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. 6599 — March 7, 2018

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

Appearances: Elizabeth D. Friedman, Redding, California, under contract with the Office of Public Advocacy, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, 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 after his attack on a seven-year-old girl, A.M. Syvinski was also

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

convicted of a misdemeanor assault on his adult neighbor.[1] Syvinski appeals his robbery conviction.[2]

Syvinski first argues on appeal that the superior court committed several evidentiary errors regarding the testimony of a physician who treated him for a drug overdose. We find these claims to be without merit.

Syvinski also claims that the evidence at trial was insufficient to prove that Syvinski attempted to take property from A.M., or that he employed force for this purpose. We find that the evidence was sufficient to establish the crime of robbery.

Background facts

On the afternoon of June 5, 2011, Syvinski peered into a sport utility vehicle owned by his neighbor, Roberto Delreal. Syvinski asked Delreal for permission to enter the vehicle, but when Delreal refused this request, Syvinski opened the vehicle door anyway. Syvinski peered inside the car before walking away.

About fifteen minutes later, Syvinski approached Delreal's nineteen-year-old son, Jonathan, as he was walking toward the SUV with a shopping bag containing clothing. Syvinski asked Jonathan if he had the key to the SUV, and Jonathan replied

---

[1] AS 11.41.500(a)(3) (first-degree robbery); AS 11.41.200(a)(1) (first-degree assault); 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); AS 11.41.220(a)(1)(C)(i) (third-degree assault); and AS 11.41.230(a)(1) (fourth-degree assault), respectively.

[2] In our earlier decision in Syvinski's case, *Syvinski v. State*, 2016 WL 936768, at *1 (Alaska App. Mar. 9, 2016) (unpublished), we did not reach the merits, which we concluded were moot because of the way that the superior court merged various counts. Both parties have asked us to reach the merits due to potential future collateral consequences of a robbery conviction, and we now do so.

that he did not. Syvinski then grabbed the shopping bag and inspected its contents before returning it to Jonathan.

Delreal came outside and confronted Syvinski. Syvinski then apparently tried to enter the Delreal residence. When Delreal refused him entry, Syvinski punched him in the face. Jonathan came to his father's aid, and Syvinski departed after Delreal kicked him in the groin.

As Delreal and his son Jonathan looked on, Syvinski then approached a seven-year-old girl named A.M., who was sitting on her bicycle. Both men later testified that Syvinski opened the girl's jacket. Jonathan speculated that Syvinski might have been looking for interior pockets, but Delreal testified that Syvinski did not go through the jacket at all before he began to strike A.M. on her head. Another eyewitness, Maria Quinones, testified that she saw Syvinski open the girl's jacket and put his hand inside "like he was looking for something, [but he] didn't find anything."

Syvinski hit A.M. three times in the face; twice while she was astride her bicycle, and once after she fell to the ground. These blows fractured A.M.'s skull in two places. Neighbors quickly intervened, and the police arrived moments later.

At trial, a police officer testified that when he arrived on the scene, Syvinski was "shaking and saying some stuff that I couldn't really understand ... ." The officer found a needle lying next to Syvinski and a needle cap in his pocket. The officer testified that Syvinski seemed deranged during transport to the jail, and that he was obsessed with keys.

The State's theory of the robbery was that Syvinski's course of conduct — his intrusion into Delreal's vehicle, followed by his examination of the contents of Jonathan's shopping bag, and finally his examination of A.M.'s jacket — proved that when Syvinski opened A.M.'s jacket, he was searching for something to steal. The

defense attorney argued that Syvinski was too debilitated by drugs or mental illness to form a specific intent to steal: "He was out of his mind, frankly."

The testimony of Syvinski's treating physician

On appeal, Syvinski argues that the trial judge should have limited the testimony of Dr. Michael Mullowney, one of the doctors who treated Syvinski during his post-arrest hospitalization at Alaska Regional Hospital. Syvinski claims that because the doctor had not been listed as an expert witness, the scope of his testimony should have been limited to his specific treatment of Syvinski, and that the judge should not have permitted him to exceed this scope by offering opinions concerning the cause of Syvinski's mental derangement.

