

#429

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
BRCR2013-0983

COMMONWEALTH

vs.

AARON HERNANDEZ

**FINDINGS OF FACT, RULINGS OF LAW, AND ORDER ON
DEFENDANT'S MOTION FOR FURTHER POST-VERDICT
INQUIRY RESPECTING A JUROR'S EXPOSURE TO SIGNIFICANT
EXTRANEOUS MATTER AND RELATED ISSUES**

Defendant Aaron Hernandez was convicted of first degree murder on April 15, 2015. On May 26, 2015, Hernandez filed Defendant's Motion for Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matters and Related Issues. That motion was accompanied by the affidavit of defense counsel James L. Sultan ("Sultan") setting forth what he allegedly had been told by an anonymous caller (the "Source") claiming knowledge of a juror's exposure to extraneous information before jury selection began. The information conveyed to Sultan allegedly included that the Juror had been present during and/or participated in a discussion about Hernandez at a party during which the Boston murder case against Hernandez had been mentioned and that the Juror had mentioned at the party that the Juror was hoping to be on the Hernandez jury. When the defendant was unable to secure an affidavit from the Source, on August 5, 2015, he filed Defendant's Renewed Motion to Question Witness Under Oath accompanied by a second affidavit from Sultan. On August 18, 2015, this Court ordered the Source to appear in court and testify under oath, subject to cross-examination. Discovery motions were filed by the Commonwealth, following which, on September 17, 2015, Sultan produced the notes of his conversations with the Source. The Source testified at a closed hearing on October 23, 2015. On December 15, 2015, Hernandez filed Defendant's Motion

For Further Post-Verdict Inquiry Respecting A Juror's Exposure to Significant Extraneous Matters and Related Issues. For the reasons discussed below, that motion is denied.

FINDINGS OF FACT

Based on the credible evidence adduced at the hearing and reasonable inferences drawn from that evidence, the Court finds the following facts:

There is no reason to believe that the Juror was exposed to extraneous information, gave false answers during impanelment, or was biased.

While Hernandez was at the Bristol County House of Correction awaiting trial, the Source's father was incarcerated at the same institution. Her father showed Hernandez pictures of the Source, his twenty-six year old daughter, following which Hernandez wrote to her. This occurred in June of 2014. The Source and Hernandez exchanged approximately twenty letters.¹ The Source furnished Hernandez with a telephone number so that he could contact her, and they spoke several times by telephone. The Source also visited Hernandez in jail in Boston in November of 2014. In their talks, they discussed private matters, and Hernandez talked with her about his upcoming case. When jury selection started in January of 2015, Hernandez made a statement to her to the effect that he believed he would "beat this case one hundred percent." She considered him to be a good friend. She told Hernandez that she would be "pissed" if he were convicted, hoped that he would not be going to jail, believed him to be not guilty, and wished the best for him. Their communications continued until February 9, 2015, after the start of the trial. The Source spoke to Hernandez by phone sixteen times between December 17, 2014 and February 9, 2015. A single letter from Hernandez is the only

¹ The Source's father fostered written communications between Hernandez and his daughter because he wanted to sell Hernandez's letters, and he did sell some of them. The Source destroyed the remaining letters in order to prevent her father from stealing them from her.

communication they have had since his conviction.

During the time frame of the impanelment, Hernandez indicated to the Source that he would not object if she were with somebody else, but that if he gets out of jail and they were together, he would not want her “chilling” with other men. When Hernandez indicated to her on January 28th that, even if he were convicted, he thought he would win on appeal, but that the appeal might take five years, the Source responded, “Oh, my God.” At the time of the trial, she cared for Hernandez.

The Source was an administrative assistant for a professional practice from 2008 until the fall of 2015. The Juror worked at a branch of the same practice that was located in a different city. The Source infrequently filled in at the other location; even then, she rarely, if ever, interacted with the Juror because the Juror worked on weekends. They had no social relationship. The Source was not a friend of the Juror. She never communicated with the Juror by cell phone, e-mail, or text, and did not interact with her on Facebook or any other social media; they were not friends on social media. Their mutual employer sponsored a work party once a year around Christmas. That was the only occasion on which the Source saw the Juror outside of work. The Juror most definitely was not someone whom the Source saw every day.

