2013 IL App (5th) 110152-U

NO. 5-11-0152

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 01-CF-99
	)	
HENRY FISHER,	)	Honorable
	)	William H. Wilson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Third-stage denial of defendant's postconviction petition was manifestly erroneous where defendant demonstrated that jurors improperly learned during deliberations that he was previously charged with a similar offense.

¶ 2 The defendant, Henry Fisher, appeals the third-stage denial of his postconviction petition. The defendant was charged with predatory criminal sexual assault of a child. The evidence showed that a juror in his trial told other members of the jury about a news broadcast which mentioned that the defendant had been previously charged with another sex offense. In this appeal, the defendant argues that (1) this evidence demonstrated a probability of prejudice sufficient to set aside the jury's verdict and (2) trial counsel was ineffective for failing to present it at a posttrial motion hearing. He argues that the postconviction court's conclusion to the contrary was manifestly erroneous. We reverse.

¶ 3 This is the fourth time this case has been before this court on appeal. Its long and

complicated history began in February 2001, when the defendant was charged by information with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2000)). In May 2003, the defendant was tried before a jury. The jury spent approximately six hours deliberating before reaching its verdict. During that time, the jury sent two notes to the court indicating that it was deadlocked. The court instructed the jury to continue deliberating. See *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972). After further deliberations, the jury found the defendant guilty. At issue is the discussion of a news report which took place during deliberations.

¶ 4 The defendant filed a motion for a new trial. Prior to the hearing on that motion, a private investigator hired by defense counsel attempted to interview all 12 jurors in the defendant's case. Nine of the jurors declined to talk to the investigator. One of the three jurors who initially agreed to discuss the case subsequently changed her mind. In response to open-ended questioning, juror John Heath told the investigator that he was the last juror to change his vote from not guilty to guilty. Heath stated that he changed his vote because he did not want to be called back into the courtroom for further instructions. Subsequently, the investigator interviewed juror Steven Newsome. Newsome told him that one of the male jurors told the rest of the jury about a news broadcast he had overheard during the trial. The broadcast mentioned previous charges against the defendant in an unrelated criminal case. According to Newsome, the juror also told them that the charges had been dropped. Neither the investigator nor defense counsel made any additional efforts to contact Heath or the remaining jurors again in an effort to obtain further information about Newsome's allegation. The investigator did, however, discover that a television station in Cape Girardeau, Missouri, aired a news story during the defendant's trial which mentioned

a previous sexual assault charge against the defendant. He acquired a video recording of the story and provided it to defense counsel.

¶ 5 The defendant filed an amended motion for a new trial. He alleged that during deliberations, one of the jurors told the rest of the jury about a newscast involving the trial. Juror Steven Newsome testified at a hearing on the motion. He stated that one of the other jurors overheard a news broadcast about the trial that the juror's wife was watching. The news story included a reference to a previous criminal charge filed against the defendant in another county. Newsome testified that the juror related this information to all of the other jurors. According to Newsome, the juror told them that the charges had been dropped or that the defendant had been acquitted. However, Newsome testified that the juror did not tell them the nature of the previous charges. The trial court denied the motion for a new trial and sentenced the defendant to 12 years in prison.

¶ 6 In his direct appeal to this court, the defendant argued that the trial court erred in denying his motion for a new trial. He argued that once he showed that extraneous information about his prior offense was before the jury, "the burden shifted to the prosecution to demonstrate [that] no prejudice resulted." *People v. Fisher*, No. 5-03-0518, order at 2 (Sept. 7, 2005) (*Fisher I*) (unpublished order pursuant to Illinois Supreme Court Rule 23) (citing *People v. Holmes*, 69 Ill. 2d 507, 372 N.E.2d 656 (1978); *Stallings v. Black & Decker (U.S.), Inc.*, 342 Ill. App. 3d 676, 796 N.E.2d 143 (2003)).

¶ 7 In rejecting the defendant's claim and affirming his conviction, we noted that both *Holmes* and *Stallings* involved independent investigations by jurors into factual matters at issue in the case. *Fisher I*, order at 2-3. We found the instant case to be "more akin to the cases involving assertions of juror exposure to media coverage."