During her opening statement, the defense attorney conceded that Syvinski was guilty of recklessly causing serious physical injury to A.M. But she contended that Syvinski was not guilty of robbery, because he acted without an intent to steal due to his mental derangement. The defense attorney did not suggest that Syvinski's derangement was the result of voluntary drug intoxication, a conclusion that she characterized as "quite questionable." She instead suggested that Syvinski was suffering from a psychotic episode brought on by mental illness.

Syvinski was briefly hospitalized at Providence Hospital the day before the events in this case. Prior to testifying at trial, Dr. Mullowney reviewed the records of this hospitalization. The prosecutor subsequently disclosed Dr. Mullowney's actions to the defense attorney, who in turn informed the judge. The defense attorney told the judge that she objected to "any solicitation of an opinion [about] what happened with Mr. Syvinski ... the day before," because Dr. Mullowney was not involved with that earlier treatment.

In response to this objection, the prosecutor told the court that Dr. Mullowney would testify that Syvinski's post-arrest hospitalization stemmed from synthetic methamphetamine intoxication (colloquially termed "bath salt" intoxication), and that Syvinski admitted to his treating physicians that he had ingested this substance. The prosecutor also revealed that, upon receiving a subpoena to testify, Dr. Mullowney reviewed Providence Hospital records and concluded that Syvinski's earlier hospitalization was also the result of bath salt intoxication.

Hearing all this, Superior Court Judge Jack Smith indicated that because Dr. Mullowney had not been designated by the State as an expert witness, his testimony would be limited to his diagnosis and treatment of Syvinski at Alaska Regional following his arrest. The judge did not clearly indicate whether Dr. Mullowney's testimony could reference Syvinski's earlier hospital admission at Providence, stating only that "there is a potential issue" regarding the permissible scope of Dr. Mullowney's testimony.[3]

The prosecutor responded that he would refrain from questioning Dr. Mullowney about the earlier hospital admission at Providence, so long as the defense agreed not to contend that this hospitalization was caused by mental illness without first offering foundational expert testimony. The prosecutor stated that, absent expert testimony, such a contention by the defense attorney would open the door to rebuttal testimony from the doctor that Syvinski's symptoms at the time of the earlier hospital admission at Providence were solely compatible with bath salt intoxication on that day, and not with mental illness.

---

[3] *See Miller v. Phillips*, 959 P.2d 1247, 1250 (Alaska 1998) (holding that treating physicians may testify to their expert opinions about their diagnoses and treatments of their patients, including their review of pertinent medical records, without first being designated as expert witnesses).

The judge agreed that if the defense attorney "open[ed] the door," Dr. Mullowney's testimony would then no longer be limited to his treatment of Syvinski at Alaska Regional.

But when the defense attorney revisited the topic a few minutes later, the judge ruled that Dr. Mullowney *would* be entitled to testify that he had reviewed records from the earlier hospital admission at Providence, in order to reassure himself that his diagnosis of Syvinski's condition during the second hospital admission at Alaska Regional was correct. Apparently, this meant that Dr. Mullowney could offer an opinion as to whether Syvinski's first hospitalization was also the result of, or at least consistent with, drug intoxication.

Lastly, the prosecutor disclosed that, upon receiving a subpoena to testify at trial, Dr. Mullowney reviewed an article in the *New England Journal of Medicine*. This article set forth the symptoms of bath salt intoxication in a chart that the doctor intended to use at trial for illustrative purposes. The defense attorney objected that, by testifying about medical literature, Dr. Mullowney would exceed the scope of the testimony permitted to a treating physician. But the judge ruled that Dr. Mullowney could refer to the chart because it merely tended to confirm his diagnosis of Syvinski's condition when he saw him at Alaska Regional.

