COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE ss.
(CAREY, J.)

SJC No. FAR-28910
AC No. 2021-P-0348

COMMONWEALTH

v.

ARTHUR E. SALSBURY JR.

APPLICATION FOR FURTHER APPELLATE REVIEW

ATTORNEY FOR THE DEFENDANT

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JULY 2022

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GLOSSARY

The following abbreviations are used throughout this brief:

The appendix filed with the Appeals Court . . . . . A.page

The trial transcript . . . . . Tr.volume:page

This brief, including the Addenda . . . . . Br.page

REQUEST FOR FURTHER APPELLATE REVIEW

Now comes the Appellant/Defendant, Arthur E. Salsbury, Jr., and respectfully requests that this Honorable Court grant him further appellate review of the decision of the Appeals Court No. 2021-P-0348, affirming the judgment entered in the Hampshire Superior Court, docket number 1880CR00036.

STATEMENT OF PRIOR PROCEEDINGS

On May 15, 2018, a Hampshire County grand jury returned an eleven count indictment charging the defendant, Arthur E. Salsbury, Jr., with aggravated rape in violation of G.L. c. 265, § 22(a) (four counts), assault with a dangerous weapon in violation of G.L. c. 265, § 15B(b) (two counts); kidnapping in violation of G.L. c. 265, § 26 (one count), unarmed robbery in violation of G.L. c. 265, § 19(b) (one count), assault and battery in violation of G.L. c. 265, § 13 (one count), and rape in violation of G.L. c. 265, § 22(b) (two counts) (A.3-5,23-33). The charges represented separate incidents involving AT, MD, SB and JH (A.23-33).

On March 25, 2019, in response to competing motions for severance and joinder filed by Salsbury and the Commonwealth respectively, the judge ordered counts 1-3 (two counts of aggravated rape and one count of assault with a dangerous weapon against AT) severed from the other indictments for trial (A.11). The trial of these three counts is addressed in this appeal.

On January 13, 2020, trial began on counts 1-3, Richard J. Carey, presiding

(A.19). As this case involved the trial of a life felony, each side had 14 peremptory challenges (Tr.1:12). The Commonwealth used seven peremptory challenges and Salsbury used six during the first day of jury selection (Tr.1:108-109). Seven jurors were seated on the first day of jury selection (Tr.1:110).

Empanelment continued on the second day of trial with a new *venire*. During attorney conducted *voir dire*, the Commonwealth asked a question as to how common the potential jurors believed that false accusations of rape happened (Tr.2:96). Juror 45 stated "I suppose it could happen, but I believe that it very, very, very rarely happens." Several other potential jurors agreed with that statement (Tr.2:97).

Salsbury revisited this topic by asking all potential jurors to raise their cards if they agreed with the statement that, "although false accusations of sexual assault happen, it's rare or infrequent" (Tr.2:103). Several jurors raised their cards to indicate that they agreed with that statement. After exploring that topic a bit further, Salsbury asked:

> Who believes, raise your card if you believe that if somebody comes forward and, quote, puts themselves through the process of indicating a sexual assault occurred, who believes that they must be telling the truth? Does anybody believe that they must be telling the truth of they come forward? ... Would anyone else agree with that, that it's very likely?

(Tr.2:105). Several jurors indicated their agreement with that statement. In all, 13

jurors, Jurors 6, 7, 11, 13, 17, 19, 22, 23, 25, 29, 34, 51 and 57, answered yes to both questions: false accusations in sexual assault cases rarely happen and that if someone comes forward to put themselves through a trial they are very likely telling the truth (Tr.2:119).

Salsbury challenged all potential jurors who answered yes to both questions for cause or, in the alternative, asked for further *voir dire* to determine whether, despite those opinions, they could be impartial (Tr.2:113-114). While the Commonwealth opposed simply striking all those jurors, it did agree that further questioning was necessary, stating:

> Your Honor, I would just say that I would agree that further inquiry would be necessary but to strike all of them, I think we need more information from those potential jurors.

(Tr.114-115).

The judge denied the request, stating, "I think jurors are not disqualified by virtue of having opinions such as the ones that have been expressed." The judge did strike Juror 17 for cause for having stated that they believe that a person who comes forward and goes through trial must be telling the truth (Tr.2:115). However, the judge neither struck for cause nor conducted any further inquiry into the other 12 jurors who had indicated that they shared a very similar opinion. Salsbury objected to the judge's ruling as to Jurors 6, 7, 11, 13, 19, 22, 23, 25, 29, 34, 51, and 57 (Tr.118-119).

