

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

JAMIE R. SMITH,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12714
Trial Court No. 3PA-13-01447 CR

MEMORANDUM OPINION

No. 6896 — September 2, 2020

Appeal from the Superior Court, Third Judicial District, Palmer,
Gregory L. Heath, Judge.

Appearances: Rachel E. Cella, Assistant Public Defender, and
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
Diane L. Wendlandt, Assistant Attorney General, Office of
Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney
General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Hanley,
District Court Judge.*

Judge HARBISON.

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Jamie R. Smith was convicted by a jury of attempted first-degree murder for beating and severely injuring his girlfriend S.S.¹ Before trial, Smith moved to suppress statements he made to the police, arguing that they were taken in violation of *Miranda v. Arizona*.² The trial court denied this motion in part, finding that while certain statements Smith made at the scene, and later during the execution of a search warrant, were taken in violation of *Miranda*, the statements Smith made several hours later during a formal interview were not tainted by the earlier *Miranda* violations. Smith appeals this decision. Smith also appeals the trial court's failure to excuse a juror for alleged misconduct, and he challenges his sentence as excessive. For the reasons we explain in this opinion, we affirm Smith's convictions and his sentence.

Factual and procedural background relevant to the motion to suppress

Smith's convictions arose out of an incident that occurred in May 2013, when several people attending a bonfire party near Houston called 911 to report an assault on sixteen-year-old S.S. The troopers who were dispatched to the scene stopped a truck as it was attempting to leave the area; Smith, who was seventeen years old at the time, was a passenger in the truck. After removing Smith from the truck, the troopers placed him in handcuffs and questioned him about the incident. The troopers then took Smith to the trooper post where they executed a search warrant to photograph his body, seize his clothing and collect biological samples from his body. Sometime after service of the warrant, the troopers read Smith a *Miranda* warning for the first time and then conducted a formal interview of him.

¹ AS 11.41.100 & AS 11.31.100. Smith was additionally convicted of first-degree assault in violation of AS 11.41.200(a)(1) based on the same incident. The trial court merged the convictions.

² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

Before his trial, Smith filed a motion to suppress the statements he made from the time the troopers first detained him at the scene, through the conclusion of the formal interview. Following a two-day evidentiary hearing, the trial court granted the motion in part and denied it in part. In its order, the trial court divided Smith's statements into four groups and analyzed each set of statements separately.

The first set of statements were made by Smith while he was seated in the passenger side of a truck that was stopped at the scene, before the troopers placed him in handcuffs. During that time, Smith interjected various statements while the troopers questioned the driver. The trial court found that Smith made these statements voluntarily and that he was not in custody for *Miranda* purposes at that time. It therefore declined to suppress this set of statements. Smith does not challenge this decision on appeal.

The second set of statements were those Smith made at the scene after being placed in handcuffs. During this time, several troopers questioned Smith, but none of them read him a *Miranda* warning. One of the troopers repeatedly accused Smith of assaulting S.S., insisting that Smith had blood on his hands and clothing that was "spatter from you [beating] her." The trial court found that Smith was in custody when he was placed in handcuffs and that any statements he made after that, while still at the scene, would be suppressed.

The third set of statements were made by Smith during the execution of the search warrant at the trooper post. The search warrant authorized the troopers to take photographs of Smith, to seize his clothing, and to take biological samples from him. The trial court found that because Smith was still in custody at this time, and because the troopers still had not read Smith a *Miranda* warning, any statements he made during the execution of the warrant would be suppressed.

The final set of statements were made by Smith during a formal interview conducted several hours after the troopers executed the search warrant. Before the

interview, Smith was advised of and waived his *Miranda* rights. The trial court denied Smith's motion to suppress these statements, finding that Smith knowingly and voluntarily waived his *Miranda* rights. It rejected Smith's argument that the statements he made during the formal interview were the tainted fruit of his prior, illegally obtained, statements.

Why we conclude that the statements Smith made in the formal interview were not the tainted fruit of the prior illegally obtained statements

On appeal, Smith argues that the trial court erred by denying his motion to suppress the statements he made during the formal interview. According to Smith, these statements were tainted by the earlier violations of his *Miranda* rights. We disagree.

In *Halberg v. State*, we explained that, when determining whether a previous violation of a criminal defendant's Fifth Amendment rights tainted the defendant's subsequent statements, courts must analyze the totality of the circumstances to determine whether the defendant's decision to give subsequent statements was "sufficiently an act of free will to purge the primary taint."³ Under this approach, taint is presumed — that is, the State must prove that a subsequent statement was voluntary and that under the totality of the circumstances the defendant's decision to speak was sufficiently an act of free will to purge the taint.⁴

A number of factors are relevant to this analysis, none of which are dispositive. These factors include:

the purpose and flagrancy of the initial illegal act, the amount of time between the illegal act and the defendant's

³ *Halberg v. State*, 903 P.2d 1090, 1094 (Alaska App. 1995) (quoting *Brown v. Illinois*, 422 U.S. 590, 602 (1975)); see also *Kalmakoff v. State*, 257 P.3d 108, 125 (Alaska 2011).

⁴ *Halberg*, 903 P.2d at 1097-98.

subsequent statement, the defendant's physical and mental condition at the time of the subsequent statement, whether the defendant remained in custody or was at liberty during this interval, whether the defendant had the opportunity to contact legal counsel or friends during this interval, whether the subsequent interview took place at a different location, whether the defendant's interrogators were the same officers who committed the prior illegal act, whether the evidence obtained from the prior illegal act affected the defendant's decision to submit to a subsequent interview, whether the police used lies or trickery to influence the defendant's decision, and whether there were other intervening events that affected the defendant's decision.^[5]

As we have explained, the trial court conducted an evidentiary hearing on Smith's motion to suppress. After hearing the evidence, the trial court determined that Smith knowingly and voluntarily waived his *Miranda* rights before the formal interview and that Smith's post-*Miranda* statements were not tainted by the earlier illegally obtained statements. More specifically, the trial court found that Smith was not operating under the "coercive pressure" of an earlier confession, when he spoke to troopers during the formal interview. In applying the *Halberg* factors, the trial court found that because approximately seven hours had elapsed between the act and the formal interview, because the interview occurred at a separate location from the scene of the crime, and because the troopers did not use Smith's earlier statements to induce a confession, Smith's post-*Miranda* statements were not tainted by the earlier *Miranda* violations.

On appeal, Smith renews his argument that the *Halberg* factors, when applied to the facts of his case, demonstrate that the statements he made during the

⁵ *Id.* at 1098.

formal interview were tainted by earlier *Miranda* violations. According to Smith, the troopers' questioning of him at the scene was in flagrant violation of *Miranda*, as was the troopers' failure to honor what Smith views as his invocation of the right to counsel during the service of the search warrant. Smith argues that the post-*Miranda* statements he made during the formal interview were the tainted fruit of the earlier *Miranda* violations and that the trial court erred in failing to suppress these post-*Miranda* statements.⁶

Upon independent review, we find no error in the trial court's resolution of this issue.⁷ Like the trial court, we conclude that the formal interview of Smith was not tainted by his prior unlawfully-obtained statements.

First, we agree with the trial court that the *Miranda* violation at the scene, while serious, was not flagrant. We have characterized flagrant police misconduct as "conduct that was obviously illegal, or that was particularly egregious, or that was done for the purpose of abridging the defendant's rights."⁸ It is true that the accusatory questioning of Smith, who was handcuffed and had not been read a *Miranda* warning, approaches a flagrant violation of Smith's rights. But the trial court's finding that the troopers' conduct was not egregious or purposeful is nevertheless supported by the record. The situation was chaotic; it was the middle of the night in a remote location

⁶ Smith does not challenge the trial court's finding that he knowingly and voluntarily waived his *Miranda* rights.

⁷ See *Kalmakoff v. State*, 257 P.3d 108, 118-19 (Alaska 2011) (citing *State v. Smith*, 38 P.3d 1149, 1153 (Alaska 2002)).

⁸ *McBath v. State*, 108 P.3d 241, 248 (Alaska App. 2005); see also *Noyakuk v. State*, 127 P.3d 856, 864 (Alaska App. 2006) (concluding that although "the troopers consciously decided not to give [the defendant] the complete set of *Miranda* warnings, their violation of *Miranda* was not flagrant or 'purposeful' (in the sense that it stemmed from a desire to subvert [the defendant's] rights)").

where there was a crowd of drunk party-goers, a severely injured victim and a number of people attempting to leave the scene. The troopers were trying to quickly obtain information and secure the scene so that the victim could receive medical attention. As a result, Smith's interview was conducted erratically and by a number of different troopers who were also attempting to talk to other witnesses. While suppression of the statements was appropriate, under these circumstances, the *Miranda* violation was not "flagrant."⁹

We also reject Smith's claim that the troopers' actions during the execution of the search warrant exacerbated the taint from their initial illegal interrogation of him. Smith asserts that during the execution of the search warrant, he made at least an ambiguous request for counsel when he told the troopers, "I haven't been read my rights. I ain't got no choice of a lawyer, nothing." Smith acknowledges that the troopers responded by telling him that they were not going to ask any questions during the execution of the search warrant. He argues, however, that this was tantamount to rebuffing his request for counsel and that it had a coercive effect, which added to the taint of the earlier *Miranda* violation.

We disagree. First, we note that the troopers did not interrogate Smith during the execution of the warrant. Indeed, it was Smith, not the troopers, who initiated the conversations that occurred during the execution of the search warrant. And, the evidence supports the trial court's finding that a reasonable police officer would not have understood Smith's statement to be a request for an attorney. Instead, Smith's statement could be reasonably understood as an inquiry about *Miranda* warnings in general. The evidence also supports the trial court's finding that, even if Smith made an ambiguous request for counsel, the troopers clarified the request, and then acted lawfully by reading

⁹ See *McBath*, 108 P.3d at 248.

Smith his *Miranda* rights and obtaining a valid waiver prior to the formal interview. We accordingly reject Smith's claim that the troopers' response to his comment exacerbated the taint of the initial *Miranda* violation.

Moreover, as the trial court noted, a significant amount of time (seven to eight hours) elapsed between the time of the on-scene questioning and the time of the formal interview.¹⁰ Although Smith remained in custody the entire time, he had access to two cell phones and sent two text messages during that time. And, as the trial court noted, the formal interview occurred in a location that was separate from the location of the on-scene questioning. Although there was one trooper who participated in both interrogations, a different trooper did most of the questioning during the formal interview.

The trial court also considered the fact that Smith had a .079 percent breath alcohol content at the time of the formal interview. The trial court reviewed the video recording of the interrogation and found that Smith was coherent and that his demeanor did not indicate that he was intoxicated. The evidence supports this finding. The record also supports the trial court's finding that the troopers did not use threats, intimidation, or other forms of inducement to elicit statements from Smith. Additionally, as the trial court noted, Smith's statements at the scene did not include confessions to the crime or statements that were inherently incriminating.

¹⁰ See *Halberg*, 903 P.2d at 1098 (finding that approximately seven hours was a "significant interval" between the initial *Miranda* violation and the challenged interview).

For these reasons, we conclude that the trial court did not err when it found that the statements Smith made during the formal interview were not tainted by the earlier violation of his *Miranda* rights.¹¹

Why we conclude that the trial court did not err in denying Smith's motion to exclude T.C. from the jury

Smith's second contention on appeal is that the trial court deprived him of a fair trial when it denied his mid-trial request to excuse juror T.C. For the reasons we are about to explain, we disagree with this contention and hold that the trial court did not abuse its discretion by allowing T.C. to remain on the jury.

During Smith's trial, at an early stage in the jury's deliberations, juror T.C. made statements to other jurors that reflected that she may have violated her duty as a juror. T.C. first disclosed that she had recognized one of the State's witnesses, Lance Hammond, as a Facebook friend. Although T.C. first realized the connection at the time that Hammond testified, she failed to alert the court. Additionally, T.C. told the other jurors that her friend "Danni," who knew she was on jury duty, had approached her while she was at work. Danni told T.C. that she knew S.S. and that they were close friends. Again, T.C. did not immediately report this conversation to the court.

As soon as the other jurors reported T.C.'s disclosures, the trial court suspended the jury's deliberations and held a hearing to address T.C.'s conduct. During the hearing, T.C. explained that, although she and the witness, Lance Hammond, were friends on Facebook, she had never met Hammond in person. She said that she had accepted his friend request because she accepts all Facebook friend requests. According to T.C., she had not communicated with Hammond on Facebook for about five years.

¹¹ See *Dulier v. State*, 511 P.2d 1058, 1060-61 (Alaska 1973).

She also asserted that neither her scant knowledge of Hammond nor her friend Danni's connection to S.S. would impact her ability to be a fair and impartial juror.

T.C. stated that she did not realize her connection to Hammond until Hammond came into the courtroom to testify. According to T.C., she did not immediately disclose her connection to Hammond or the conversation with Danni because she "wasn't sure who to go up to or anything because I'm still new [to] this." She stated, "I was going to," and, "I thought I could tell you guys at the end, or was — I wasn't sure if that was a good idea or not . . . I kind of got scared."

