IN THE COURT OF APPEALS OF THE STATE OF ALASKA

COLTEN EVAN ZAUKAR, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12237 Trial Court No. 4BE-12-1011 CR MEMORANDUM OPINION No. 6620 — April 18, 2018

Appeal from the Superior Court, Fourth Judicial District, Bethel, Charles W. Ray Jr., Judge.

Appearances: Kelly R. Taylor, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Tamara E. DeLucia and Terisia K. Chleborad, Assistant Attorneys General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge MANNHEIMER.

Colten Evan Zaukar was convicted of several counts of sexual assault, stemming from his attack on a woman in the village of Sleetmute in 2012. Each separate

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

count was based on evidence that Zaukar engaged in a different form of sexual penetration with the victim.

With respect to the count alleging anal penetration, Zaukar asserts that the evidence presented at his trial was legally insufficient to support the jury's verdict. As Zaukar points out, the victim testified that she felt Zaukar's penis "against her anus", but she did not assert that Zaukar's penis entered her rectum or otherwise penetrated her anus to some lesser degree.

However, the sexual assault response nurse who examined the victim after the attack testified that she took rectal swabs from the victim. Later testing of these swabs revealed the presence of seminal fluid.

Under AS 11.81.900(b)(60)(A), the definition of "sexual penetration" includes "[any] intrusion, however slight, ... into the genital or anal opening of another person's body". Viewing the trial evidence, and the reasonable inferences to be drawn from it, in the light most favorable to upholding the jury's verdict, reasonable fact-finders could conclude that Zaukar penetrated his victim's anal opening to some degree. This evidence was therefore legally sufficient to support Zaukar's conviction. [1]

Zaukar's remaining contention on appeal is that he should not have received separate convictions for his act of penetrating his victim's genitals with his fingers and his act of penetrating his victim's genitals with his penis. Zaukar argues that his case falls within the rule that if an act of digital penetration and an act of penile penetration are part of one continuing assault, with the digital penetration merely preparatory to the penile penetration, then only one merged conviction should be entered. *See Thompson v. State*, 378 P.3d 707, 716 (Alaska App. 2016), and *Oswald v. State*, 715 P.2d 276, 280-81 (Alaska App. 1986).

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[1] *See State v. McDonald*, 872 P.2d 627, 653 (Alaska App. 1994).

The State asserts that the rule of *Thompson* and *Oswald* is ill-conceived — that it rests on an antiquated view of sexual assault, and that it is inconsistent with the intent of the legislature. The State therefore urges us to overrule these cases. We have considered the State's arguments, but we do not find them so compelling as to justify overruling *Thompson* and *Oswald*.

We therefore direct the superior court to merge Zaukar's convictions on these counts, and to re-sentence Zaukar accordingly.

With this exception, the judgement of the superior court is AFFIRMED.