VERMONT SUPREME COURT
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Case No. 23-AP-297

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

JUNE TERM, 2024

State of Vermont v. Ntando McIntosh* } APPEALED FROM:
} Superior Court, Windsor Unit,
} Criminal Division
} CASE NO. 22-CR-11065
Trial Judge: Katherine A. Hayes

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

Defendant challenges his conviction by jury of one count of reckless endangerment. During a recess in his trial, defendant—a Black man—walked through the court parking lot and noticed that one of the jurors had a Confederate flag on his truck. Defense counsel searched social media and discovered what appeared to be a photograph of the juror with a second Confederate flag. The parties subsequently agreed to strike him from the panel. On appeal, defendant argues the trial court abridged his constitutional right to trial by an impartial jury by failing to adequately investigate whether this juror exposed the other members of the panel to an extraneous influence in the form of racial bias. We conclude that defendant failed to preserve this claim for appeal and affirm.

The State charged defendant in the alternative with operating a vehicle on a public highway in a grossly negligent manner, in violation of 23 V.S.A. § 1091(b), and recklessly engaging in conduct which placed or may have placed another in danger of death or serious bodily injury, in violation of 13 V.S.A. § 1025. Both counts were based on allegations that, on September 25, 2022, defendant initiated a high-speed vehicle chase after complainants K.P. and M.P. drove away from his property with his two dogs, and that defendant struck complainants' car with his truck in the process.

Defendant's one-day trial was held in July 2023. The State first called K.P., whose testimony included the following. On the morning of September 25, K.P. and his father, M.P., found two dogs in their yard. They took the dogs to a veterinarian to see if they were microchipped and learned that the dogs belong to defendant and he lived just up the road from their house. Complainants drove to defendant's address with his dogs in the back of their car, planning to return them. There, they parked and got out of the vehicle, leaving the dogs inside. Defendant arrived in his truck soon after.

K.P. opened the hatchback, told defendant that he had his dogs, and stated that defendant should learn to take care of them. K.P. described the dogs as being "in rough shape," skinny

with matted fur. Defendant began yelling at K.P., and the two men argued. K.P. said he did not need to do this, and would just call animal control. Defendant replied, "F you. I'll go get my shotgun," and ran into his house. He returned with his hands behind his back, as though he was tucking something into his waistband. Complainants shut the hatchback, got in their car with defendant's dogs, and drove away quickly. Defendant ran after them on foot, hitting their car with his hands.

K.P., who was driving, saw defendant's truck speeding after them once they left his driveway. K.P. was under the impression that defendant had a gun. He did not want defendant to follow them to their home, so he turned in the opposite direction and drove toward the town of Hartford, intending to go to the police station. He told M.P. to call 911. Defendant followed, and both vehicles drove at ninety miles an hour as defendant attempted to draw up next to complainants in the other lane. The gates of defendant's truck were flapping, hitting the side of complaints' car. On several occasions, K.P. tried to create distance between their vehicles by braking abruptly, prompting defendant to lock his brakes and slide while K.P. accelerated away. As the vehicles approached the aquatic center in Hartford, they were side by side. K.P. again braked abruptly, and when defendant followed suit, his truck sideswiped complainants' car. K.P. turned the car around and then saw that the police had arrived. He had no further interactions with defendant.

M.P.'s subsequent testimony was similar to his son's. He explained that during the drive toward Hartford, he was on the phone with a 911 dispatcher, providing updates about their location. He described defendant's driving during the incident as fast, scary, and dangerous.

Next, the State called an officer from the Hartford Police Department, who provided the following account of the events of September 25. That morning, he received a report of an incident involving a shotgun and two moving vehicles and began driving toward an area where he believed he might intercept them. He saw a truck following a car very closely. Both vehicles were weaving and driving relatively quickly, though he could not estimate their speed. When the truck stopped, the officer also stopped his vehicle and got out. Because he had received information that a shotgun might be involved, he was carrying his duty rifle. A man he later identified as defendant exited the truck. The officer displayed his rifle and repeatedly ordered defendant to get on the ground and show him his hands. Defendant became highly emotional. As he approached and started removing items of clothing, the officer saw that he did not have a gun. When defendant said, "they have my dogs," the officer began to realize that there was more to the situation than he initially understood.

The situation became less charged, and defendant calmed and spoke with the officer and two others who had arrived during their encounter. Defendant put the clothing he had removed back on. To the officer's knowledge, no gun was ever found in defendant's possession. After the State admitted video from the officer's body camera, court recessed for lunch.

Defendant raised the issue concerning the juror when the attorneys returned to the courtroom that afternoon. Defense counsel explained that as they were leaving for lunch, defendant noticed that juror #7 was driving a truck with "a Confederate flag sticker of some sort" or something "like a plastic license plate" hanging from the toolbox in the bed. The attorneys then searched social media and found a 2019 picture appearing to depict the juror with a truck bearing a large Confederate flag.

Defense counsel moved to strike the juror on this basis and noted a concern that the other jurors may "have seen it or have been influenced or there's been any discussion . . . . pointing

out, like, oh, there goes the guy, you know, getting into his truck with a Confederate flag on it." The court asked whether he was requesting to strike juror #7 "without giving him any opportunity to talk about that at all." Defense counsel replied that he was "happy to voir dire him," but immediately noted that the State had stipulated to strike him from the panel.

The court asked about voir dire of the rest of the panel, and the prosecutor replied that it might "be more of a question just to voir dire [juror #7] and see if he's talked to anyone about his beliefs," indicating that the State had no objection to doing so, although she could not "imagine what they would have talked about, especially since they are not allowed to talk about the case." When the court responded that it was "leaning" toward excusing the juror without individual voir dire, defense counsel did not object. Instead, he raised a concern that other jurors leaving the building for lunch may have seen the defense attorneys photographing the juror #7's truck to document the issue for the court. He said, "I don't know of any inferences, like, you know, it's strange for the attorneys on one side to be around a juror's truck and taking a picture of the truck," and explained that he wanted to avoid "any unfair prejudice toward my client because we felt the need to take a picture." The court asked if defendant was proposing to ask the jurors about this, and defense counsel replied, "[j]ust, if anything since lunch had happened that could influence their testimony." The court agreed, and defense counsel requested that the court, "then try to be more specific, about was there—did they witness any incident in the parking lot." The court responded, "I don't know that I want to call their attention to the issue." Defense counsel said, "I don't want to say specifically, of course," but reiterated that he wanted to ensure the jurors did not think the defense attorneys "were doing something that was unethical or that we shouldn't be doing" in documenting their observations of the truck. The court suggested that this was "quite a reach," again noting that it did not want to ask questions that would "call the attention of the jury to any of this if it's not necessary." Defense counsel replied, "Okay. I made my argument."

The court subsequently excused juror #7 without individual voir dire. When the remaining jurors returned, the court asked, "[o]ver the lunch break, did anything come to the attention of any of you or did you see anything or hear anything or learn anything that in any way would affect your ability to be fair and impartial in connection with this matter?" No juror responded affirmatively, and the State's case resumed.

The officer who had been on the stand before lunch returned and related that defendant shook hands with all of the officers and explained to them that he removed his clothing to establish that he did not have any weapons because he did not want to be shot. The State called a second officer who was present during the incident and admitted photographs he took and footage from his body camera. The officer testified that he prepared a crash report estimating that when the truck and the car collided near the aquatic center, both were driving close to the 35 MPH speed limit. Each vehicle sustained "some scuff marks" but was still drivable. The officer also explained that he looked in the cab of defendant's truck and did not see a shotgun or any other weapons there, including under the seat. He described returning defendant's dogs to him: the dogs were happy to see defendant, and defendant was happy they were back; he petted them and loaded them into his truck.

The State rested its case. Defendant moved for a judgment of acquittal, and the court denied the motion. Finally, defendant took the stand and testified to the following.

Defendant's dogs escaped on the morning of September 25 while he was adjusting fencing outside his home. He drove around the neighborhood looking for them without success.

When he returned to his house, two men he later learned were K.P. and M.P. were there outside their car. They opened the hatchback and said, "I guess you don't want your dogs back?" K.P. told defendant he needed to take better care of his dogs. Defendant felt that K.P. was speaking to him like "a child, or hey boy, or something like that," as if "he's an authority on dogs and he knows better than me." Defendant's dogs work outdoors guarding his goats, as such, "their fur is never going to be clean and shiny looking. They're sleeping with goats. They're running through bushes. They're getting brambles all on their fur." One was "a little bit thin" because she recently had puppies. He explained that the dogs are his "buddies," and he is committed to and really cares about them.

K.P. told defendant, "you're not getting your dogs back," defendant responded, "what the F are you talking about," and K.P. shut his hatchback, closing defendant's dogs in complainants' car. Defendant became afraid. It was not clear to him what was happening, and it was on his mind that "[a] few months earlier that year . . . Ahmaud Arbery got killed by two guys in a pickup truck." He told complainants, "okay, I'm going to go get my shotgun," thinking this would give them time to decide to return his dogs and leave. He had "no intention of really coming out with a shotgun" and when he returned, he did not have a weapon. His hand was not behind his back or in his waistband. He was shocked to see complainants driving away and ran after them, trying to hang onto their roof rack and hit the car while asking where they were going.