Of the 12 jurors that the judge refused to remove on Salsbury's motion to strike for cause, four of them ended up on the jury (Jurors 7, 19, 23 and 29), and all four of those jurors were involved in deliberations (A.35; Tr.2:121; 4:189). As for the others, the Commonwealth used a peremptory challenge on Juror 13 (Tr.2:111), and Salsbury removed seven with peremptory challenges. Salsbury, who had eight peremptory challenges remaining at the start of the second day of empanelment, used a peremptory challenge on Juror 45 who had indicated that "I mean, I suppose [false accusations] could happen, but I believe that it very, very, very rarely happens." (Tr.2:97,119). Salsbury used his remaining seven peremptory challenges on jurors that he had challenged for cause, challenging Jurors 6, 11, 22, 25, 34, 51, and 57 (Tr.2:119). Salsbury did not have enough peremptory challenges to remove all the partial jurors from the panel. Had the judge allowed more of Salsbury's challenges for cause, he would have used any remaining peremptory challenges to remove the partial jurors who ended up on the panel (Tr.2:120; 3:4).

At the conclusion of the trial, the jury returned verdicts of not guilty on the two counts of aggravate rape and the lone count of assault with a dangerous weapon, but guilty of the lesser included charge of rape (Tr.5:17-19). Salsbury was sentenced to concurrent terms of 9½ to 13 years on each count of rape, to run concurrent with each other, but consecutive to the sentence previously imposed on

count 5 at a separate trial (Tr.6:11-12).

Salsbury timely appealed (A.21,34). On June 1, 2022, the Appeals Court issued a full opinion affirming the convictions. Commonwealth v. Salsbury, 101 Mass. App. Ct. 102 (2022)(Br.22). No party has filed for rehearing with the Appeals Court.

STATEMENT OF THE FACTS

Fall of 2009 was not a happy time for AT. She had been consuming as many drugs as she could for weeks or possibly a whole month. AT had not slept for days (Tr.3:38,62). AT had resorted to prostitution, or walking the streets as she called it, to get money for drugs (Tr.3:39). AT was addicted to both crack and heroin at this time, and was actively using (Tr.3:62). Both heroin and crack cause confusion (Tr.3:68).

On the night of October 3, 2009, AT told her boyfriend at around midnight that she needed to buy some ketchup (Tr.3:36-37; 4:119). AT borrowed $20 from her boyfriend and left their apartment in Holyoke (Tr.3:35,63). AT did not buy ketchup (Tr.3:64). Having walked only 4 or 5 blocks from her apartment (Tr.3:63), AT bought and consumed either crack or heroin (Tr.3:65; 4:120). Now high, AT was standing in the rain, afraid to go home because she had lied to her boyfriend (Tr.3:70-72).

AT saw a man she thought she recognized in a vehicle and waved him over

to ask for ride to her mother's home in Chicopee (Tr.3:35,74,77-78; 4:121). AT was a prostitute at the time, but she claimed that she was not looking for a date that evening (Tr.3:39-40). The driver agreed to give AT a ride, and AT got in the vehicle, which drove off (Tr.3:42). AT claimed to have told the driver a few times that she was not looking for a date (Tr.3:40-42). As the vehicle crossed the Willimantic Bridge, AT fell asleep or passed out (Tr.3:43,80).

AT testified that she woke up to the sensation of the car driving off road (Tr.3:43-44). AT testified that the man stopped the car in a woodsy area, took out a knife, and told AT to take off her clothes (Tr.3:44,46-47,62). AT took off one boot and pulled one pant leg off (Tr.3:48,82). The man then raped her orally and vaginally (Tr.3:48-50). The man did not wear a condom and he ejaculated (Tr.3:51-52). When he was finished, he used his foot to kick her out of the vehicle into the mud on a rainy night (Tr.3:52-53). AT crawled around on the ground for a bit (Tr.3:83).

AT did not know where she was and had difficulty seeing in the dark (Tr.3:33,54). She wandered around for a little bit and knocked at four homes before someone answered (Tr.3:54-55). She happened to knock on the door of William Menard, an Amherst police officer, whose wife contacted the local police (Tr.3:57,92,96).

The police responded to Menard's home and while talking with AT, they

decided to take her to the Granby police station (Tr.3:10,58). From the police station, AT was taken to the hospital for examination and DNA samples were taken (Tr.3:58-59; 4:40-43). No injuries were noticed during the examination (Tr.4:37). AT told the examining nurse that she was "totally wasted" (Tr.3:67).

AT's testimony was substantially impeached at trial and the jury did not fully credit her testimony as it found Salsbury not guilty of assault with a dangerous weapon and of the greater charges of aggravated rape. By her own admission, AT was actively using heroin or crack around that time and had used either crack cocaine or heroin very shortly before entering the vehicle (Tr.3:36-37,62-63). These drugs cause confusion and cause her to make bad decisions (Tr.3:68-69). AT was exhausted from having been awake so long due to her drug use (Tr.3:36). AT had been doing as many drugs as she was able to for a period of weeks or months leading up to the incident (Tr.3:38,62). AT had a needle on her when brought to the police station (Tr.3:11-12).

Contrary to AT's story of being thrown out of the vehicle and crawling around for a bit, Menard described AT as having her hair up in a pony tail and that her clothes were not disheveled (Tr.3:104). Menard also described AT's pants as being neatly tucked into the top of her boots and said that there was nothing else noteworthy about her appearance (Tr.3:105). Officer James White described AT as exhibiting the signs of being under the influence of heroin (Tr.3:24). Officer

White had told other officers that night that AT appeared to be under the influence of drugs (Tr.3:26; 4:118). AT told the police that she had used heroin that night (Tr.3:34).