At trial, Dr. Mullowney testified that he first saw Syvinski as a patient on May 25, 2011, at the request of another physician who had performed a surgery on Syvinski's wrist. Then, on June 6, 2011 — the day following Syvinski's arrest and admission to Alaska Regional Hospital — Dr. Mullowney took over from the admitting physician, and thereafter managed Syvinski's care for the ensuing four days.

Dr. Mullowney testified that when Syvinski was hospitalized following his arrest, he seemed violent and psychotic. When the prosecutor asked Dr. Mullowney to assess the cause of these symptoms, the doctor did so in a lengthy narrative. Dr.

Mullowney explained that Syvinski had stated that he had ingested bath salts, and that Syvinski's symptoms were consistent with the effects of a synthetic methamphetamine overdose. Dr. Mullowney noted that, over the course of several days, the drug wore off and Syvinski returned to normalcy. Given Syvinski's symptoms and the arc of his recovery, Dr. Mullowney stated that he could hardly imagine any other explanation for Syvinski's condition.

After his recitation of Syvinski's symptoms, Dr. Mullowney referenced the chart from the journal article, and indicated that some of the listed symptoms were present in Syvinski's case, and some were not.

Dr. Mullowney then noted that Syvinski had been sweating during his earlier hospital admission at Providence, and that this was a side effect of bath salt intoxication. Dr. Mullowney opined that the earlier admission could also have been the result of bath salt ingestion.

When the prosecutor asked Dr. Mullowney how he had ruled out a psychiatric origin of Syvinski's symptoms, Dr. Mullowney responded that Syvinski had no particular history of psychiatric distress, that he had presented as normal in late May, that he demonstrated physical symptoms consistent with his claim of having ingested bath salts, and that he returned to normalcy as the drug cleared from his system during his five-day hospital stay — a history inconsistent with profound psychiatric distress.

The defense attorney then began her cross-examination of Dr. Mullowney by asking him what he had concluded from his review of the Providence Hospital records. Dr. Mullowney responded that, according to these records, Syvinski had threatened to kill himself, and that his symptoms included varied breathing, sweating, and a complaint of dizziness, and that he recovered after several hours of sleep. Only then did the prosecutor on redirect examination ask Dr. Mullowney whether Syvinski's

symptoms during the prior hospital admission at Providence were consistent with bath salt intoxication, and Dr. Mullowney responded that they were.

During her summation, the defense attorney argued that the jury did not need to decide whether Syvinski acted under drug intoxication or a psychiatric break, because it was obvious that he was, for whatever reason, not "in his right mind," and was therefore incapable of forming, or had not formed, an intent to steal from A.M.

The jury returned guilty verdicts on all counts.

The judge did not abuse his discretion in allowing Dr. Mullowney to testify as he did

Syvinski first claims that the judge erred by permitting Dr. Mullowney to offer an opinion regarding Syvinski's condition during the earlier hospitalization at Providence, and by allowing Dr. Mullowney to testify about his post-treatment review of medical literature. Syvinski asserts that this testimony "demolished Syvinski's defense" that he was unable to formulate an intent to steal.

Syvinski also claims that the judge committed plain error when he permitted Dr. Mullowney to testify that he had ruled out a psychiatric origin of Syvinski's symptoms, without first requiring one or the other of the attorneys to voir dire Dr. Mullowney about his qualifications to offer psychiatric testimony. Syvinski argues that we should remand the case to the superior court for a hearing on whether Dr. Mullowney was qualified to offer psychiatric testimony, and to allow the defense an opportunity to offer expert rebuttal testimony.

With respect to Syvinski's claim that the judge erred by permitting reference to a symptom chart from a medical journal, we find no abuse of discretion. Even before Dr. Mullowney referred to the chart, he testified from his own training and

experience that Syvinski manifested the symptoms of synthetic methamphetamine intoxication. His later reference to the chart merely reinforced this testimony.

And if the defense attorney perceived a discovery violation due to the late disclosure of the chart, her remedy was to move for a continuance.[4] We conclude that the judge did not abuse his discretion when he permitted Dr. Mullowney to bolster his diagnosis using medical literature.

We reach a similar conclusion with respect to Dr. Mullowney's reference to Syvinski's hospital admission at Providence on June 4th, the day before his arrest. Dr. Mullowney personally examined Syvinski less than two weeks earlier, on May 25, 2011. Dr. Mullowney also undertook Syvinski's care on June 6th. Dr. Mullowney could not reasonably be required to ignore the records from the intervening June 4th admission at Providence Hospital suggesting that Syvinski had engaged in a single course of drug binging.[5]

True to his word, the prosecutor did not question Dr. Mullowney about the prior hospitalization at Providence until after the defense attorney squarely raised the matter on cross-examination. The prosecutor's redirect examination was well within the scope of the cross-examination. No abuse of discretion occurred.

Lastly, when Dr. Mullowney explained why he rejected the theory that Syvinski's symptoms had a psychiatric origin, the judge did not commit plain error by failing to order *sua sponte* that the parties could voir dire Dr. Mullowney about his psychiatric expertise. It was reasonable to assume that Dr. Mullowney, a board-certified internist, was qualified, given his training and clinical experience with drug overdoses, to assess whether Syvinski's symptoms had a physical rather than a psychiatric origin.

---

[4] *See Bostic v. State*, 805 P.2d 344, 346-47 (Alaska 1991).

[5] *See Miller v. Phillips*, 959 P.2d at 1050-51.

The State presented sufficient evidence to prove Syvinski's intent to steal from A.M.

Syvinski argues that no reasonable person could conclude that he acted with an intent to steal when he assaulted A.M., and thus he should be acquitted of robbery.

Evidence is legally sufficient to support a criminal conviction if the evidence, and the reasonable inferences to be drawn from it, when viewed in the light most favorable to upholding the jury's verdict, are sufficient to convince fair-minded jurors that the government has proved each element of the charged crime beyond a reasonable doubt.[6]

Robbery occurs when a person, in the course of taking or attempting to take property from another person, uses or threatens force, with the intent to accomplish the taking or to retain possession of the stolen property.[7] Evidence of voluntary intoxication of a person accused of robbery may be offered to negate the element of specific intent to take property from another person.[8]

The State presented evidence tending to show that Syvinski was searching for something: first in Roberto Delreal's car, then in Jonathan Delreal's shopping bag, third in the Delreal home, and finally inside A.M.'s coat. Jurors could reasonably conclude that he was searching for some tangible object, and that if he had found the object, he would have seized it. Jonathan testified that Syvinski asked him if he had a key to his father's car, and an officer testified that during his transport to the jail, Syvinski spoke obsessively about a key. Reasonable jurors could conclude that Syvinski

---

[6] *Rae v. State*, 338 P.3d 961, 963 (Alaska App. 2014).

[7] AS 11.41.510(a).

[8] *See* AS 11.81.630.

was under the influence of bath salts and believed that others possessed a key (or some other object) that he felt he must locate and seize.

We acknowledge that, given the irrationality of Syvinski's behavior, reasonable jurors might have questioned whether the State established the culpable mental state required for robbery. But viewing the evidence and all reasonable inferences therefrom in the light most favorable to upholding the jury's verdict, we conclude that reasonable jurors could conclude that Syvinski forcibly grabbed A.M. and rummaged inside her coat in search of a tangible item that, if found, Syvinski would have taken from her. And this grabbing and rummaging provided sufficient evidence of the use of force to accomplish the taking.

Conclusion

As a final point, both Syvinski and the State agree that when the judge renumbered the counts on the judgment form, he failed to accurately set forth the counts that Syvinski was convicted of. We direct the judge to attend to this matter on remand. With this exception, we AFFIRM the judgment of the superior court.