The Source was introduced to the Juror’s spouse through her boss at the professional practice; her boss and the Juror’s spouse are friends. She saw the Juror’s spouse from time to time at the office. She never heard him talk about Hernandez there. She did not socialize with the Juror’s spouse other than at the annual holiday party. Their relationship is strictly an acquaintanceship.

On December 6, 2014, the Source attended a holiday party at her boss’s house. Over fifty people were there, including employees from both offices and “tons” of the boss’s friends and family members. Many people were there whom the Source did not know. The Juror and the Juror’s spouse

were among the guests. Music was playing.

The partygoers spread out over two rooms: the living room and another room on the first floor in which a bar was located. The party began at 6 p.m. and ended around midnight. The Source arrived at 6:30 or 7:00 p.m. and left at 11 p.m. or midnight. When she arrived, the Juror and the Juror's spouse were already there. During the evening, the Source discussed work a bit with the Juror, and they engaged in some small talk. The Juror's spouse was with friends; they talked about all possibly going out together on New Year's Eve.

At some point later in the night, in the area of the bar, as the Source approached to get her fourth or fifth drink, the Source overheard a few seconds of a conversation among a group of five to seven men. One of the men mentioned Hernandez's name and said, "What do you think about the cases?" Another man said, "I think he'll beat the first case, but not the second Boston case." That was the only time during the party when the Source heard Hernandez's name being mentioned. The Source herself never mentioned Hernandez at the party. I credit the Source's testimony that she did not recognize any of the people who participated in the conversation.

The Source was six to eight feet behind the men whom she heard talking. The Juror was not a party to or participant in that conversation. The Juror was not speaking with the people who were talking about Hernandez. The Source has absolutely no idea where in the house the Juror may have been when this conversation took place.² All that the Source knows is that the Juror was present somewhere at the party. There is no credible evidence that the Juror was present during the conversation in the sense of being close enough to the conversation to overhear what was being said.

² The Source testified that the Juror was not present "in that conversation" or "during that conversation." From her other testimony, it appears that she intended her words to mean that the Juror did not participate in the conversation.

The Source is not sure where the Juror's spouse was in relation to the conversation. She does not know if the Juror's spouse was present during the conversation. The Juror's spouse did not participate in the conversation.³ Had the spouse done so, the Source would have recognized the spouse, and she recognized none of the people who participated in the conversation. The Source has no recollection of ever seeing the Juror and the Juror's spouse together at the bar at any time during the party. There is no credible evidence that the Juror's spouse was present during the conversation in the sense of being close enough to the conversation to overhear what was being said.

Following the verdict, after the jurors were interviewed on television, someone at work expressed an opinion that it seemed like the Juror had wanted to be on the Hernandez case. This was not a statement attributed to the Juror. The co-worker made no reference to the Juror having expressed such a desire at the Christmas party or at any other time. The Source never had any conversation with the Juror about the Juror wanting to be on the Hernandez trial; no third person told the Source that the Juror had said to this other person that the Juror wanted to be on the Hernandez jury.⁴

When the Source learned during the course of the trial that the Juror was a juror on Hernandez's trial, she did not tell Hernandez that the Juror, prior to jury selection, had been or may have been exposed to the fact that there was another case pending against him in Boston. The Source did not attempt to contact any of the defense attorneys during the course of the trial.

³ Even if the Spouse had participated in the conversation, it would be wholly speculative to assume that the Juror had overheard the conversation or that the Juror and the Juror's spouse had discussed the subject matter of the conversation.

⁴ The Source denies telling Sultan that someone told her that the Juror stated at the party that the Juror wanted to be on the Hernandez jury.

I infer that, once Hernandez was convicted, the Source was highly motivated to do something that might help him win his release. The day after the guilty verdict was rendered, the Source contacted Sultan in order to convey information she thought would help Hernandez. She did not disclose her relationship with Hernandez. The Source was so motivated to help Hernandez that she said things to Sultan that were misleading and, in some cases, outright falsehoods.

