Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-362

JULY TERM, 2020

State of Vermont v. Titus Peters*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 358-4-17 Bncr
		Trial Judge: William D. Cohen

In the above-entitled cause, the Clerk will enter:

Defendant appeals his convictions of aggravated sexual assault, lewd and lascivious conduct, lewd or lascivious conduct with a child, and voyeurism following a jury trial. We affirm defendant's convictions but remand the matter for resentencing on the lewd-and-lascivious-conduct counts.

In April 2017, defendant was charged with aggravated sexual assault with a child, unlawful restraint, lewd or lascivious conduct with a child, and lewd and lascivious conduct. The charges were based on allegations that defendant touched the vaginal areas of, exposed his penis to, and masturbated in front of his stepdaughters, who were then seventeen, twelve, and ten years old. The State later added another count of lewd and lascivious conduct and three counts of voyeurism based on a video and pictures defendant took of stepdaughters. Prior to trial, the State dismissed one of the lewd-and-lascivious-conduct counts.

On the morning of the first day of trial, the court asked the jury if any members had read an article about the case that appeared in the Bennington Banner the previous day. One juror raised his hand. The court questioned the juror outside the presence of the other jurors. The juror stated that he "just glanced over [the article] . . . I didn't read the—per se, but I just kind of scanned through it." He stated that he did not realize the article was about the case for which he had been selected as a juror. When asked what he remembered about the article, he stated "[t]hat it was on a sexual assault matter. That was it. . . . Basically, what the headline said." He stated that he did not think the article would affect his ability to give defendant a fair and impartial trial and that he understood that defendant was innocent until proven guilty. The court asked if the juror would be able to keep any information he later remembered about the article to himself. The juror responded, "[T]o be honest, I don't even remember details of the article, just the basic headline. I mean, I can't bring up something I can't remember."

Defense counsel asked that the juror be excused, arguing that if he did read the article, it contained incriminating information that would be difficult to disregard. The court denied the motion. It instructed the jury that "[i]f some information concerning this case in any way inadvertently comes to your attention, please tell no other juror what you've learned and

immediately tell the court officer when you arrive back at court." After each break during the two-day trial, the court asked the jury if they had learned anything about the case during the break. No one responded affirmatively.

The jury convicted defendant on all six counts. Defendant stipulated to having three prior felonies for purposes of the habitual offender enhancement on the lewd-or-lascivious-conduct-with-a-child charge. The sentencing hearing took place in October 2019. The court imposed three concurrent sentences of thirty years to life for the convictions of aggravated sexual assault, lewd or lascivious conduct with a child, and lewd and lascivious conduct, and concurrent sentences of one-to-two years for the voyeurism charges. The court stated that it was not using the habitual offender enhancement on any of the convictions. Defendant appealed.

Defendant first argues that his convictions must be reversed because the juror who read the newspaper article was exposed to extraneous information that had the capacity to affect the jury's verdict. "A defendant is entitled to a fair trial free of the suspicious taint of extraneous influences." State v. Wool, 162 Vt. 342, 353 (1994). A defendant alleging that the jury was tainted must show that an irregularity occurred and that it had the capacity to affect the verdict. State v. Schwanda, 146 Vt. 230, 232 (1985). The burden then shifts to the State to show "that the irregularity did not in fact prejudice the jurors against defendant." State v. Abdi, 2012 VT 4, ¶ 13, 191 Vt. 162 (quotation omitted). "Determining whether a verdict was affected by extraneous influences is a fact-driven exercise that turns on the particular facts and circumstances of each case." State v. Gorbea, 169 Vt. 57, 60 (1999) (quotation omitted). Because the trial court is in the best position to assess whether the jury has been affected by extraneous influences, we "accord the trial court's ruling every reasonable presumption in its favor" and will affirm unless the trial court abused or withheld its discretion. Id.

Even assuming the information in the article had the capacity to affect the jury's decision, the record supports the State's claim that no prejudice in fact occurred. The article is not part of the record, but—despite its reference to defendant's prior criminal convictions—it appears to have been a straightforward news account rather than, say, an inflammatory opinion article attacking defendant. Cf. Bellows Falls Vill. Corp. v. State Highway Bd., 123 Vt. 408, 408 (1963) (affirming trial court's decision ordering new trial where majority of jurors read editorial that railed against defendant and urged jury to judge case "as a matter of morality"). The court instructed the jury to notify the court immediately if they learned any information about the case, and asked the jury if anyone had learned anything new after each break during the trial.[*] No one responded positively, and there is no evidence to suggest that the one juror who read the article discussed it with anyone else during the trial.

We have held that "[e]xposure of jurors to news accounts, without more, is insufficient reason to cause a new trial. Bias or prejudice must be shown, and the court has discretion in evaluating the impact upon the jury." State v. Searles, 159 Vt. 525, 530 (1993). Defendant has failed to make such a showing here. The juror stated he did not recall the substance of the article and said that he only "glanced over" it. Nothing in the record indicates that the juror had a "fixed bias" or "harbored prejudicial preconceived notions" about defendant or the case. State v. Wheel, 155 Vt. 587, 599-602 (1990). To the contrary, the juror stated that he did not remember the article,

[*] Defendant argues that the court should have given more specific instructions to the juror who read the article and should have subjected him to an additional voir dire after trial. Defendant did not raise these objections below and does not claim that the court committed plain error. We therefore do not address these arguments. See State v. Brown, 2010 VT 103, ¶ 16, 189 Vt. 88 (declining to address unpreserved argument where plain error not argued on appeal).

that it would not affect his ability to impartially judge the case, and that he understood defendant was innocent until proven guilty. Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion to strike the juror. We therefore decline to disturb the verdict. See State v. Hudson, 163 Vt. 316, 325 (1995) (declining to grant new trial based on jurors' exposure to news accounts where no evidence that prejudice resulted); see also State v. Washington, 166 Vt. 600, 601 (1997) (mem.) (holding that even if comment made by juror's husband to her about defendant had capacity to affect verdict, record rebutted presumptive prejudice).

Defendant next argues that the matter must be remanded for resentencing because the sentences imposed by the court for his convictions for lewd and lascivious conduct and lewd or lascivious conduct with a child exceeded the sentences allowed by statute. The maximum penalties for these offenses are five years and two-to-fifteen years, respectively, unless the court applies a habitual-offender enhancement. 13 V.S.A. §§ 11, 2601-2602. Here, despite expressly declining to apply a habitual-offender enhancement, the court sentenced defendant to thirty years to life on both counts.

The State concedes that these sentences were erroneous and that defendant should be resentenced on these two counts, but not on his other convictions. We agree. The trial court's explanation of its sentencing decision does not suggest that the sentences for aggravated assault and voyeurism were influenced by the lewd-and-lascivious-conduct or lewd-or-lascivous-conduct with a child convictions or the sentences for those convictions. Defendant does not argue that these sentences were interdependent with the challenged sentences. Accordingly, we will remand solely for resentencing on the convictions under 13 V.S.A. §§ 2601 and 2602. Cf. State v. Simpson, 160 Vt. 220, 226 (1993) (explaining that when fewer than all convictions are affirmed on appeal, reviewing court ordinarily will not remand for resentencing on affirmed convictions if separate sentences were imposed and it does not appear reversed convictions or sentences for same influenced sentencing regarding affirmed convictions).

Defendant's convictions are affirmed. The sentences for counts III and V are vacated, and the matter is remanded for resentencing on those counts only.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice