

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

JOSHUA CHARLES RICHARDSON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11280  
Trial Court No. 3AN-10-9579 CR

MEMORANDUM OPINION

No. 6371 — August 31, 2016

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Gregory A. Miller, Judge.

Appearances: Renee McFarland, Assistant Public Defender,  
and Quinlan Steiner, Public Defender, Anchorage, for the  
Appellant. Mary A. Gilson, Assistant Attorney General, Office  
of Criminal Appeals, Anchorage, and Michael C. Geraghty,  
Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley,  
District Court Judge.\*

Judge MANNHEIMER.

Joshua Charles Richardson was convicted of first-degree burglary and  
second-degree theft, based on evidence that he broke into a storage unit located in the

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

garage of an apartment building and stole a number of items that belonged to the manager of the building.

When the break-in and theft were discovered, a police officer came to the apartment building and examined the storage unit. During this examination, the apartment manager pointed out that there were some cigarette butts on the floor of the storage unit, but the police officer did not collect these butts to preserve them as physical evidence.

Before Richardson's trial, his attorney filed a motion asking the court to give the jurors a *Thorne* instruction regarding these uncollected cigarette butts — *i.e.*, an instruction telling the jurors to presume that the uncollected cigarette butts would have tended to show that someone other than Richardson committed the burglary and theft.<sup>1</sup>

The trial judge declined to give this instruction, and Richardson now contends that the judge's decision was error.

As this Court explained in *Selig v. State*, 286 P.3d 767, 772 (Alaska App. 2012),

The general rule is that the State has no duty to collect physical evidence, and the State's duty to preserve evidence applies only to physical evidence that has actually been gathered. Thus, in normal circumstances, ... the State's failure to collect evidence would not entitle a defendant to [a *Thorne*] instruction.

Richardson acknowledges that this is the general rule, but he argues that the rule should be different in cases where (1) the police had the ability to collect the evidence and (2) the police knew, or should have known, that the uncollected evidence

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<sup>1</sup> See *Thorne v. Dept. of Public Safety*, 774 P.2d 1326, 1331 (Alaska 1989).

would likely be an important factor in any later determination of the defendant's guilt or innocence.

Whatever might be the merit of Richardson's proposal, his suggested rule would not apply to his case.

According to the testimony presented at Richardson's trial, the apartment manager personally saw Richardson carrying away some of the stolen property. When the apartment manager yelled at Richardson to stop, Richardson ignored him and jumped into a pickup truck. As Richardson drove away, he shouted, "Fuck you. They're mine now!" The manager wrote down the license number of Richardson's vehicle, and then he called 911.

Assuming that the foregoing information was communicated to the police officer who arrived to investigate these crimes, that police officer would not have any reason to think that the cigarette butts on the floor of the storage unit were going to be critical evidence in the later determination of Richardson's guilt or innocence.

We therefore uphold the trial judge's refusal to give Richardson's requested jury instruction.

Richardson raises one other claim on appeal — a claim that relates to his sentencing.

Because of a prior felony conviction, Richardson faced presumptive sentencing ranges of 4 to 7 years' imprisonment for his first-degree burglary conviction and 2 to 4 years' imprisonment for his second-degree theft conviction. Richardson asked the superior court to find that his burglary was mitigated under AS 12.55.155(d)(9) — *i.e.*, that his burglary was among the least serious within the definition of first-degree burglary.

The superior court rejected this proposed mitigator, and Richardson challenges the court's decision on appeal.

Richardson argues that his burglary was among the least serious within the definition of first-degree burglary because, even though the garage he broke into was part of a dwelling (it was on the ground floor of an apartment building), there was no direct access from this garage into the victim's apartment. Rather, access to the garage was through a common hallway (a hallway which, in turn, led to individual apartments). Based on this fact, Richardson argues that his crime was more like second-degree burglary — *i.e.*, burglary of a building that is not a dwelling.

Richardson's sentencing judge acknowledged that Richardson's burglary of the storage unit in the garage did not constitute as great a violation of the residents' privacy and security as a burglary of the apartment dwellers' living quarters. But the judge pointed out that, in Richardson's case, the victim of the burglary/theft personally confronted Richardson while he was in the act of committing these crimes. Thus, the judge concluded, Richardson's case presented the kind of situation that prompted the legislature to impose more severe penalties for burglary of a dwelling.

We agree with the sentencing judge that, under the facts of Richardson's case, Richardson's conduct was not among the least serious within the definition of first-degree burglary. We therefore uphold the judge's rejection of Richardson's proposed mitigator.

In conclusion, the judgement of the superior court is **AFFIRMED**.