The Source and Sultan spoke five or six times. She never agreed to meet him. She used a false first name and did not provide a last name. She was not under oath when she spoke with Sultan. Sultan did not read the contents of his affidavits to the Source prior to or after they were filed with the Court in order to verify that they accurately reflected what she had told him and, once her identity became known, he did not provide her with copies of his affidavits.⁵

In one of their conversations, the Source told Sultan that she saw the Juror every day.⁶ This information was included in one of the affidavits filed by Sultan. The statement to this effect by the Source to Sultan was false.

Paragraph two of the Affidavit of James L. Sultan in Support of Defendant's Motion for Post-Verdict Inquiry Respecting Juror's Exposure to Significant Extraneous Matter and Related Issues states that the Source told Sultan, on April 16, 2015, that she had been at a party in December at which the Boston murder case against Hernandez had been discussed and that the Juror "had been

⁵ At the hearing, the Source was shown only Paragraph two of the first of Sultan's affidavits filed by the defendant and asked whether she had made the statements contained therein.

⁶ The Source's out-of-court statements were not admitted for their truth.

present during and/or participated in that discussion.”⁷ The Source did not tell Sultan that the Juror had participated or may have participated in any such conversation. In her testimony, the Source both denied telling Sultan that the Juror was present during that conversation or for that conversation and agreed that she may have told Sultan that the Juror was present during that conversation. She is not sure if she told Sultan that the Juror was present in a position to have heard the conversation. Most likely, the Source told Sultan that the Juror was present during the conversation, intending to create the false impression that the Juror was close to the bar area in a position to have heard what was being said about Hernandez. The Source, in fact, had no idea where the Juror was when the conversation occurred.⁸

The Source told Sultan that the Juror’s spouse may have participated in the conversation and may have been the person opining that Hernandez would beat the first case, but not the second one, but that she was not one hundred percent sure; today she claims not to be sure of the accuracy of

⁷ Sultan’s contemporaneous notes were filed with the Court in connection with the Defendant’s Response to Commonwealth’s Discovery Requests. The defendant did not seek to introduce them as exhibits at the hearing, and Sultan did not testify either to the accuracy of his notes or to what the Source had said to him. In some cases, the notes do not appear to conform to what is stated in the affidavits. For example, the notes for the April 16, 2015 conversation state, with respect to the conversation at issue, “discussion of Boston case in her presence,” not that the Juror had been “present during and/or participated in that discussion.” In his Memorandum of Law in Support of Defendant’s Motion for Further Post-Verdict Inquiry Respecting a Juror’s Exposure to Significant Extraneous Matter and Related Issues, the defendant argues that the Source’s sworn testimony “considered in conjunction with the previously-filed affidavits of Mr. Sultan respecting what [Source] told him back in April” amount to a “colorable showing” that an extrinsic influence may have had an impact upon the jury’s impartiality. To the extent that the defendant is suggesting that the Court, at this stage, should consider the hearsay in Sultan’s affidavits for its truth, the Court rejects that proposition.

⁸ The Source does not recall telling Sultan that if the Source heard what was being said about Hernandez, the Juror must have heard it because the Juror was closer to the speaker than was the Source.

what she told Sultan. The Source did not know who made the statement at issue because she did not recognize any of the participants in that conversation. Had it been the Juror's spouse, she would have recognized the spouse.

During individual voir dire, in response to the Court's questions, the Juror stated that Hernandez's name had never come up in a discussion between the Juror and the Juror's spouse or with any friends and that the Juror had never overheard Hernandez's name being discussed. When asked about conversations with family members, the Juror again stated that Hernandez's name never came up when they talked. The Juror stated yet again that Hernandez's name had never come up in conversations between the Juror and the Juror's spouse. The Juror also stated that the Juror had not heard about or seen anything about any charges or accusations or other cases involving alleged misconduct by Hernandez in Boston, elsewhere in Bristol County, or in any other state. The Juror acknowledged hearing or seeing something about the Bristol case when Hernandez first was arrested and remembered a picture of him being arrested at his home. The Juror stated that nothing the Juror may have seen, heard, or read caused the Juror to form any firm opinion or lasting impression about the case.

