

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

BYRON EDWARD SYVINSKI,  
  
Appellant,  
  
v.  
  
STATE OF ALASKA,  
  
Appellee.

Court of Appeals No. A-11421  
Trial Court No. 3AN-11-6549 CR

MEMORANDUM OPINION

No. 6303 — March 9, 2016

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

Appearances: Elizabeth D. Friedman, Assistant Public  
Advocate, and Richard Allen, Public Advocate, Anchorage, for  
the Appellant. Diane L. Wendlandt, Assistant Attorney General,  
Office of Criminal Appeals, Anchorage, and Michael C.  
Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheim, Chief Judge, and Allard, Judge, and  
Suddock, Superior Court Judge.\*

Judge SUDDOCK.

A jury found Byron Edward Syvinski guilty of first-degree robbery and five counts of assault stemming from his attack on a young girl. He asks this Court to reverse his robbery conviction: He raises several evidentiary issues regarding expert witness

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

testimony at trial, and he challenges the sufficiency of the evidence to prove an intent to steal. But since the trial judge merged Syvinski's robbery verdict into his first-degree assault conviction, his appeal of the robbery conviction is moot. Accordingly, we affirm.

*Factual background and prior proceedings*

On June 4, 2011, Syvinski was admitted to Providence Hospital with psychiatric symptoms. His Providence medical records reported suicidal ideation, agitation, hallucinations, and insomnia. Syvinski slept for a few hours in the psychiatric ward and was then discharged.

The next day Syvinski confronted a seven-year-old girl sitting on her bicycle. He grabbed the bicycle, opened the girl's jacket, and searched its pockets. Finding nothing, he struck the child's face two or three times with his hand, which was encased in a hard cast. Syvinski knocked the girl from her bicycle. He continued striking her on the ground until neighbors were able to restrain him. She suffered two skull fractures, a traumatic brain injury, internal bleeding, a swollen eye, and facial bruising.

The police arrived and arrested Syvinski. He was rambling incoherently, his eyes were bulging, and he was shaking. An officer transported him to Alaska Regional Hospital, where he was treated for five days, mainly by Doctor Michael Mallowney. The doctor's discharge diagnosis was drug intoxication.

Syvinski was indicted for first-degree assault for recklessly causing serious physical injury to the child by use of a dangerous instrument, first-degree robbery for inflicting serious physical injury in the course of a robbery, and four other counts of felony assault.<sup>1</sup> Dr. Mallowney testified at trial regarding his treatment of Syvinski.

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<sup>1</sup> AS 11.41.200(a)(1) (first-degree assault); AS 11.41.500(a)(3) (first-degree robbery);  
(continued...)

Prior to testifying, the doctor reviewed Syvinski’s medical records from his earlier admission to Providence Hospital. Mallowney ruled out mental illness and concluded that Syvinski was under the influence of “bath salts” at the time of the incident. “Bath salts” is a term used to describe synthetic designer drugs that are often sold disguised as true bath salts. These drugs have mood-altering and stimulant properties. Dr. Mallowney referred to a chart from the *New England Journal of Medicine* that described the physical and mental symptoms of persons under the influence of bath salts.

The defense objected, arguing that Dr. Mallowney, by reviewing Syvinski’s Providence Hospital medical records and the journal article, had exceeded the allowable scope of treating-physician testimony, and that the State therefore should have listed him as an expert witness pursuant to Alaska Criminal Rule 16(b)(1)(B). The judge overruled defense counsel’s objections. The judge also denied Syvinski’s motion for a judgment of acquittal on the charges.

During his closing argument, defense counsel argued that Syvinski should be acquitted of robbery because he was “out of his mind” from bath salt intoxication and did not have a specific intent to steal from the child. The jury found Syvinski guilty of all charges. The court merged Syvinski’s robbery verdict and the five felony assault verdicts into a single conviction for first-degree assault. The court entered a conviction for first-degree assault and sentenced him on that offense. This appeal followed.

*Why we conclude that Syvinski’s claims are moot*

On appeal, Syvinski argues that the judge erred in rejecting Syvinski’s objections to Dr. Mallowney’s testimony, and that the trial judge also erred in denying

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<sup>1</sup> (...continued)  
AS 11.41.200(a)(3) (first-degree assault); AS 11.41.210(a)(1) and/or (2) (second-degree assault); AS 11.41.220(a)(1)(B) (third-degree assault); and AS 11.41.220(a)(1)(C)(i) (third-degree assault), respectively.

his motion for judgment of acquittal on the robbery charge. We need not resolve these issues because they are moot: The superior court merged the robbery verdict and the verdicts on the various counts of felony assault into a single conviction for first-degree assault, and the court sentenced Syvinski only for first-degree assault.<sup>2</sup>

We acknowledge that Syvinski's claims might not be moot for the purpose of evaluating the reasonableness of his sentence if there was a possibility that the superior court increased Syvinski's sentence because of the robbery allegation. But we have examined the judge's sentencing remarks, and those remarks clearly demonstrate that the judge gave no weight to the robbery allegation.

### *Conclusion*

This Court AFFIRMS the superior court's judgment of conviction for first-degree assault.

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<sup>2</sup> See *Garhart v. State*, 147 P.3d 746, 752-53 (Alaska App. 2006) (holding that when verdicts are returned for counts charging separate theories of the same crime, the sentencing judge "must merge one or more of the verdicts so that the defendant receives only the number of convictions and sentences allowed by the double jeopardy clause").