IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ZEBULON C. WHISLER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11371 Trial Court No. 3PA-09-136 CR MEMORANDUM OPINION No. 6648 — June 27, 2018

Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge.

Appearances: Elizabeth D. Friedman, Assistant Public Advocate, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

A jury convicted Zebulon C. Whisler of twelve counts of sexual assault involving five separate victims. After the trial, Whisler learned that one of the jurors,

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

T.F., was aware during trial of Whisler's juvenile delinquency adjudication for a sexual offense, a fact that was kept from the jury under the terms of a pretrial protective order. Whisler accordingly moved for a new trial.

After holding an evidentiary hearing on the matter, and after hearing testimony from T.F. and from several other jurors, Superior Court Judge Eric Smith found that T.F. had violated the judge's instruction to the jurors prohibiting them from conducting internet research about the case. But Judge Smith ruled that, notwithstanding T.F.'s violation of this order, T.F.'s knowledge of Whisler's juvenile delinquency adjudication was not the sort of external prejudicial information that can serve to impeach a jury's verdict under Alaska Evidence Rule 606(b).

On appeal, the State effectively concedes that if T.F. conducted internet research during the trial and learned of Whisler's prior juvenile record, evidence of T.F.'s misconduct was admissible under Rule 606(b) to impeach the jury's verdict. But the State contends that Judge Smith was clearly erroneous when he found that T.F. violated the prohibition on internet research. The State contends that T.F. innocently learned of Whisler's record *before* the trial began, and that she did not engage in internet research during the trial. Thus, the State argues, the jury's verdict should stand.

We conclude that the judge's factual finding was not clearly erroneous, and that because of T.F.'s misconduct, Whisler's conviction must be reversed.

Judge Smith's finding that T.F. conducted internet research during the trial

Prior to trial, the judge issued a protective order that precluded introduction of evidence pertaining to Whisler's juvenile delinquency adjudication in Oregon for a sexual offense. And at the beginning of the trial, the judge ordered the jurors not to conduct any outside research on Whisler or the facts of the case.

Immediately after the jury found Whisler guilty, the prosecutor and the defense counsel spoke informally with the jurors. One of the jurors asked the prosecutor whether Whisler had "done anything" in Oregon before moving to Alaska. Realizing that this juror might have received information about Whisler's juvenile delinquency adjudication in Oregon, the prosecutor informed the defense counsel of the juror's inquiry. A defense investigator then interviewed some of the jurors and, due to the results of this investigation, Whisler moved for a new trial based on juror misconduct.

Judge Smith conducted an evidentiary hearing to determine whether any juror misconduct had occurred. Two jurors testified about T.F.'s comments. One juror testified that, after the jury had returned its verdict, she began feeling bad about how the case was resolved. But she was reassured by another juror — whom she believed to be T.F. — that she need not worry about the verdict because Whisler had previously been convicted of a sexual crime and had served time. A second juror testified that T.F. told her, post-verdict, that Whisler had gone to a treatment center for sexual offenders as a juvenile.

T.F. testified and denied that she had any knowledge of Whisler's delinquency adjudication as a sexual offender before or during Whisler's trial. T.F. conceded that she had conducted internet research into Whisler's past history, but she claimed that she had not conducted this research until *after* she was contacted by the defense investigator following the trial. T.F. also denied that any of the jurors had discussed Whisler's juvenile record.

Following the evidentiary hearing, Judge Smith made written findings of fact and denied Whisler's motion for a new trial. The judge rejected T.F.'s claim that she did not know about Whisler's juvenile adjudication for sexual abuse until after the trial. The judge concluded that T.F. learned of Whisler's juvenile record by conducting internet research during the trial.

We must affirm Judge Smith's findings of fact unless they are clearly erroneous — *i.e.*, unless, upon review, we are left with a definite and firm conviction that Judge Smith's findings are wrong.[1] The judge's conclusion — that the most likely explanation for T.F.'s knowledge of Whisler's juvenile history is that she conducted internet research during the trial — is supported by substantial evidence in the record. We conclude that the judge's factual findings were not clearly erroneous.

