conduct to determine whether it was in fact objectively necessary.

The instruction in this case suffers from the same deficiency. It did not explicitly tell the jurors that they were required to evaluate the defendant's use of force from the perspective of a reasonable person in the defendant's circumstances.[23]

However, having reviewed the record, we conclude that the remaining jury instructions and the closing arguments as a whole correctly articulated this "reasonableness" principle and that Green was not prejudiced by the incomplete nature of the challenged jury instruction.[24]

Jury Instruction No. 44 was not given to the jury in isolation. The jury received two pattern jury instructions on the law of self-defense: one regarding the use of deadly force and one regarding the use of non-deadly force. Both of these instructions stated that a person may only use force when the person *reasonably believes* it is necessary for self-defense.[25]

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[22] *Id.* at 803.

[23] *See id.* at 799.

[24] *See Guertin v. State*, 854 P.2d 1130, 1133 (Alaska App. 1993) (concluding that "the trial court's instructions, read as a whole and in a common-sense manner, accurately conveyed the legal concepts the jury needed to decide Guertin's guilt or innocence").

[25] Jury Instruction No. 38 stated that a defendant who is justified in using non-deadly force may use deadly force "when and to the extent the defendant reasonably believes the deadly force is necessary[.]" Jury Instruction No. 39 stated that a defendant may use non-

(continued...)

Further, the challenged instruction was placed directly after another instruction that exclusively discussed the principle that a defendant's belief in the need to use self-defense must be reasonable under the circumstances at the time the force is used. That instruction stated:

> The reasonableness of a defendant's beliefs must be evaluated based on the circumstances of the situation facing the defendant, including any relevant knowledge the defendant had about the other person; physical attributes of all persons involved including the defendant; and any prior experiences that could provide a reasonable basis for the defendant's beliefs.
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> Reasonable belief means that a reasonable person would have held such a belief under the same circumstances. A defendant's belief may be reasonable even when, in hindsight, the belief turns out to have been mistaken.

We also note that in rebuttal argument, the prosecutor explained to the jury that there was both an objective and a subjective component to self-defense:

> That is[,] a reasonable person had to believe that in Mr. Green's situation, Mr. Sagerser was going to or was using force against him and the defendant had to believe that. So the defendant has to believe that and it has to be something a reasonable person would have believed in the situation.

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[25] (...continued)
deadly force when and to the extent the defendant believes it is necessary for self-defense — and explicitly stated that the defendant's beliefs "must be reasonable under the circumstances."

For these reasons, we conclude that, when the instructions are viewed as a whole and in light of the prosecutor's explanation of the law to the jury, the error does not require reversal of Green's convictions.[26]

Why we conclude that the trial court erred when it did not completely excise certain stricken statements from the presentence report

Green's last argument involves the presentence report. At Green's sentencing, defense counsel objected to various factual assertions in the presentence report because the information was not presented at trial. The court agreed to rely only on information that was presented at trial and accordingly crossed out the contested facts by drawing a line through various sentences in the report.

But the deleted statements remain a legible part of Green's presentence report. Green argues — and the State agrees — that the trial court was required to completely excise these portions of the report.

We agree with the parties.[27] Alaska Criminal Rule 32.1(f)(5) requires a court to completely black out or otherwise remove material that the court finds to be unproven or irrelevant, so that it is no longer a legible part of the report. Accordingly, we remand this case to the trial court so that it may fully redact the stricken statements from the presentence report.

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[26] *See Guertin*, 854 P.2d at 1133.

[27] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess whether a concession of error "is supported by the record on appeal and has legal foundation").

Conclusion

We REMAND this case to the trial court for the limited purpose of ensuring that its alterations to the presentence report comply with the requirements of Alaska Criminal Rule 32.1(f). In all other respects, we AFFIRM the judgment of the superior court.