

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

ELLIOT ISIAH HERNANDEZ,  
  
Appellant,  
  
v.  
  
STATE OF ALASKA,  
  
Appellee.

Court of Appeals No. A-12137  
Trial Court No. 3AN-13-1086 CR

MEMORANDUM OPINION

No. 6560 — January 3, 2018

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Larry D. Card, Judge.

Appearances: Michael L. Barber, Barber Legal Services,  
Boston, Massachusetts, under contract with the Office of Public  
Advocacy, Anchorage, for the Appellant. Eric A. Ringsmuth,  
Assistant Attorney General, Office of Criminal Appeals,  
Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for  
the Appellee.

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

Judge WOLLENBERG.

Elliot Isaiah Hernandez was charged with one count of first-degree assault for shooting Raymond Thiele, one count of third-degree assault for pointing a gun at Dale Clark, and one count of third-degree misconduct involving a weapon for being a felon in possession of a concealable firearm. Following the start of Hernandez's trial,

the prosecutor announced that one of the alleged victims, Thiele, intended to assert his privilege against self-incrimination. The court concluded that Thiele had a valid privilege, and the State declined to offer Thiele immunity.

Hernandez's attorney then moved for a mistrial, asserting that his defense strategy "very strongly relied on [Thiele's] testimony being inconsistent with everybody else's." The trial court denied the mistrial, and the jury subsequently convicted Hernandez as charged.

On appeal, Hernandez argues that the trial court erred in denying his motion for a mistrial because Thiele's mid-trial unavailability prejudiced his defense. For the reasons explained here, we reject Hernandez's claim and affirm his convictions.

### *Background facts*

In the early morning hours of January 14, 2013, the Anchorage police responded to a 911 call about a shooting at an apartment complex. The police discovered a shell cartridge in the hallway outside Dale Clark's apartment and a bullet hole in the front door of the apartment. Clark and another man, Raymond Thiele, were inside Clark's apartment, and Thiele was suffering from a gunshot wound to the neck. Thiele was transported to the hospital and treated for his injury.

Clark identified the shooter as a man who went by either "Isaiah" or "E," and he said he had known Isaiah for a few months. Clark reported that he had been in his apartment that evening with Isaiah and several other people, including Thiele. At one point, Isaiah became angry, pointed a gun at Clark, and told Clark that he wanted to shoot him. Isaiah then said that he and Clark would "handle this outside," put the gun in his pocket, and left the apartment.

Thiele slammed the door behind Isaiah, but Clark realized that Isaiah's girlfriend, T.T., was still in the apartment. Clark opened the door, demanded that T.T.

leave, and slammed the door behind her. Clark then heard a gunshot and saw that Thiele had been shot through the door.

One of the people who lived across the hall from Clark, Kayce Keene, heard the gunshot and called the police. Keene had spoken briefly with Isaiah earlier that evening when he visited her apartment with Keene's cousin. Keene later testified that she had not met Isaiah before that night and that she had asked him to leave after hearing him talking on the phone about selling a gun.

Based on their investigation, the police identified Elliot Isaiah Hernandez as the possible gunman. The police put together a six-person photo lineup, which included Hernandez as No. 5. When presented with the photo lineup, Keene stated, "I want to say No. 5." While at the hospital, Thiele also viewed the photo lineup and stated that No. 5 had the "closest resemblance" to the man who shot him.

The following day, the police observed a person matching Hernandez's description. Hernandez initially fled, but he subsequently surrendered and was placed under arrest. Along Hernandez's path, the police located a handgun that appeared to have been recently tossed to the ground. A firearms expert from the state crime lab matched test-fired casings from this firearm to the casing that was recovered at the crime scene.

The State secured an indictment against Hernandez for one count of first-degree assault for shooting Thiele, one count of third-degree assault for threatening to shoot Clark, and one count of third-degree misconduct involving weapons for being a felon in possession of a concealable firearm.<sup>1</sup>

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<sup>1</sup> The State also initially charged Hernandez with attempted second-degree murder but dismissed this count before trial.

*Trial proceedings*

Hernandez's case proceeded to a jury trial. In his opening statement, Hernandez's attorney asserted that Hernandez was misidentified as the man who shot Thiele and threatened to shoot Clark. Hernandez's attorney claimed that Hernandez had been asleep in the smoke shack behind his grandfather's house when the crimes occurred.<sup>2</sup> The attorney also indicated that members of Hernandez's family would testify that he was at his grandfather's house in the early morning hours when the shooting took place. Hernandez's attorney further suggested that Clark and Thiele were not credible witnesses; he stated that Clark was high on methamphetamine and alcohol during the crimes and that Thiele was a convicted armed robber.

