

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

SCOTT ABRAHAM GROOM,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13288  
Trial Court No. 3AN-13-05483 CR

MEMORANDUM OPINION

No. 7037 — January 11, 2023

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Kevin M. Saxby, Judge.

Appearances: Kelly R. Taylor, Assistant Public Defender, and  
Samantha Cherot, Public Defender, Anchorage, for the  
Appellant. Diane L. Wendlandt, Assistant Attorney General,  
Office of Criminal Appeals, Anchorage, and Treg R. Taylor,  
Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

Scott Abraham Groom was convicted of one count of scheme to defraud.<sup>1</sup> He was sentenced to 2 years' incarceration and was ordered to pay \$259,881.12 in restitution.

Groom makes several arguments on appeal, some challenging his conviction and some challenging the trial court's restitution award. Because the arguments challenging his conviction may be addressed more summarily than the arguments relating to the restitution award, we have bifurcated these issues for decision. In this opinion, we resolve Groom's challenges to his conviction, affirming the judgment of the superior court. A separate opinion resolving the restitution issues will be issued at a later time.

### *Background facts and proceedings*

Groom was convicted of engaging in conduct constituting a scheme to obtain over \$10,000 in state funds by "false or fraudulent pretense, representation, or promise" and obtaining funds in accordance with this scheme.<sup>2</sup> To prove its case, the State presented evidence that Groom and his co-defendant, Laurayne Fischer, submitted false claims to the Alaska Division of Workers' Compensation requesting reimbursement for medical treatment Fischer purportedly provided to Groom.

Groom had been entitled, under a workers' compensation settlement agreement, to be reimbursed by the Division for the cost of certain medical treatment. Over a period of approximately two and a half years, Fischer filled out medical claim forms stating that she had provided treatment to Groom that she had not, in fact,

---

<sup>1</sup> AS 11.46.600(a)(2).

<sup>2</sup> *See id.*

provided. Groom faxed the claim forms to the Division, and the Division paid Fischer as requested. Fischer and Groom then shared the reimbursement proceeds.

The State eventually filed criminal charges against Fischer and Groom for this conduct. A grand jury returned a ninety-three-count indictment charging Fischer with fifty-five felony offenses, including multiple counts of perjury, second-degree theft by deception, and falsifying business records. The same grand jury charged Groom with thirty-eight felony offenses, including one count of scheme to defraud, and multiple counts of second-degree theft by deception and falsifying business records.

Prior to Groom's trial, Fischer entered into a comprehensive cooperation and plea agreement with the State. As provided by the agreement, Fischer entered a guilty plea to a single consolidated count of theft in the second degree and then testified against Groom when his case went to trial.

During the trial, the State presented evidence that, after Groom reached his settlement with the Division, Groom asked the Division to pay his wife, Vicky, to provide the medical treatment covered by the settlement agreement — specifically, the massaging and wrapping of Groom's limbs. The Division refused this request because Vicky was not a certified medical provider.

After the Division refused to pay Vicky, Groom contacted Fischer, a certified nursing assistant who lived near Groom's home. Fischer agreed to provide Groom's treatment and to fill out the necessary paperwork to obtain payment from the Division. Groom then communicated with the Division to determine how to get Fischer approved as his treatment provider and the rate she would be paid, and he provided Fischer with the reimbursement forms for her to use.

Fischer testified that she initially did not provide Groom with any treatment, but she nevertheless filled out reimbursement forms and gave the completed forms to Groom. Groom then faxed the forms to the Division, and the Division sent

reimbursement checks to Fischer. When Fischer received the checks, she cashed them, keeping two-thirds of the money and giving Groom the remaining third.

Fischer testified that after approximately two years of proceeding in this manner, she started providing treatment to Groom. The treatment — lymphatic massage and wrapping — was done five days a week, and each treatment session lasted ninety minutes. However, Fischer testified that Groom instructed her to bill the Division for six treatment sessions per week and to indicate that each treatment session lasted for three hours. Fischer testified that she followed Groom's instructions, and that, after about six months, she stopped providing treatment but continued to bill the Division and to share the reimbursement proceeds with Groom.

During the defense attorney's cross-examination of Fischer, the attorney asked Fischer whether her husband had ever provided any of Groom's treatment, and she responded that he had not. The defense attorney then questioned Fischer about an interview in which she and her husband spoke to a defense investigator. The questioning was intended to elicit testimony from Fischer that she had remained silent when her husband told the investigator that he had provided some of Groom's treatment. But the jury never heard this testimony because the prosecutor objected on hearsay grounds, and the trial court sustained the objection.

Throughout the trial, Groom's attorney focused on Fischer's credibility and her cooperation agreement with the State, urging the jury not to believe Fischer's assertions about Groom's role in the scheme to defraud. The attorney argued that Groom had actually received the treatment that was the subject of the various claims for reimbursement, even though the treatment was sometimes provided by Fischer's husband rather than by Fischer herself, and that Groom thus was entitled to receive the funds and had not obtained them by false pretenses.

The jury rejected Groom’s defense, finding him guilty of thirty-seven of the thirty-eight counts in the indictment. These counts merged into a single conviction for scheme to defraud.