Fisher I, order at 3. We noted that, in such cases, a defendant has the burden of showing a probability of prejudice sufficient to render the trial "inherently lacking in due process." *Fisher I*, order at 3 (citing *People v. Silagy*, 116 Ill. 2d 357, 366, 507 N.E.2d 830, 833 (1987)). We found that this standard was not met where the evidence presented at the posttrial motion hearing showed that the jurors knew only that "the defendant had been charged with some crime at some time in the past" and there was no indication that any of the jurors learned the nature of the previous charge. *Fisher I*, order at 4.

¶ 8 In July 2006, the defendant filed a petition seeking relief under the Post Conviction Hearing Act (725 ILCS 5/122-1 to 8 (West 2004)). He alleged that (1) a news report that was aired during the trial mentioned a 1994 sexual assault charge against the defendant; (2) contrary to the evidence presented at the posttrial motion hearing, the juror who brought the news report to the attention of the jury *did* tell the other jurors the nature of the previous charge; (3) the jurors discussed the previous charge; and (4) trial counsel was ineffective for failing to investigate further and present this evidence to the trial court. Attached to the petition was an affidavit of juror Heath attesting to these facts. The postconviction court dismissed the petition at the second stage, finding that the jury issue was addressed in the defendant's direct appeal, and the ineffective assistance claim was forfeited.

¶ 9 On appeal from that ruling, this court noted that the issue was "whether an evidentiary hearing [was] necessary to determine whether counsel was ineffective for failing to adequately develop evidence that would have demonstrated that the jurors had been exposed to the media report." *People v. Fisher*, No. 5-06-0650, order at 7 (Sept. 28, 2007) (*Fisher II*) (unpublished order pursuant to Illinois Supreme Court Rule 23). We found that it was. *Fisher II*, order at 7. We noted that some of the statements in

Heath's affidavit were related to the process of deliberation and the jury's motive in reaching the verdict it did. *Fisher II*, order at 9. Such statements are inadmissable. See *People v. Nitz*, 219 Ill. 2d 400, 424-25, 848 N.E.2d 982, 997 (2006). We further noted, however, that other statements in the affidavit were related to the fact that the extraneous information regarding the prior offense was revealed to the jury. These statements are admissible. *Fisher II*, order at 9. We explained that it would be possible to question Heath or other jurors about what they heard about the broadcast without asking them about the deliberative process or what role the information played in their decision. *Fisher II*, order at 9-10. We remanded for an evidentiary hearing consistent with these directions. *Fisher II*, order at 10.

¶ 10 On remand, the court allowed for supervised evidence depositions of all jurors, which it ordered to be conducted in the presence of the court. Eleven of the jurors were deposed; however, the depositions did not occur in the presence of the court. Four jurors did not remember any juror mentioning a news broadcast at all. One remembered a juror mentioning a news story of some kind, but could not remember what it was about. Six jurors remembered that the broadcast referred to previous criminal charges against the defendant. Three jurors specifically remembered hearing that the defendant had been charged with another sex offense. A fourth juror did not hear the revelation directly. She testified, however, that when she returned to the jury room after leaving to use the restroom, the rest of the jury was discussing the matter. She believed that the previous offense was also a sex offense, but was not certain. A fifth juror remembered being told that the broadcast mentioned a previous charge against the defendant, but he did not recall what that charge was. The sixth juror (Newsome) testified that it "seemed like it was" a sex offense, but he was not certain. Of the six jurors who testified that they remembered hearing about the broadcast,

three testified that the previous charge had been dropped, while the other three testified that they did not know or did not remember the outcome of the previous charge.

¶ 11 During the depositions, both parties made objections to additional questioning related to the jurors' motives and the deliberation process. The court subsequently held an evidentiary hearing in the matter. The only evidence presented was the 11 juror affidavits. The parties asked the court to rule on the objections, but it did not appear from the record that the court did so.

¶ 12 In February 2009, the court denied the defendant's request for postconviction relief in a six-page handwritten docket entry. The court found that (1) four of the jurors had no recollection of discussing the newscast; (2) seven jurors did recall discussing the story, but six of the seven stated that it had no impact on their decision; and (3) the last juror did not specifically state that the information regarding the newscast played a role in his decision. The court thus concluded that the defendant did not make the requisite showing of prejudice.

¶ 13 The defendant appealed that ruling, and this court reversed. We found that the postconviction court relied on inadmissible evidence of the jurors' motives in ruling as it did. *People v. Fisher*, No. 5-09-0066, order at 7 (June 1, 2010) (*Fisher III*) (unpublished order pursuant to Illinois Supreme Court Rule 23). We remanded the matter once more and directed the postconviction court to rule on the parties' objections and resolve the defendant's claim using only the admissible evidence.

¶ 14 On remand, the postconviction court once again denied the defendant's request for relief. This time, the court based its decision largely on a finding that the juror who informed other jurors of the news broadcast had not intentionally watched the broadcast. As the court pointed out, the evidence suggested that the juror had

overheard a news program that his wife was watching. The court found that this fact distinguished this case from *Holmes* and *Stallings*, both of which involved independent investigations intentionally undertaken by jurors. See *Holmes*, 69 Ill. 2d at 510, 372 N.E.2d at 657 (several jurors went to a shoe store and examined the heels of various boots to determine whether they resembled footprints a police officer had testified to finding in the snow); *Stallings*, 342 Ill. App. 3d at 682, 796 N.E.2d at 148 (juror undertook investigation of circular saw riving blades in a products liability case where the safe design of a circular saw was at issue). The court further distinguished the instant case from *Holmes* and *Stallings*, finding that the information related by the juror was not crucial to any issue in the case. See *Holmes*, 69 Ill. 2d at 519, 372 N.E.2d at 661-62; *Stallings*, 342 Ill. App. 3d at 682, 796 N.E.2d at 148.

¶ 15 The court also found that the defendant failed to demonstrate that counsel's performance was deficient. In making this finding, the court emphasized the fact that most of the jurors had been unwilling to talk to defense counsel's investigator and the fact that Heath did not mention the jurors' discussion of the news story in his initial interview with the investigator. This appeal followed.

¶ 16 The Post-Conviction Hearing Act provides a three-step process to resolve a defendant's claims that his conviction or sentence resulted from a violation of rights that are protected under the state or federal constitution. *People v. Makiel*, 358 Ill. App. 3d 102, 104, 830 N.E.2d 731, 736 (2005). This appeal involves the third stage of postconviction proceedings, which is an evidentiary hearing on the defendant's claims. We will reverse the decision of a postconviction court following an evidentiary hearing only if the decision is manifestly erroneous. *Silagy*, 116 Ill. 2d at 365, 507 N.E.2d at 833.

¶ 17 In order to prevail on a claim of ineffective assistance of counsel, a defendant must

demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness. *Makiel*, 358 Ill. App. 3d at 105, 830 N.E.2d at 737. The defendant must also demonstrate prejudice as a result of counsel's deficient performance. To show prejudice, the defendant must show that but for counsel's mistakes, there is a reasonable probability that the result of the proceeding at issue would have been more favorable. *Makiel*, 358 Ill. App. 3d at 105-06, 830 N.E.2d at 737 (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

¶ 18 In the instant case, the questions before us are: (1) was it objectively unreasonable for counsel to fail to discover and present all of the admissible evidence related to the external information brought to the attention of the jury; and (2) was there a reasonable probability that the result of the trial court's ruling on the defendant's posttrial motion would have been different had defense counsel presented this evidence at the motion hearing? Here, we will consider the second question first. In answering that question, we must determine whether the admissible testimony in the evidence depositions meets the standard for setting aside a jury verdict on the basis of extraneous information.

¶ 19 Generally, the testimony of former jurors to impeach a verdict is not admissible. *People v. Hobley*, 182 Ill. 2d 404, 457, 696 N.E.2d 313, 339 (1998). Juror testimony is not admissible to show the jury's " 'motive, method or process' " in reaching the verdict it did. *Hobley*, 182 Ill. 2d at 457, 696 N.E.2d at 339 (quoting *Holmes*, 69 Ill. 2d at 511, 372 N.E.2d at 658). However, testimony *is* admissible to show that there was improper extraneous information or influence on the jury. *Hobley*, 182 Ill. 2d at 457-58, 696 N.E.2d at 339. A jury verdict will not be set aside unless the external information resulted in prejudice. *Hobley*, 182 Ill. 2d at 458, 696 N.E.2d at 339. Because jurors may not testify about the impact the external information had on their

mental process, the test is whether the outside information created " 'such a probability that prejudice will result' " that the deliberations may be " 'deemed inherently lacking in due process.' " *Hobley*, 182 Ill. 2d at 458, 696 N.E.2d at 339 (quoting *Holmes*, 69 Ill. 2d at 514, 372 N.E.2d at 659).

¶ 20 The fact that media coverage of a trial has been brought to the attention of jurors does not automatically demonstrate a probability of prejudice sufficient to taint the verdict and require a new trial. *Silagy*, 116 Ill. 2d at 366, 507 N.E.2d at 833. A defendant must show the probability of prejudice as a result of exposure to media coverage. *Hobley*, 182 Ill. 2d at 465-66, 696 N.E.2d at 343. In determining the probability of prejudice stemming from any external information improperly brought to a jury's attention, we must consider the nature of the information itself. *Holmes*, 69 Ill. 2d at 514, 372 N.E.2d at 659. Thus, a defendant does not meet his burden if he does not put forth any evidence as to the content of the news stories improperly revealed to the jury. See *Hobley*, 182 Ill. 2d at 466, 696 N.E.2d at 343. Where, as here, the record *does* contain evidence showing what the jurors were told about the content of the news story, we must consider the nature of that content in accordance with *Holmes*.

¶ 21 Here, the admissible evidence developed at the third stage of postconviction proceedings demonstrated that at least four of the jurors learned that the defendant was previously charged with a sex offense. As the defendant correctly contends, evidence that a defendant was previously charged with a crime–particularly the same type of crime for which he is on trial–can be highly prejudicial. Because of this potential, even if other-crimes evidence is admissible at trial for some relevant purpose, a court must still weigh its probative value against the potential for prejudice. See *People v. Mullins*, 242 Ill. 2d 1, 14-15, 949 N.E.2d 611, 619 (2011). Here, the defendant was tried on a charge that he had committed a sex offense.

Evidence that he had been charged with another sex offense in the past was not admitted at trial, but it came to the jury's attention through an external source. Although we have no way to know the actual influence of this information on the jury's decision, we find that in light of the highly prejudicial nature of this information, the probability of prejudice was sufficient to warrant a new trial.

¶ 22 In reaching a contrary conclusion, the court below focused on the fact that the juror accidentally overheard the broadcast. As previously mentioned, the court distinguished the facts before it from the supreme court's decision in *Holmes* and our decision in *Stallings* on this basis. We are not persuaded that this distinction is critical. As previously discussed, both *Holmes* and *Stallings* involved situations where jurors deliberately conducted their own investigations. In *Holmes*, jurors visited a shoe store and compared the imprints on the bottoms of boot heels to an officer's description of footprints he saw in the snow at the scene of a robbery. *Holmes*, 69 Ill. 2d at 510, 372 N.E.2d at 657. In *Stallings*, one juror conducted his own investigation into riving blades used in circular saws where a critical issue in the case was the safety of the design of a saw that did not include a riving blade. *Stallings*, 342 Ill. App. 3d at 681, 796 N.E.2d at 147. However, both decisions turned on the prejudicial nature of the information shared with other jurors, not the intentions of the jurors in conducting the investigations. See *Holmes*, 69 Ill. 2d at 661-62, 372 N.E.2d at 519; *Stallings*, 342 Ill. App. 3d at 682, 796 N.E.2d at 148.

¶ 23 The postconviction court further found that the extraneous information did not relate to a critical issue in the case. Again, we are not persuaded by this reasoning. The *Holmes* court noted that the type of extraneous information called to the attention of the jury in the case before it "was in the nature of evidence with which the defendant had not been confronted at trial." *Holmes*, 69 Ill. 2d at 516-17, 372 N.E.2d at 660.

However, the court also noted that there were many types of extraneous information or outside influences that might prejudice a jury. *Holmes*, 69 Ill. 2d at 516, 372 N.E.2d at 660. Here, while the defendant's prior charge was not itself at issue, it was information the jurors may have considered relevant to determining whether the defendant committed the sex offense at issue in this trial. As this court pointed out in *Stallings*, extraneous information that " 'could have tipped the scales' " may have improperly influenced the verdict. *Stallings*, 342 Ill. App. 3d at 682, 796 N.E.2d at 148 (quoting *Haight v. Aldridge Electric Co.*, 215 Ill. App. 3d 353, 370, 575 N.E.2d 243, 255 (1991)).

¶ 24 The State argues, however, that the deposition testimony does not demonstrate a probability of prejudice sufficient to justify setting aside the verdict for two additional reasons. First, the State points out that there was no evidence that the prior charge involved the sexual abuse of a child, as the instant case does. Although information that the defendant had been involved in a previous case involving sexual abuse of a child would have carried an even greater probability for prejudice, we believe that the information that he had been charged with *any* sex offense could easily have "tipped the scales" in favor of a guilty verdict.

¶ 25 Second, the State points out that some of the jurors were aware that the previous charge had been dropped, and none testified that they believed the defendant had been convicted on that charge. The State argues that jurors would be likely to conclude that the defendant had not committed the previous offense. We believe, however, that jurors presented with this information could just as easily conclude that the defendant had "gotten away with" the previous charge. Lay people do not always assume that a criminal defendant is innocent if the charges are dropped before trial. Thus, we do not believe that any of the distinctions considered by the postconviction court or

argued by the State mitigate the prejudicial nature of the information presented to the jury. We conclude that had all the relevant and admissible evidence been presented to the trial court at the hearing on the defendant's posttrial motion, there is a reasonable probability that the result would have been different.

¶ 26 Finally, we consider the parties' contentions regarding whether trial counsel was ineffective for failing to discover and present this evidence. The defendant argues that reasonably effective trial counsel armed with the information gleaned from the investigator would have at least taken the simple step of attempting to interview John Heath and Vicky Colombo, the juror who initially was willing to talk to the investigator but changed her mind. Both Heath and Colombo were among the jurors who specifically remembered that the previous charge was a sex offense. The State argues that at the time, the possibility that either of these jurors would provide the relevant information was purely speculative.

¶ 27 We addressed this issue the second time this matter came to us on appeal. We found that the recording of the news story coupled with the information provided by Newsome should have indicated to counsel that further investigation could have led to helpful evidence. *Fisher II*, order at 8-9. We remanded for an evidentiary hearing because, we explained, that was "[t]he only way to determine whether further investigation *would have been likely to yield the crucial information*." (Emphasis added.) *Fisher II*, order at 9. As we have discussed at length, the evidence presented at the third stage of these proceedings demonstrated that the crucial evidence did, in fact, exist. The question remains, then, whether counsel could reasonably have been expected to discover it.

¶ 28 As we noted earlier, only two jurors were willing to speak with the investigator when he initially contacted them. However, the jurors who testified that they were told the

nature of the previous charges also testified that they would have testified to that effect earlier had they been subpoenaed to do so. All in fact did testify when subpoenaed. In addition, Heath willingly provided an affidavit. Thus, we conclude that the additional evidence presented at the evidentiary hearing shows that further investigation could have led defense counsel to the evidence he needed to present in order to successfully argue for a new trial for the defendant.

¶ 29 We acknowledge that, as the State points out, there was no way for defense counsel or the investigator to know for certain that further investigation would lead to the type of evidence necessary to support the motion for a new trial. However, we do not agree with the State's characterization of this uncertainty as "pure speculation." Counsel was aware that a broadcast had aired which specifically stated that the defendant was previously charged with sexual assault. Newsome informed the investigator that a juror had brought a news report to the attention of the entire jury. We can think of no strategically sound reason not to take the simple step of attempting to contact other jurors–especially Heath, who had already been willing to talk to the investigator. Thus, we conclude that the defendant has satisfied his burden under both parts of the *Strickland* test.

¶ 30 For the reasons stated, we reverse the court's judgment denying the defendant's petition.

¶ 31 Reversed.