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

RYAN ANTOGHAME, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13541 Trial Court No. 2NO-18-00728 CR MEMORANDUM OPINION No. 7036 — January 4, 2023

Appeal from the Superior Court, Second Judicial District, Nome, Romano D. DiBenedetto, Judge.

Appearances: George W.P. Madeira Jr., Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge TERRELL.

Ryan Antoghame was convicted, following a jury trial, of third-degree assault and coercion for causing injury to his girlfriend and preventing her from leaving

a public place.[1] He was sentenced to a composite term of incarceration of 8 years with 3 years suspended (5 years to serve), followed by 5 years' probation.

On appeal, Antoghame argues that the superior court erred when it failed to determine what a juror said during trial in order to assess whether that juror's statements had a prejudicial effect on the other jurors who heard them. We agree that the superior court did not conduct the necessary inquiry into the juror's statements, and we therefore remand this case for the court to make further findings and re-evaluate Antoghame's motion for a mistrial in light of these findings.

Antoghame also challenges the sentence imposed by the superior court. Because we are remanding this case to the superior court for further proceedings, we do not reach Antoghame's sentencing claims at this time, but we direct the court to correct an error in the judgment.

Procedural background

Ryan Antoghame was charged with recidivist assault and coercion following a physical altercation with his girlfriend behind the Nome Visitor Center in which he hit her in the face and tried to stop her from leaving by grabbing her arm and pushing her. The case proceeded to trial.

On the second day of witness testimony, the court informed the parties that a juror, R.M., had reported to one of the court clerks that another juror, T.E., had been talking about the case during the proceedings. The court summoned R.M. and questioned him about the incident he reported.

R.M. told the court that he and another juror heard T.E. "verbally responding and commenting on witnesses' responses and the lawyers' questions" during

[1] AS 11.41.220(a)(5) and AS 11.41.530(a)(1), respectively.

the proceedings. When asked if T.E. was talking to another juror, R.M. explained, "It was to himself." The court also asked if T.E. was mumbling under his breath, to which R.M. responded, "Some of the times I could understand what he was saying."

R.M. then began telling the court, "[O]ne thing that he said that really kind of bothered me . . . ." But at this point the court interrupted him, saying, "I don't know that I want to get into the substance of what he said right now." The court then sent R.M. to wait in the jury room.

As the parties were discussing how to proceed, Antoghame's attorney asked the court to bring back R.M. and determine what T.E. actually said. His attorney explained that knowing this was "important to deciding what we do next. . . . [I]f he's saying something innocuous like, this is just like I've seen on TV, maybe that's not an issue. But if he is commenting on what he believes to be the veracity of either counsel or witnesses, then I think that becomes much more serious." His attorney proposed "that the very fact that [R.M.] thought it important enough to tell the clerk is probably reason enough that what he's saying is having some impact."

The superior court decided to bring in each juror, ask them if they had heard any of T.E.'s comments, and if they had, ask them whether they could put those comments aside and fulfill their duties as jurors. The court also decided it would excuse T.E. from the trial proceedings after questioning the jurors.

But the court explained that it would not ask the jurors about *what* T.E. said because it did not want to "impeach[] a jury, a verdict, or a juror" and it had not heard enough "to get into the role of [T.E.'s] comments that may or may not have been heard." The court explained that it might reach a different conclusion if T.E. had been "pontificating about how this witness was a liar or this lawyer's not believable." But, based on R.M.'s statements, the court concluded that "this was, at best, someone mumbling to themselves . . . . It's a *de minimis* violation [of the juror's duty]."

The court then called in each juror individually and conducted the inquiry described above. Six jurors told the court that they did not hear T.E. speaking at all; two jurors reported they could hear him speaking, but they could not understand the words he was saying; two jurors heard T.E. speaking, but it was unclear from their testimony whether or not they understood what he was saying;[2] and three jurors, including R.M., heard T.E. speaking and understood what he was saying.