After hearing from T.C., the trial court and the parties questioned the other eleven jurors individually. Those jurors who overheard T.C.'s disclosures confirmed that the disclosures would not influence their deliberations.

After hearing from the jurors, Smith's attorney asked the trial court to excuse T.C. from the jury. The attorney argued that T.C. committed juror misconduct because although she recognized Hammond on day three of the trial, she waited another week and a half to disclose the information, thus demonstrating a lack of candor with the court. Additionally, the attorney claimed that she would have preempted T.C. if she had known this information during the voir dire.

The trial court denied Smith's request to excuse T.C. In its order, the trial court found T.C. to be credible. The trial court accepted T.C.'s representations that she had not realized her connection to Hammond until he came into the courtroom to testify, that she had never met him in person, and that she had had only limited contact with him through Facebook. The trial court found that T.C. did not receive any information about the case from Hammond and that she could be unbiased. The trial court also found that the information about Danni's connection to S.S. was "innocuous" and did not establish that T.C. was biased. Lastly, the trial court found that neither T.C. nor any other member

of the jury was influenced by the information that T.C. disclosed. Smith now appeals this ruling, arguing that the trial court deprived him of a fair trial when it denied his mid-trial motion to excuse T.C. from the jury.

A two-part inquiry governs challenges to a verdict based on juror misconduct: (1) whether the evidence establishes a serious violation of the juror's duty and, if so, (2) whether the violation deprived the complaining party of a fair trial.¹² We have explained that a "serious violation" of a juror's duty may be demonstrated by any obstruction of justice.¹³ Such an obstruction of justice occurs when a juror lies or consciously withholds information, if the true facts would have supported a challenge for cause.¹⁴

On appeal, Smith renews his claim that T.C. engaged in serious misconduct by both failing to promptly disclose her association with Hammond and by her exposure to extraneous information about S.S. Smith also contends that the trial court erred when it concluded that Smith would not be prejudiced by T.C.'s participation in the deliberations or from T.C.'s sharing of the information with the other jurors.

We review a trial court's order rejecting a defendant's claim of jury misconduct for an abuse of discretion.¹⁵ In this case, the trial court found that T.C. failed to timely report the information about Hammond and Danni due to "inexperience" rather than due to a conscious intent to hide the information. The record supports this finding.

¹² *West v. State*, 409 P.2d 847, 852 (Alaska 1966); *see also Fickes v. Petrolane-Alaska Gas Serv., Inc.*, 628 P.2d 908, 910 (Alaska 1981); *Swain v. State*, 817 P.2d 927, 930 (Alaska App. 1991).

¹³ *See Manrique v. State*, 177 P.3d 1188, 1191-92 (Alaska App. 2008).

¹⁴ *Soundara v. State*, 107 P.3d 290, 296 (Alaska App. 2005).

¹⁵ *See Fickes*, 628 P.2d at 911.

Accordingly, the trial court did not err when it found that T.C. did not engage in serious misconduct.

Smith also claims that the trial court failed to correctly analyze the prejudicial impact of T.C.'s misconduct. We disagree. Even if Danni and S.S. were close friends, this knowledge would not have impacted the jury's deliberations because S.S. was unable to remember any details about the assault and was unable to identify her assailant. This, as well as the *de minimus* nature of T.C.'s knowledge of Hammond, supports the trial court's conclusion that T.C.'s conduct did not deprive Smith of a fair trial.

We also reject Smith's contention that the trial court incorrectly considered the subjective impact of the extraneous information on the jury rather than applying an objective test.¹⁶ The record shows that the trial court did not base its assessment of prejudice solely on the jurors' subjective statements about the impact of the information. In fact, it applied an objective test.¹⁷ The trial court found that T.C.'s limited Facebook connection with Hammond would not create a bias for or against Hammond's testimony. The trial court also found that T.C.'s conversation with Danni would not create bias because T.C. did not obtain any facts regarding the case from her conversation with Danni.

Under these circumstances, we see no error in the trial court's denial of Smith's motion to exclude T.C. from the jury.¹⁸

¹⁶ See *Swain*, 817 P.2d at 933.

¹⁷ In its order denying Smith's motion for a new trial, the trial court explained: "[O]bjectively there is not a reasonable possibility that the withheld information would affect a juror's vote or other jurors' votes to whom the information was communicated."

¹⁸ Smith also argues that the trial court should have considered proceeding with a jury
(continued...)

Why we conclude that Smith's sentence is not excessive

Smith's final argument on appeal is that his sentence is excessive. Because Smith was convicted of attempted murder,¹⁹ he was subject to a sentence of 5 to 99 years.²⁰ The trial court sentenced him to 45 years with 15 years suspended (30 years to serve).

