

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. 2019-411

AUGUST TERM, 2020

State of Vermont v. Dustin Deberville*	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 1616-12-18 Wncr
		Trial Judge: Mary L. Morrissey

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

Defendant appeals his convictions for aggravated domestic assault following a jury trial. On appeal, he argues that the court erred in denying his motion for a new trial based on his allegation that a juror had extraneous information about him which had the capacity to affect the jury's verdict. We affirm.

Defendant was charged with two counts of aggravated domestic assault for allegedly threatening the complainant with a knife and for injuring her. In April 2019, a jury was selected. After jury selection and prior to trial, one juror sent an email to the court indicating that since the jury draw she had realized that one of the witnesses, defendant's mother, had been her hairdresser. She explained that she had not seen or had contact with the witness in about nine years. On the morning of trial, the juror was brought into the courtroom and questioned regarding the email. Defendant was present while the juror was questioned. The juror stated that the witness used to do her hair and she had last seen the witness nine years previously. She stated that she could be fair and impartial to both defendant and the State. Defense counsel questioned whether the juror had conversations about the witness's son and the juror stated that they may have but she did not remember them because it was long ago. Both defendant and the State indicated that they had no objection to the juror remaining on the jury. Following the trial, the jury returned verdicts of guilty on both counts of aggravated domestic assault.

In May 2019, defendant filed a motion for a new trial, asserting that upon further reflection defendant recalled that the juror had sent him a letter and a photograph when he was previously incarcerated in 2010-2011. The court scheduled an evidentiary hearing to investigate the allegations.

In September 2019, at the hearing, the juror testified that she had conversations with defendant's mother and that she had a vague recollection about the content of the conversations. She testified that she may have discussed defendant with his mother, but she did not recall ever learning that defendant was incarcerated. When the juror was asked whether she had ever written

defendant a letter, she remembered someone had written her from jail ten years earlier and did not remember that the person was defendant. The juror had no recollection of sending defendant her photograph and did not recollect speaking to defendant on the telephone. The court found that at the post-trial hearing the juror appeared sincerely surprised to learn that it may have been defendant who sent her a letter.

Defendant testified that he met the juror when his mother cut her hair and that the juror sent him two letters, one with a photograph, when he was incarcerated around 2009-2010. Defendant responded to the letters but did not hear back. He also testified that he called the juror in 2012 or 2013, and they spoke for a few seconds on the telephone. Defendant stated that he did not recognize the juror's name or appearance until two to four weeks after trial when his mother told defendant that she thought the juror was "her."

The trial court found that based on the evidence it could not conclude that contact between defendant and the juror occurred. Even if it did, the court concluded that the contact was of such little significance that neither defendant nor the juror recalled it until after the trial—the juror at the hearing and defendant in conversation with his mother. Therefore, the court held that the contact did not have the capacity to affect the jury's verdict and denied the motion for a new trial. Defendant filed this appeal.

On appeal, defendant argues that the court erred in denying the motion for a new trial because the juror's knowledge of defendant had the capacity to affect the jury's verdict.¹

"A defendant is entitled to a fair trial free of extraneous influences." *State v. Gorbea*, 169 Vt. 57, 60 (1999). Determining whether a verdict was impacted by extraneous influences is fact driven and therefore on appeal this Court will uphold the trial court's decision "[a]bsent a showing of abuse or withholding of discretion." *Id.* To demonstrate that there has been extraneous influence requiring a new trial, a defendant must show "that an irregularity occurred, and that the irregularity had the capacity to affect the jury's verdict." *Id.* "If the defendant so demonstrates, the State then bears the burden to show that the irregularity did not in fact prejudice the jurors against defendant." *State v. Squiers*, 2006 VT 26, ¶ 21, 179 Vt. 388 (quotation omitted).

We conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial in this case. The court provided a detailed and reasonable explanation for its decision. The court found that the only irregularity that occurred in this case was some possible limited historical contact between the juror and defendant.² The court was unable to definitively find, based on the evidence presented, that there was ever contact between the juror and defendant. The court noted that neither one recognized the other either by name or appearance during the jury

¹ On appeal, the State argues that defendant waived his right to challenge the participation of this juror in the trial because the juror's connection to defendant's mother was revealed prior to trial and defendant affirmatively stated he had no objection to the juror participating in the trial. Because we affirm on other grounds, we do not reach the waiver issue.

² Defendant does not argue on appeal that the juror's prior relationship with his mother, a witness, was an irregularity that tainted the jury, but bases his appeal solely on the asserted prior contact between the juror and him. Accordingly, we address solely the latter claim.

selection and trial, and neither had a memory of any communication. The court found that it was significant that prior to trial the juror had taken the initiative to notify the court regarding her history with defendant's mother and determined it was unlikely that the juror would provide this information and fail to also disclose that she had contact with defendant or knew he had previously been incarcerated. The court concluded that even assuming some limited contact between defendant and the juror in the past, this fact had no capacity to affect the jury's verdict because during the juror's participation in the trial the juror did not remember having contact with defendant or knowing about his prior incarceration. The court's finding on this point is supported by the evidence, and its conclusion is within its discretion.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

William D. Cohen, Associate Justice