I do not find the suggestion that there was pre-impement exposure to extraneous information and that such exposure was not disclosed by the Juror during the voir dire supported by credible evidence. The putative source of such allegations has denied, under oath, that she has any knowledge that the Juror overheard any conversation about the Boston case. Her answers under oath give rise to no reason to believe that the Juror overheard that conversation. The defendant has not made a colorable showing that the Juror was exposed to extraneous matters and did not disclose that knowledge when questioned under oath during the voir dire. I do not find the suggestion that the

Juror expressed a desire to serve on the jury in this case and thus harbored some bias that she did not disclose supported by credible evidence. The putative source of such allegations has denied, under oath, that she has any knowledge that the Juror expressed any such desire. Accordingly, I find that a post-verdict inquiry of the Juror and the Juror's spouse is not warranted.

RULINGS OF LAW

The Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights guarantee a criminal defendant the right to a trial by an impartial jury. Commonwealth v. Semedo, 456 Mass. 1, 22 (2010); Commonwealth v. Murphy, 86 Mass. App. Ct. 118, 121, rev. den., 469 Mass. 1109 (2014). The presence of even one partial juror violates this right. Id. A trial judge has broad discretion in determining whether a post-verdict inquiry of a juror is warranted and is under no duty to conduct such an inquiry unless the defendant makes a colorable showing that extraneous matters may have affected a juror's impartiality. Commonwealth v. Rivera, 464 Mass. 56, 80, cert. den., 469 Mass. 1109 (2013); Semedo, 456 Mass. at 22; Commonwealth v. Guisti, 434 Mass. 245, 251 (2001). The party seeking the inquiry must show more than mere speculation. Rivera, 464 Mass. at 81; Commonwealth v. Lynch, 439 Mass. 532, 545, cert. den., 540 U.S. 1059 (2003); Murphy, 86 Mass. App. Ct. at 122. A request for a post-verdict inquiry of a juror is properly denied where there is no colorable showing that an extrinsic influence may have impacted the jury's impartiality. Lynch, 439 Mass. at 545. The adequacy of the defendant's showing is left to the sound discretion of the trial judge. Id.; Commonwealth v. Dixon, 395 Mass. 149, 152 (1985).

In response to Sultan's affidavit relating that the Source claimed to have knowledge that an impaneled juror may have been exposed to a serious and specific extraneous influence, this Court proceeded cautiously by ordering an examination of the Source under oath in a closed courtroom.

See Commonwealth v. Bresnahan, 462 Mass. 761, 773 n.14 (2012) (where counsel filed affidavit stating that third party friend of defendant gave him telephone number of juror and that juror told him that judge entered jury room during deliberations, judge would have been warranted in requiring one or more of the relevant individuals – the defendant’s friend, the defendant, and/or juror – to testify at preliminary hearing); Guisti, 434 Mass. at 253 (where case is close, judge should exercise discretion in favor of conducting judicial inquiry). Cf. Commonwealth v. Philyaw, 55 Mass. App. Ct. 730, 738 (2002) (judge abused discretion in refusing to conduct evidentiary hearing where co-worker of juror filed affidavit alleging that juror told him about unauthorized view of crime scene). Here, the Source filed no affidavit. Her unwillingness to do so led the Court to allow her to be questioned under oath so that Hernandez would have an opportunity to attempt to establish a colorable claim of extraneous influence on the Juror or bias. Hernandez now asks this Court to direct both the Juror and the Juror’s spouse to appear and testify on the basis that the Source’s testimony “raises the distinct possibility that [Juror] may well have been present and overheard the conversation in question.”