Each time a juror seemed about to speak about the content of what they heard T.E. say, the court cut them off. When a juror indicated that they had heard T.E. speaking, instead of asking the juror what they heard, the court asked the juror whether what they heard would affect their ability to serve on the jury. All of the jurors who were asked stated that they did not believe T.E.'s comments would affect their duties as jurors.

After the jurors were questioned, Antoghame moved for a mistrial based on T.E.'s comments. He argued that, because the content of T.E.'s statements was unknown, the court must assume they were prejudicial. The superior court denied the motion, excused T.E. from the jury, and resumed the trial.

The jury ultimately found Antoghame guilty of both charges. This appeal followed.

Why we conclude that a remand is required for the court to ascertain what the jurors heard T.E. say during the proceedings

On appeal, Antoghame argues that the superior court erred when it prevented the jurors who heard T.E.'s statements during the trial from explaining to the court what they heard T.E. say. Antoghame asserts that, without knowledge of the

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[2] When asked if she heard any comments, one juror testified that she heard T.E. say "a single word." The court asked another juror, "Without telling me the content of what you heard, were you able to make out what he said . . . ?" The juror responded, "Here and there."

content of T.E.'s statements, the court was unable to properly analyze whether the misconduct deprived Antoghame of a fair trial. Antoghame asks this Court to remand his case so that the superior court may conduct this necessary inquiry.

The State argues that T.E. did not commit a "serious violation" of his duties as a juror. Accordingly, the State claims that there was no juror misconduct to prejudice any other jurors and a remand for further findings is not required.

Prior to addressing these claims, we must briefly discuss the applicable law. "The term 'jury misconduct' often is used to describe both action by jurors that is contrary to their responsibilities and conduct by others which contaminates the jury process with extraneous influence."[3]

We have previously explained in *Swain v. State* that there are two related lines of cases in Alaska on this subject: one that deals with instances of juror misconduct that threatens the integrity of the verdict, and another that deals with situations in which jurors are exposed to potentially prejudicial matter outside the trial record (potentially through no fault of their own).[4] These two lines of cases set out slightly different standards for trial courts to apply when evaluating the need for a new trial in the wake of some kind of "jury misconduct."

Whether juror misconduct necessitates a new trial depends on a two-part test: First, the evidence must establish a serious violation of the juror's duty — *i.e.*,

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[3] 6 W. LaFave, J. Israel, N. King, & O. Kerr, *Criminal Procedure*, § 24.9(f), at 688-89 (4th ed. 2015) ("In the end, whether motivated by good faith or bad, any action by an outsider or by a juror himself that has the potential for interfering with juror decision-making in accordance with the juror's responsibilities constitutes misconduct.").

[4] *Swain v. State*, 817 P.2d 927, 930 (Alaska App. 1991).

fraud, bribery, forcible coercion, or any obstruction of justice.[5] Second, the violation must deprive a party of a fair trial — which may be shown by three factors: (1) whether the juror would have been challenged for cause had the juror disclosed the relevant information; (2) whether the misconduct went to a collateral or material issue; and (3) whether the probable effect of the misconduct was prejudicial.[6]

In comparison, when evidence demonstrates that a juror has been exposed to material outside the trial record, a new trial will be granted when "the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself."[7]

The two standards, however, are more alike than they are different. As we explained in *Swain*, both standards share a common objective: to assure a fair trial by protecting the integrity of jury verdicts.[8] And both standards are guided by the same fundamental principle: "In order for a defendant to receive a fair trial, the jurors must all be impartial."[9] "Thus, while the two standards differ in form, they are essentially similar in substance" and "clear distinctions have not always been drawn between claims of juror misconduct and claims of exposure to potentially prejudicial extrajudicial

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[5] *West v. State*, 409 P.2d 847, 852 (Alaska 1966); *Fickes v. Petrolane-Alaska Gas Serv., Inc.*, 628 P.2d 908, 910 (Alaska 1981).

[6] *Fickes*, 628 P.2d at 911.