Why we reverse the judge's ruling that T.F.'s internet research into Whisler's criminal history could not be used to impeach the verdicts

Judge Smith found that T.F.'s internet research during trial was in direct contravention of the judge's explicit order and was "utterly inappropriate." But the judge denied Whisler's motion for a new trial, finding that all evidence of T.F.'s misconduct was barred by Alaska Evidence Rule 606(b).

When a party challenges the validity of a verdict, Rule 606(b) prohibits the party from introducing evidence as to any "matter or statement occurring during the course of the jury's deliberations," or as to "the effect of any matter or statement upon that or any other juror's mind." But Rule 606(b) allows inquiry into any "extraneous prejudicial information" that was improperly brought to the jurors' attention.

Here, Judge Smith found that T.F.'s knowledge of Whisler's prior sexual offense adjudication did not amount to extraneous prejudicial information within the meaning of Rule 606(b), because it did not consist of details of the current crime for which Whisler was being tried. But when a juror engages in outside research and learns prejudicial information about the defendant, this can justify reversal of a case even if the

[1] *See, e.g.*, *Booth v. State*, 251 P.3d 369, 373 (Alaska App. 2011).

externally obtained information does not directly pertain to the defendant's commission of the crime being litigated.

For example, in *Swain v. State*, this Court remanded a case to the superior court for an evidentiary hearing to determine whether a juror had learned during trial that one of the defendants on trial for robbery had committed another similar robbery.[2] We declared that if the juror had in fact learned of this other robbery, a new trial would be required.[3] Thus, we held that a juror's learning of adverse information *about the defendant* (as opposed to information about the specific crime for which the defendant was on trial) could constitute extraneous prejudicial information for purposes of Rule 606(b).[4]

When Judge Smith ruled that evidence of T.F.'s misconduct was not admissible under Evidence Rule 606(b), he relied on the Alaska Supreme Court's decision in *Titus v. State*.[5] But as the State concedes, the judge's reliance on *Titus* was flawed. In *Titus*, the supreme court addressed the problem of jurors who have pre-existing knowledge of a defendant's reputation and past conduct unrelated to the charges then being tried.[6] The supreme court held that a juror's knowledge of such background facts did not suffice to impeach a jury's verdict (assuming that the juror truthfully answered any voir dire questions about their pre-existing knowledge), and that only a

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[2] *Swain v. State*, 817 P.2d 927, 928-29, 935 (Alaska App. 1991).

[3] *Id.* at 935.

[4] *See id.* at 928-29, 934-35.

[5] *Titus v. State*, 963 P.2d 258 (Alaska 1998).

[6] *See id.* at 260, 263.

juror's pre-existing knowledge of the facts directly relevant to the crime charged could serve to impeach a jury's verdict.[7]

But the supreme court's decision in *Titus* did not address the issue of juror misconduct, nor did it purport to overrule *Swain*. And cases decided after *Titus* have continued to acknowledge *Swain* as the controlling authority on the issue of juror misconduct.[8]

Here, T.F. violated a direct court order to refrain from internet research about the case. Judge Smith found that T.F. violated this order. Viewed objectively, the information about Whisler's criminal history that T.F. obtained through her misconduct created "a substantial likelihood that [her] vote" — or the vote of other jurors — "was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record."[9] Thus, the jury's verdicts cannot stand.

Conclusion

We REVERSE the judgment of the superior court.

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[7] *See id.* at 263, 265.

[8] *See, e.g.*, *Liddicoat v. State*, 268 P.3d 355, 357 (Alaska App. 2011); *Manrique v. State*, 177 P.3d 1188, 1191 (Alaska App. 2008).

[9] *Ciervo v. State*, 756 P.2d 907, 910 (Alaska App. 1988) (internal quotations omitted), *overruled on other grounds by Swain v. State*, 817 P.2d 927, 931-34 (Alaska App. 1991); *see also Dickson v. Sullivan*, 849 F.2d 403, 404-05, 407-08 (9th Cir. 1988) (finding prejudice in the remark of a deputy sheriff escorting the jury panel that the defendant had "done something like this before"); *United States v. Delaney*, 732 F.2d 639, 643 (8th Cir. 1984) ("If a single juror is improperly influenced, the verdict is as unfair as if all were.") (quoting *Stone v. United States*, 113 F.2d 70, 77 (6th Cir. 1940)).