On appeal, Smith claims that the trial court misconstrued the evidence concerning his behavior after the assault when it compared his behavior to that of the defendant in *Starkweather v. State*.²¹ He also contends that the trial court did not correctly weigh the *Chaney* factors when sentencing Smith.

We are not persuaded by Smith's argument that the trial court's reliance on our opinion in *Starkweather v. State* was inappropriate, nor that his sentence was excessive.

In *Starkweather*, we approved a sentence for attempted murder of 64 years with 25 years suspended (39 years to serve).²² We held that an aggravated sentence for attempted murder is appropriate where the facts of the attempted murder approached the

¹⁸ (...continued)

of eleven members or granting a mistrial. But this argument has no merit. Smith did not agree to be tried by only eleven jurors, nor did he request or consent to a mistrial. *See* Alaska R. Crim. P. 23(b) (requiring a felony defendant's written consent before proceeding with less than twelve jurors); *Tritt v. State*, 173 P.3d 1017, 1019 (Alaska App. 2008) ("Once jeopardy attaches, the trial may not be stopped short of a verdict unless the defendant consents or there is manifest necessity for a mistrial.").

¹⁹ As we noted earlier, Smith was also convicted of first-degree assault, but the trial court merged the convictions.

²⁰ *See* AS 12.55.125(b).

²¹ *Starkweather v. State*, 244 P.3d 522 (Alaska App. 2010).

²² *Id.* at 533.

seriousness of the completed crime — that is, when the defendant’s violent acts, but for chance, would have achieved the victim’s death.²³

Smith criticizes the trial court’s reliance on *Starkweather* in this case. He argues that, unlike the defendant in *Starkweather* who isolated his victim to prevent her from receiving help, Smith tried to bring S.S. out of the woods for the express purpose of getting help for her.²⁴ We are not persuaded by this argument.

In this case, S.S. was so badly beaten that when she first arrived in the emergency room, it was not clear that she would survive. The doctors could not open her eyes to check for dilation, and she had blood “pouring down her throat” from her extensive facial wounds. S.S. had a “blowout fracture” on the right side of her face, and in other places the bone had been pulverized. S.S. also suffered bruising to her lungs, a “hugely” swollen pancreas, a torn kidney, swelling in her intestines, and trauma to the inside of her mouth and cuts to the sides of her mouth. S.S. is now permanently disfigured from her injuries.

When the trial court sentenced Smith, it noted the extensive injuries to S.S. and found that, if not for other people at the scene, this “easily could have been a murder case.” The trial court found that “[t]here happened to be a medically-trained person there that intervened, they called 911, and they saved her life.” These factual findings support the trial court’s reliance on *Starkweather*. Smith, like *Starkweather*, was a youthful offender who engaged in conduct so violent that he nearly killed the victim.

Additionally, we conclude that the differences in Smith’s and *Starkweather*’s actions after the completion of their attacks on the victims do not invalidate the trial court’s assessment of the harm suffered by S.S. Moreover, the trial

²³ *Id.* at 534-35.

²⁴ *See id.* at 534.

court found that the degree of harm suffered by S.S. was a primary factor, but not the only factor, in determining Smith’s sentence.²⁵ The trial court also gave weight to the fact that Smith and S.S. were in a dating relationship, that the attack was extremely violent, that it seemed to be unprovoked and that Smith had a record of continuing to be violent in prison.

Finally, we are not persuaded by Smith’s argument that he received an “unusually lengthy” sentence or that the trial court improperly weighed the *Chaney* criteria.²⁶ Smith received a considerably lower sentence than that imposed by the trial court in *Starkweather*.²⁷ And given the circumstances of this case, the trial court’s focus on the sentencing criteria of community condemnation, isolation, and rehabilitation was not clearly mistaken.²⁸

Having independently reviewed the record in this case, we conclude that Smith’s sentence was not clearly mistaken.

Conclusion

The judgment of the superior court is AFFIRMED.

²⁵ *See id.* at 532 (“[T]he wide range of penalties for attempted murder reflects the broad range of conduct encompassed within the definition of the offense, and the degree of harm suffered by the victim is a primary factor in determining the defendant’s sentence.”).

²⁶ *See State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

²⁷ *Starkweather*, 244 P.3d at 534.

²⁸ *See McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974) (adopting as a rule, the “clearly mistaken” standard of review for sentencing appeals).