[7] *Ciervo v. State*, 756 P.2d 907, 910 (Alaska App. 1988) (quoting 2 *ABA Standards for Criminal Justice*, § 8-3.7 (Approved Draft 1978 & Supp. 1982)), *abrogated in part by Swain*, 817 P.2d 927.

[8] *Swain*, 817 P.2d at 931.

[9] *Id.* (quoting *Ciervo*, 756 P.2d at 910); *see also* U.S. Const. amend. VI; Alaska Const. art. I, § 11.

materials."[10] Importantly for this appeal, both standards — the one governing juror misconduct and the other governing juror exposure to extraneous prejudicial matter — require an *objective* assessment of the possible prejudicial impact of the conduct or material in question.[11]

Here, both parties analyze Antoghame's claim under the rubric developed for acts of juror misconduct, not exposure to extraneous information. This makes sense, given that the underlying issue arose from potential misconduct by a juror (T.E.).

But the superior court excused T.E. from serving as a juror prior to deliberations. Under these circumstances, it is essentially irrelevant whether T.E. actually committed a "serious violation" of his duties as a juror. Rather, the critical inquiry is whether whatever T.E. said during the presentation of evidence likely had a prejudicial effect on the jurors who heard it and remained to deliberate. In this situation, the test we have developed for determining whether a juror's exposure to extraneous material requires a new trial — a test which does not require proof that any juror committed actual misconduct — is a more useful analytic tool for resolving the issue raised in this case.

Applying that test to this case, the superior court was required to determine whether there was "a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case

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[10] *Swain*, 817 P.2d at 931 & n.1.

[11] *See Fickes*, 628 P.2d at 911 (noting that the probable prejudicial effect of misconduct must be "viewed objectively"); *Swain*, 817 P.2d at 932 (clarifying that "for purposes of determining the likelihood that a juror's vote has been influenced, a reviewing court must apply an objective test").

itself."[12] And in determining the likelihood that a juror's vote has been influenced, the court must apply an objective test.[13]

But in assessing the possible prejudicial impact of T.E.'s statements, the superior court explicitly prohibited jurors from discussing what they heard T.E. saying to himself during the trial proceedings. It is unclear why the superior court refused to allow jurors to testify regarding the content of T.E.'s statements, but it appears that the court may have been concerned about Alaska Evidence Rule 606(b).

Rule 606(b) provides, in part:

> Upon an inquiry into the validity of a verdict . . . , a juror may not be questioned as to any matter or statement occurring during the course of the jury's deliberations or to the effect of any matter or statement upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith . . . .

We assume the court was referring to this rule when it stated that it did not want to "impeach[] a jury, a verdict, or a juror." But Rule 606(b) only applies to the questioning of a juror *after* the jury has returned a verdict.[14] We have explained that "[t]he rule prohibits the use of juror testimony and juror affidavits in 'an inquiry into the validity of a verdict', but it does not restrict the use of this evidence when the court investigates potential juror misconduct before the jury renders its decision."[15] Because

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[12] *Ciervo*, 756 P.2d at 910 (quoting 2 *ABA Standards for Criminal Justice*, § 8-3.7 (Approved Draft 1978 & Supp. 1982)).

[13] *Swain*, 817 P.2d at 932.

[14] *See Larson v. State*, 79 P.3d 650, 653 (Alaska App. 2003) ("Evidence Rule 606(b) does not apply when the issue of potential jury misconduct is litigated before the jury returns its verdict.").

[15] *Id.*

the conduct in this case occurred prior to the close of evidence, the court was permitted to rely on juror testimony regarding statements made by another juror. The court was also not restricted in asking the jurors about whether they subjectively believed that T.E.'s commentary would affect their ability to serve on the jury — and indeed, the superior court did ask each juror who heard T.E.'s comments this question.