*Any error in excluding evidence that Fischer’s husband had performed some of Groom’s treatment was harmless*

On appeal, Groom renews his argument that Fischer’s silence during the interview with the defense investigator was admissible to show that she adopted the truth of her husband’s statement that he had provided some of Groom’s medical treatment — and thus was admissible as a prior inconsistent statement under Alaska Evidence Rule 801(d)(1)(A)(i).

Under Alaska law, a party’s silence may be considered to adopt the truth of another person’s statement when the statement contains “assertions of facts, which, if untrue, the party would under all circumstances naturally be expected to deny.”<sup>3</sup> But “[t]he rule is not applicable in circumstances where a reply is not called for, or where silence is equally consistent with a state of mind other than acquiescence in the truth of what was said.”<sup>4</sup> This is because “silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation.”<sup>5</sup>

With this in mind, there is no apparent error in the trial court’s ruling. Fischer’s silence was equally consistent with a state of mind other than agreeing with the

---

<sup>3</sup> *Blue v. State*, 558 P.2d 636, 645 (Alaska 1977) (citing McCormick on Evidence § 270, at 651-52 (2d ed. 1972)).

<sup>4</sup> *Watson v. State*, 387 P.2d 289, 291 (Alaska 1963).

<sup>5</sup> *Silvernail v. State*, 777 P.2d 1169, 1176 (Alaska App. 1989) (quoting *United States v. Hale*, 422 U.S. 171, 176 (1975)).

truth of her husband's statement that he had provided some of Groom's treatment. For example, as the State points out, Fischer may simply have chosen not to contradict her husband in front of the investigator, who was a stranger to them. Similarly, Fisher would not naturally be expected to deny her husband's untrue statement while discussing the case with a defense investigator, especially since she had already agreed to testify against Groom. Alternatively, Fischer may have viewed her husband's statement as nothing more than a misguided attempt to lessen her culpability. As such, the trial court could reasonably find that Fischer was not persistently silent "in the face of accusation."<sup>6</sup>

Additionally, as the State points out, even if Fischer's husband performed some of Groom's treatment, this fact would not have any impact on Groom's culpability. Thus, even if the trial court's ruling was improper, any error in excluding this evidence was harmless.<sup>7</sup>

The unchallenged evidence at trial showed that Groom knew that the Division would only reimburse him for treatment from an approved provider. Indeed, he had previously asked to be reimbursed for treatment provided by his wife, Vicky, but he was unsuccessful because Vicky was not an approved provider. Furthermore, the evidence showed that Groom, not Fischer, communicated with the Division about getting Fischer approved as Groom's treatment provider and the rate she would be paid. And Fischer testified that Groom instructed her as to how the forms should be filled out, collected the forms from her, and faxed them to the Division himself. Thus, the evidence demonstrated that Groom knew that he was entitled to be reimbursed only for treatment provided by Fischer herself. Accordingly, even if the jury had determined that Fischer's husband provided some treatment to Groom, this would not have affected the verdict.

---

<sup>6</sup> *Id.*

<sup>7</sup> *See Love v. State*, 457 P.2d 622, 631 (Alaska 1969).

On appeal, Groom also claims that the trial court’s ruling prevented him from impeaching Fischer’s testimony that her husband had not provided any of Groom’s treatment. We agree that the evidence potentially had impeachment value. But Groom was not prejudiced by the trial court’s ruling. Groom ultimately impeached Fischer’s credibility with far more compelling evidence, including (1) evidence that Fischer agreed to testify in exchange for a very favorable plea deal and her release from pretrial custody, (2) evidence of other inconsistencies between her trial testimony and the statements she made during her interview with the defense investigator, and (3) inconsistencies within her trial testimony. Given the ample opportunity Groom had to impeach Fischer, we conclude that evidence of her silence after her husband claimed to have provided some of Groom’s treatment would not have appreciably affected the verdict.

*This case must be remanded for correction of the judgment*

Groom claims that the judgment contains two errors. First, the judgment states that Groom was convicted of all counts of falsifying business records when in fact the jury found him not guilty of one of those charges, Count XCIII (93), and second, the judgment states that all of the counts merged “for sentencing.” The State concedes these errors.

We have reviewed the record and we agree with the parties that the judgment incorrectly reflects that Groom was found guilty of all counts of falsifying business records.<sup>8</sup> We also agree that Alaska law does not recognize merger for sentencing purposes only, and that when a defendant is found guilty of counts that must

---

<sup>8</sup> See *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (holding that an appellate court must “independently review the proceedings below to insure that the error confessed is supported by the record on appeal and has legal foundation”).

merge, the merger results in a single conviction (and thus a single sentence).<sup>9</sup> We accordingly must remand this case to the superior court so that it may correct these errors.<sup>10</sup>

### *Conclusion*

We REMAND this case to the superior court with instructions to correct the errors in the judgment, but in all other respects, we AFFIRM Groom's conviction. A separate opinion addressing his restitution claims will be issued at a later time.

---

<sup>9</sup> *Nicklie v. State*, 402 P.3d 424, 426 (Alaska App. 2017).

<sup>10</sup> Groom also argues that two of the counts for falsifying business records, Counts LIX (59) and LXII (62), charged the same conduct, and that as a result one of the verdicts should be vacated. But because both of these counts merged into Groom's single conviction for scheme to defraud as charged in Count LVI (56), Groom's challenge to the duplicative nature of these counts is moot, and we decline to reach it.