After complainants left, defendant got into his truck to see where they went. He saw complainant's car at a stop sign, and they "took off." Complainants drove quickly, navigating around other cars. Defendant tried to follow them as best he could in his high-mileage truck because he did not know where they were taking his dogs. During this time, he was not necessarily angry, but instead wondering what was going on. He did not have a weapon. He was thinking about the wellbeing of himself, complainants, his dogs, and the other people on the road. He did not hit complainants' car from behind or pull into it from the side. He did not see the complainants' car braking and then speeding up as K.P. described.

As they approached the aquatic center, complainants were driving around 40 MPH, giving defendant an opportunity to catch up to them. Because the road opened in that area, defendant reasoned that this was the safest place to ask them to stop and that he would not be able to keep up if they turned onto the interstate ahead. He pulled up next to complainants to flag them down and, in the process, stopped looking at the road for "a split second." The two vehicles collided.

Defendant was initially relieved when he subsequently saw a police cruiser. But after he stopped his vehicle and got out, he understood what had happened: "[t]hey're calling the police to say that a Black man is chasing me with a gun." At this point, defendant became angry, realizing that that complainants had placed his life in jeopardy and anything could happen in this situation.

After deliberation, the jury indicated that they could not agree on a verdict as to grossly negligent operation, but found defendant guilty of the alternative charge of reckless endangerment. This appeal followed.

Defendant asks that we vacate his conviction and remand for a new trial. He argues that under the jury-irregularity framework, the trial court abused its discretion in not conducting or permitting appropriate voir dire to determine if juror #7 exposed the other members of the panel

to an extraneous influence of racial bias. In the alternative, he contends that the failure to investigate possible jury taint was plain error.

"A criminal defendant is entitled to a fair trial by an impartial jury, free of the suspicious taint of extraneous influences." State v. Amidon, 2018 VT 99, ¶ 15, 208 Vt. 360 (quotation omitted); U.S. Const. amend. VI; Vt. Const. ch I, art. 10. "[W]hen confronted with a record that discloses even a possible infringement" of this fundamental right, "it is the duty of this Court . . . to set aside a guilty verdict." State v. Woodard, 134 Vt. 154, 158 (1976). Defendant's argument implicates two issues related to jury-taint claims: preservation and the corresponding standard of review, and the applicable analytical framework. We recently addressed both in State v. Kandzior, 2020 VT 37, 212 Vt. 260.

In that case, we held that to preserve a jury-taint claim for appeal, "a defendant must timely move for a mistrial upon learning of possible taint." Id. ¶¶ 19-20. In analyzing a motion for mistrial on this basis, the trial court conducts "a two-part initial inquiry," considering first whether an irregularity occurred and, if so, whether it had the capacity to affect the verdict. State v. Lee, 2008 VT 128, ¶ 23, 185 Vt. 110. An irregularity is anything creating the suspicion of external influence tending to disturb the jury's exercise of unbiased judgment. State v. Schwanda, 146 Vt. 230, 232-33 (1985). In assessing whether an irregularity had the capacity to affect the result, "courts should consider the totality of the circumstances," recognizing that "[t]he relevant factors in each case will be different, as illustrated by the diverse array of juror-irregularity cases that have arisen." State v. Mead, 2012 VT 36, ¶ 14, 192 Vt. 1 (quotation omitted). Considerations which may be significant in this analysis "include the relative importance of the extraneous influence to a material issue in the case, whether the extraneous influence was inflammatory in nature, and whether there was any attempt to exert influence on the juror." Id. ¶ 15. If the defendant establishes the two initial elements, "the burden shifts to the State to show the absence of prejudice." Lee, 2008 VT 128, ¶ 26.

Because the trial court "is in the best position to determine whether a jury has been tainted," we review its ruling on a motion for mistrial on these grounds for abuse of discretion. State v. Grega, 168 Vt. 363, 370 (1998). However, if defendant's jury-taint claim was not preserved, we review only for plain error. Kandzior, 2020 VT 37, ¶ 21 (noting that though abuse-of-discretion is highly deferential standard of review, plain error is "even more highly deferential" (quotation omitted)).

Kandzior also clarified that we evaluate jury-taint claims one of two ways, applying either the jury-irregularity framework discussed above or the separate failure-to-investigate analysis. Id. ¶¶ 26, 32-33. When a trial court investigates possible taint, we assess a defendant's claim under the jury-irregularity framework because the court has created an evidentiary basis on which to review whether prejudice occurred. Id. ¶ 32; see also, e.g., Schwanda, 146 Vt. at 232 (explaining that where irregularity is shown under this framework, "the opposing party must show that the irregularity in fact had no effect on the jury," and mistrial "should not be granted absent a showing of prejudice"). However, if the trial court fails to investigate upon discovering potential jury taint, plain error occurs because we are left without a record on which to determine whether or how the jury was affected. Kandzior, 2020 VT 37, ¶ 21. This failure "amounts to a structural error that affects substantial rights and can be corrected without a specific showing of prejudice." Id.

Defendant contends that we should review the trial court's decision not to conduct or permit more extensive voir dire regarding juror #7's potential influence for an abuse of discretion

under the jury-irregularity framework. He acknowledges that he did not move for a mistrial but argues—notwithstanding our holding in Kandzior—that he preserved his jury-taint claim by requesting individual and panel voir dire upon learning of juror #7's association with the Confederate flag. But see 2020 VT 37, ¶ 20 ("[T]o preserve a jury-taint claim, a defendant must timely move for a mistrial."). In support, he notes that we have applied the jury-irregularity framework in cases where the trial court investigated possible jury taint although the defendant did not move for a mistrial or request an opportunity for counsel to voir dire the jury. See, e.g., State v. Onorato, 142 Vt. 99, 105-07 (1982). The apparent implication is that the jury-irregularity framework applies here because the trial court investigated potential taint in asking the jury if they saw or learned of anything over the lunch break that would in any way affect their ability to be fair and impartial. Finally, defendant cites Kandzior for the proposition that when we consider a claim of taint under the jury-irregularity framework, we must review for abuse of discretion. We conclude that this is neither the correct standard of review nor the applicable analysis.

First, Kandzior does not stand for the proposition that analysis under the jury-irregularity framework must be coupled with abuse-of-discretion review. See 2020 VT 37, ¶ 26 (referencing "our jury-irregularity case law, including those cases reviewing for abuse of discretion" (emphasis added)). As set forth above, we explained in that case that the appropriate standard of review depends on whether the defendant preserved the jury-taint claim, while the mode of analysis is contingent on whether the trial court investigated the potential taint and established the evidentiary basis necessary to determine if any prejudice has been created such that review under the jury-irregularity framework is possible. Id. ¶¶ 16, 26.

Here, defendant did not preserve his jury-taint claim for appeal, so we consider only his argument that the trial court's failure to conduct or permit more extensive voir dire constituted plain error. In reaching this conclusion, we need not consider whether defendant is correct in suggesting that in some circumstances, a jury-taint claim can be preserved where the defendant does not timely move for a mistrial. Assuming for the sake of argument that a request for voir dire could preserve a jury-taint claim, the requests defendant made here were incongruent with the arguments he now presents. Kandzior, 2020 VT 37, ¶ 16 ("Preservation refers to whether a litigant specifically raised an issue with the trial court, thereby giving the court a fair opportunity to rule on it." (quotation omitted)).

On appeal, defendant contends that juror #7's association with the Confederate flag gave rise to a possibility that he exposed the other panel members to racially biased extraneous influence in a trial where race and racism were material issues. He highlights several ways in which racial bias could influence the way the jury viewed the evidence. These include his testimony regarding his state of mind—that he did not become angry until after he exited his vehicle and realized that that complainants put his life in danger by calling the police to report that he was chasing them with a shotgun neither man saw. He also notes the importance of the jury's assessment of his credibility given the numerous conflicts between complainants' testimony and his own. Because of the possible irregularity, he argues, the court erred in failing to conduct or permit individual voir dire of juror #7 or more specific voir dire of the panel. In defendant's view, asking the jury generally whether they saw, heard, or learned anything over the lunch break that would affect their ability to be fair and impartial was insufficient because it did not elicit important information about juror #7's potential interactions with them prior to the noon recess.

This is not the form defendant's argument took in the trial court. Though defendant initially raised the possibility that juror #7 could have influenced other members of the panel, he never explicitly argued that this influence could have arisen from interactions between juror #7 and other members of the panel. Instead, as the discussion progressed, defense counsel narrowed his focus to the risk of prejudice if the panel saw defendant's attorneys photographing juror #7's vehicle and thought they were doing something unethical. His only concrete request for a more specific inquiry of the panel was directed at this concern. Moreover, in making this request, it was defendant who proposed the court inquire if anything had happened "since lunch." Finally, though defendant told the court he was "happy" to have individual voir dire of juror #7, he did not object when the court indicated it was leaning toward excusing him from the panel without further questioning, even after the prosecutor raised the possibility of asking juror #7 individually whether he talked to anyone on the panel about his beliefs.