The issue here is that, by limiting the juror's testimony to *only* their subjective reaction to T.E.'s statements, the court was unable to assess the prejudicial nature of the comments under the required objective test. Even when a court is permitted to inquire into whether or not a juror subjectively believes they were prejudiced by a certain comment, as is the case when the questioning occurs *prior* to the verdict, the court must still objectively examine the possible prejudicial impact of the conduct or the extraneous information. As Professor LaFave notes, "a juror may intentionally or unintentionally fail to recognize the prejudicial impact of an event and profess that [they were] not affected. Thus, in many instances, the critical question may be whether, under the particular circumstances, a reasonable person would have been influenced."[16]

As Antoghame argues on appeal, because the court prevented the jurors from explaining what they heard T.E. say during the trial proceedings, the court was unable to fully evaluate whether what the jurors heard was prejudicial. The court itself acknowledged that if T.E. had been, for example, "pontificating about how this witness was a liar or this lawyer's not believable," his comments might have had an impact on the other jurors who heard him speaking. But the record on this issue remains unclear because none of the jurors who heard T.E.'s commentary were allowed to discuss the content of T.E.'s statements. And the court, in asking only whether each juror subjectively believed they had been prejudiced by the comments they heard, did not

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[16] 6 W. LaFave *et al.*, *Criminal Procedure*, § 24.9(f), at 695-96 (4th ed. 2015).

assess the objective likelihood that exposure to this extraneous information would have influenced their vote. We conclude that this was error, and that a remand for an evidentiary hearing on this subject, as requested by Antoghame, is required.[17]

We wish to note a few things for the superior court to consider on remand. First, the court must only recall the jurors who stated that they were able to hear T.E. speaking during Antoghame's trial and could understand what he was saying.[18] The court should inquire as to what each juror heard T.E. say.

The court will then have the opportunity to evaluate if, viewed objectively, there was a substantial likelihood that exposure to this extraneous material influenced their vote. (To the extent that the jurors heard T.E. say different things, the court should evaluate whether what each juror believed they heard was objectively prejudicial.) If the court concludes that a reasonable juror would have been prejudiced by any of T.E.'s statements, the court must grant Antoghame a new trial.

We acknowledge that, given the passage of time since the trial occurred in this case, the jurors might struggle to remember what they heard T.E. say or they may no longer be available to provide testimony. In the event this occurs, we leave it to the parties to litigate, and for the superior court to resolve in the first instance whether a juror's lack of memory or unavailability entitles Antoghame to a new trial.

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[17] *See, e.g.*, *Swain*, 817 P.2d at 935 (remanding for trial court to make further findings regarding the content of extraneous information provided to juror, where court only assessed subjective prejudicial impact of the information).

[18] From this Court's review of the record, the jurors to be recalled should include R.M., J.M., G.S., and C.A. We note that another juror, D.K., reported hearing T.E. speak a single word. But D.K. was dismissed prior to deliberations as an alternate juror, so even if the word she heard was objectively prejudicial, it would be harmless in this case as she did not ultimately deliberate on Antoghame's charges.

Finally, we direct the court on remand to correct an error in the judgment that could adversely affect the Department of Corrections' calculation of Antoghame's sentence. The court sentenced Antoghame to a flat 4-year sentence for the recidivist assault conviction, and 5 years with 3 years suspended (*i.e.*, 2 years to serve) on the coercion conviction, with 1 year of the coercion sentence to run consecutively to the assault sentence, for a composite sentence of 5 years' incarceration. But on the first page of the judgment, the court indicated that Antoghame's "Total unsuspended time of incarceration" is 6 years. That figure would be correct if the purpose of this line on the form was simply to determine in the abstract the total amount of active time the defendant is required to serve on all of the counts, without taking into account whether the jail time is fully consecutive, concurrent, or partially consecutive. But the purpose of this line is to describe the defendant's composite active term of incarceration — which the Department of Corrections uses when calculating the defendant's good-time credit, maximum release date, and parole eligibility date, among other things. Accordingly, we direct the superior court on remand to correct this line of the judgment to reflect Antoghame's total composite unsuspended sentence of 5 years.

Conclusion

For the reasons provided, we REMAND this case for further proceedings consistent with this opinion. We do not retain jurisdiction. If the superior court concludes that Antoghame is not entitled to a new trial, Antoghame can appeal this decision, at which point we will also resume consideration of his sentencing claims.