The Court concludes that further judicial inquiry is not warranted. The Court has assessed the demeanor of the Source and determined the weight and credibility of her testimony. See Bresnahan, 462 Mass. at 775. Cf. Commonwealth v. Ciminera, 11 Mass. App. Ct. 101, 107, *aff’d*, 384 Mass. 807 (1981) (when juror gave equivocal responses about whether she had heard about pending charges against defendant before or after verdict was rendered, court deferred to judge’s determination that any knowledge occurred post-verdict and that interests of justice did not require further interviews). Where, as here, an evidentiary hearing produces no credible evidence of an extraneous influence, a judge may decline to act further and may deny the defendant’s motion for

juror inquiry without conducting further hearings. Commonwealth v. Bright, 463 Mass. 421, 444 (2012); Bresnahan, 462 Mass. at 772 n.13.

No credible evidence was adduced at the hearing from the Source that meets the defendant's burden of showing a colorable claim that the Juror overheard a remark about the Boston charges at a party. The possibility advanced by the defendant that, notwithstanding the Juror's specific answer to the contrary under oath during the voir dire, the Juror did know about the Boston case is no more than mere speculation. The Source credibly testified that she has no idea where the Juror was during the conversation. While under oath, the Source did not adopt statements in Sultan's affidavits that prompted the evidentiary hearing, and her testimony revealed that she had a motive to be untruthful when speaking with Sultan. Following the hearing, there is no potent factual basis for suspecting that the Juror was subjected to extraneous influences. Cf. Ciminera, 11 Mass. App. Ct. at 109.

The "possibility" of exposure by the Juror to extraneous influence is insufficient to warrant examination of the Juror and the Juror's spouse given the policy considerations disfavoring the impeachment of jury verdicts. See id. The possibility has not been shown to be either reasonable or likely. Given the massive pre-trial publicity surrounding this case and the likely attendance of most of the jurors in the venire at holiday parties in the weeks preceding impanelment, there is a "possibility" that most, if not all, of the jurors brought in for jury selection had been in settings where they might have heard Hernandez's name being mentioned. That was the reason that questions were asked during the voir dire exploring whether such possibility had been a reality.

During individual voir dire, the Juror specifically was asked whether Hernandez's name had ever come up in a discussion between the Juror and the Juror's spouse or with any friends and whether the Juror had ever overheard Hernandez's name being discussed in any setting. The Juror

responded that the Juror had never spoken to the Juror's spouse about Hernandez. His name never came up when they talked, and the Juror had not heard or seen anything about any charges or accusations or other cases involving alleged misconduct by Hernandez in Boston or elsewhere. There has been no colorable showing that the Juror was untruthful in these answers under oath during individual voir dire.

Nor is there any credible evidence that the Juror ever expressed a desire to serve on the jury in this case and thus harbored some bias which the Juror failed to disclose. The defendant has not met his burden of making a reasonable claim of juror bias to warrant a post-verdict inquiry of the Juror. See Murphy, 86 Mass. App. Ct. at 125. There has been no colorable showing that the Juror failed honestly to answer a material question on voir dire and that a correct response would have provided a valid basis for a challenge for cause. See Commonwealth v. Emerson, 430 Mass. 378, 384 (1999); Cf. Sampson v. United States, 724 F.3d 150, 168-170 (1st Cir. 2013) (affirming trial court's reversal of death penalty sentence because evidentiary hearing revealed that impaneled juror repeatedly lied during voir dire about painful life experiences that prevented her from being impartial).

This Court declines to exercise its discretion to order the examination of the Juror or the Juror's spouse because the questioning of the Source under oath resulted in no colorable showing that extrinsic matters may have affected the Juror's impartiality or that the Juror harbored an undisclosed bias. Cf. Commonwealth v. Cuffie, 414 Mass. 632, 636 (1993) (error not to interview juror where judge had significant or considerable indication that extraneous matter – an unauthorized visit to crime scene – had infected deliberations). This Court concludes that the interests of justice do not require any further inquiry into this matter.

ORDER

For the foregoing reasons, it is **ORDERED** that the defendant's Motion for Further Post-Verdict Inquiry Respecting a Juror's Exposure to Significant Extraneous Matters and Related Issues be and hereby is **DENIED**.



E. Susan Garsh
Justice of the Superior Court

DATED: January 8, 2016