Both Clark and Keene testified for the State. Keene testified that she had previously identified Hernandez in the photo lineup but that she could not identify Hernandez in court. Clark also could not initially identify Hernandez in court. Clark subsequently identified Hernandez in a photograph provided by the prosecutor and testified that Hernandez looked different at the time of trial than he had at the time of the incident.

After Keene and Clark testified, the prosecutor notified the court that Thiele intended to assert his privilege against self-incrimination. The court found that Thiele had a valid claim, and the State declined to offer immunity to Thiele.

Hernandez's attorney then moved for a mistrial, arguing that his strategy "essentially relied on playing all of these witnesses off one another" and "very strongly relied on [Thiele's] testimony being inconsistent with everybody else's." He maintained that Thiele's unavailability significantly disadvantaged his intended defense.

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<sup>2</sup> Hernandez's grandfather later testified that the smoke shack was an outbuilding that contained both a bunk and a heater and that his grandsons sometimes stayed there overnight.

The court denied Hernandez's motion for a mistrial. The trial court instructed the jury that Thiele was unavailable and that the jury should not hold it against either party.

Hernandez's attorney subsequently introduced testimony regarding Thiele's out-of-court identification. He also presented testimony by two of Hernandez's family members in support of Hernandez's alibi defense. Hernandez's sister testified that she had seen Hernandez around 5:30 a.m. on January 14 (the day of the crimes), and Hernandez's grandfather testified that he had seen Hernandez around 7:00 a.m.

In closing argument, Hernandez's attorney maintained that Hernandez was misidentified as the shooter, emphasizing that both his sister and his grandfather saw him in the smoke shack in the early morning hours, soon after the shooting took place. Hernandez's attorney argued that Hernandez could not have walked from the crime scene to his grandfather's house in the time between the 911 call (at 5:09 a.m.) and his sister observing him at his grandfather's house (at 5:30 a.m.). The attorney also questioned the credibility of the State's witnesses, pointing out that neither Clark nor Keene could identify Hernandez in court and that the lineup identifications by Keene and Thiele prior to trial were not unequivocal.

The jury found Hernandez guilty on all three counts.

*The trial court did not abuse its discretion in denying Hernandez's motion for a mistrial*

On appeal, Hernandez argues that the trial court erred in denying a mistrial because his defense was prejudiced and his trial rendered fundamentally unfair due to Thiele's sudden unavailability. He asserts that his attorney prepared for trial under the belief that Thiele would testify and that he predicated his defense on pointing out the inconsistencies in Thiele's previous statements.

The decision to grant a mistrial is entrusted to the sound discretion of the trial court, and we review the trial court's decision for an abuse of discretion.<sup>3</sup> We will reverse the trial court's decision "only when, after reviewing the whole record, we are left with a definite and firm conviction that the trial court erred in its ruling."<sup>4</sup>

Here, the record does not support Hernandez's claim that his defense hinged on, or was irreparably upended by, Thiele's unavailability. Rather, beginning in his opening statement, Hernandez's attorney relied primarily on an alibi defense. As the trial court recognized, Thiele did not have testimony to offer in support of this alibi defense.

We acknowledge that in his opening statement, Hernandez's attorney also questioned the credibility of Clark and Thiele and suggested the jury should view their forthcoming testimony with skepticism. But this argument was consistent with Hernandez's alibi defense. Thiele's subsequent unavailability did not prevent Hernandez from presenting his alibi defense, or from impeaching the credibility of the State's other main witnesses, Clark and Keene.

Hernandez's argument on appeal thus amounts to a general assertion that he was unable to confront and cross-examine Thiele as planned. But unexpected events often occur at trial, and the mere fact that an event is unexpected does not alone require a mistrial. Hernandez fails to explain why, given his primary reliance on an alibi defense, the judge's instruction to the jury not to consider Thiele's unavailability was insufficient to cure any potential prejudice from his assertion in his opening statement that Thiele would testify. And Hernandez does not suggest that Thiele would have been available as a witness at a future trial.

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<sup>3</sup> *Tritt v. State*, 173 P.3d 1017, 1019 (Alaska App. 2008).

<sup>4</sup> *Id.*

Moreover, Thiele was a State's witness and a shooting victim. There is no indication, nor does Hernandez argue, that Thiele would have testified in a manner that would have exculpated Hernandez.

For these reasons, we conclude that the trial court did not abuse its discretion in denying Hernandez's motion for a mistrial.

*Conclusion*

We AFFIRM the judgment of the superior court.