As a result, defendant did not present the issues he seeks to raise on appeal to the trial court "with specificity and clarity," in a manner that afforded the court "a fair opportunity to rule" on them. State v. Ben-Mont Corp., 163 Vt. 53, 61 (1994). Because defendant's request for voir dire could not have preserved his jury-taint claim, we consider his argument under the plain-error standard of review. Id.

Though defendant urges application of the jury-irregularity framework, we can do so only where the trial court has investigated possible taint, establishing "the necessary evidentiary basis for determining if in fact any prejudice has been created." Kandzior, 2020 VT 37, ¶ 26 (quotation omitted). Here, defendant is not contending that the record reflects prejudice and the trial court therefore erred in concluding that the jury was unbiased. Instead, the crux of his claim is that the trial court denied his constitutional right to an impartial jury by failing to appropriately investigate potential taint. While defendant addresses each aspect of the jury-irregularity framework in turn, he allows that the court's investigation was insufficient to support the analysis in some aspects—including the ultimate question of whether the alleged irregularity had an effect on the jury, resulting in prejudice. As defendant concedes, there is no evidentiary basis on which to assess whether or how the jury was affected by the irregularity he alleges. This does not mean, as he suggests, that the State cannot satisfy its burden on this question under a jury-irregularity framework. It means that we cannot review his jury-taint claim under that framework and must apply the failure-to-investigate analysis. Id. ¶ 32. We therefore consider defendant's alternative contention the court's failure to adequately investigate possible jury taint was plain error.

Plain error is found in the "rare and extraordinary case," State v. Turner, 145 Vt. 399, 403 (1985), where there is "glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights," State v. Oscarson, 2004 VT 4, ¶ 27, 176 Vt. 176. Ordinarily, we will reverse on plain error only where we find "not only that the error seriously affected substantial rights, but also that it had an unfair prejudicial impact on the jury's deliberations." Oscarson, 2004 VT 4, ¶ 27. As we recognized in Kandzior, however, a court's failure to investigate possible jury taint leaves us without a record on which to determine whether the jury was fair and unbiased. 2020 VT 37, ¶ 27. Thus, "when a trial court fails to investigate possible jury taint, plain error occurs regardless of any prejudice." Id. ¶ 28.

Defendant's argument on this point is narrow. He contends that because race was a material issue in his case, the jury's exposure to an influence of racial bias through juror #7 could have impacted their verdict, and in limiting its questioning to whether the jury was exposed to

extraneous influence during the lunch recess, the trial court failed to investigate the possibility that juror #7 influenced them before that time.

However, the failure-to-investigate analysis is subject to an "important caveat[]"—the duty to investigate arises only "when the trial court discovers the possibility of jury taint." Id. ¶ 33. Here, defendant contends that the court discovered the possibility of taint when it learned of juror #7's association with the Confederate flag, which suggested that that he was "potentially racist," and in turn gave rise to a possibility that he exposed the jury to a racially biased influence through unspecified means, notwithstanding the court's initial instruction that the jurors were not to discuss the case amongst themselves until it was time to deliberate.

The number of inferences defendant's theory calls for the court to make before arriving at the possibility of jury taint distinguishes it from those cases in which we have recognized a duty to investigate. In Kandzior, there was "no dispute that the trial court was aware of possible jury taint" because "the prosecutor informed the court that someone had told her that 'she could hear everything we were saying' at the bench conferences." 2020 VT 37, ¶ 35. In Woodard, the "suspicion" of jury taint arose where a juror told the court that he overheard the defendant making incriminating statements—"I'm hung unless I have an alibi" or "I'm hung and I've got to have an alibi"—while defendant was on a phone call in the courthouse lobby, but remained among the jury for several hours before disclosing this. 134 Vt. at 155-57. As we recognized in both cases, plain error is necessarily "glaring." Kandzior, 2020 VT 37, ¶ 23; Woodard, 134 Vt. at 156. In this circumstance, we cannot say that it was plain error not to engage in more specific voir dire about juror #7's possible influence on other members of the panel prior to the lunch recess.

Affirmed.

BY THE COURT:

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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Nancy J. Waples, Associate Justice