AT was unable to identify the assailant. Years later, the police investigation focused on Salsbury and Salsbury provided a DNA sample (Tr.4:62-63). DNA testing identified Salsbury as the source of the DNA samples taken from AT after the incident (Tr.4:95). Of course, the DNA technician was not able to say whether the DNA sample had been forcefully or consensually deposited (Tr.4:104).

The Appeals Court, in its recitation of the facts, indicated that AT was raped "repeatedly at knifepoint." (Br.22). This is contradicted by the jury verdicts which acquitted Salsbury of both assault with a dangerous weapon and aggravated rape. The jury did not credit AT's testimony that she was raped at knifepoint.

POINT FOR WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether Salsbury's rights to a fair trial under the United States Constitution and the Massachusetts Declaration of Rights were violated where the Appeals Court approved the seating of several jurors who had indicated that they were biased during *voir dire*.

REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

I. Salsbury's rights to a fair trial were violated where the judge wrongfully refused to excuse potential jurors whose answers during attorney led *voir dire* revealed that they were not impartial, where Salsbury did not have sufficient peremptory challenges to remove all the partial jurors, and where the Appeals Court failed to correct the error on appeal.

A defendant is entitled to an impartial jury under the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights. *Commonwealth v. Vann Long*, 419 Mass. 798, 802 (1995); *Commonwealth v. Susi*, 394 Mass. 784, 786 (1985); *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). In the instant case, Salsbury's rights to an impartial jury were violated because partial jurors were seated and because the judge's failure to rule correctly on Salsbury's motion to strike certain jurors resulted in the diminution of his peremptory challenges. As for the first argument, discussed in Argument I A *ante*, Salsbury is entitled to a new trial if any of Jurors 7, 19, 23 or 29 should have been struck on Salsbury's motion, as the judge's erroneous ruling resulted in on or more biased jurors being seated on the jury. As for the second argument, discussed in Argument I B *ante*, Salsbury is entitled to a new trial if the judge erred in denying Salsbury's motion to strike for cause as of Jurors 6, 11, 22, 25, 34, 51, or 57, as the erroneous denial of Salsbury's motion resulted in a diminution of his

peremptory challenges and he was forced to accept a juror he would have removed, but for the judge's error.

Although the Appeals Court correctly interpreted Salsbury's arguments, it disagreed with the outcome. In so doing, the Appeals Court decided that agreeing that false accusations were rare and further that an alleged victim was very likely telling the truth if they testified did not render a potential juror biased (Br.24). That decision is contrary to the controlling law and further review is necessary to correct this decision. It is not in the interests of justice to allow jurors to sit on a jury when they believe it is unlikely that the complaining witness has made a false accusation and further that they are likely the believe the complaining witness simply because she chose to testify.

A. Salsbury's rights to an impartial jury were violated because several partial jurors were seated in this case.

The denial of the right to a fair and impartial jury because a juror is biased is structural error, and reversal is required without a showing of prejudice. *Commonwealth v. Hampton*, 457 Mass. 152, 163 (2010); *Washington v. Recuenco*, 548 U.S. 212, 218-219 & n.2 (2006). In order to show that a jury was not impartial because a juror was biased, the defendant must show actual or implied bias. *Hampton*, 457 Mass. at 163. The presence of even a single juror who is not impartial violates the right to trial by an impartial jury. *Long*, 419 Mass. at 802,

citing Ross v. Oklahoma, 487 U.S. 81, 85-86 (1988).

Four seated jurors in this case – Jurors 7, 19, 23 and 29 – stated during attorney-led *voir dire* that they believed that false reports of sexual abuse were rare or infrequent and further that an individual who comes forward and goes through a trial is very likely telling the truth (Tr.2:118-119; A.35). All four of these jurors were deliberating jurors (A.35; Tr.2:121; 4:189). Each of these jurors demonstrated actual bias by stating that a sexual assault complainant will only rarely or infrequently make a false accusation and further that a complainant who has come forward and put themselves through a trial is very likely telling the truth (Tr.2:103,105). *Laguer*, 410 Mass. at 98-99.

A juror who believes that a complaining witness who comes forward and puts herself through trial is very likely telling the truth is expressing a bias in favor of that witness because of circumstances that are not objectively related to truthfulness. Similarly, a juror who believes that false accusations of rape happen only rarely or infrequently is expressing a categorical belief on a point – whether an accusation is true or false – that necessarily has to be decided on a case-by-case basis. This belief undermines the purpose of having a trial. It is a straightforward expression of bias that is directly relevant to the case. In combination, four of the deliberating jurors indicated a strong belief that Salsbury was guilty before the first

witness was even called.

The statements at issue in this case are similar to other instances where jurors were found to be partial. *See Long*, 419 Mass. at 804 & n.6; *Commonwealth v. Clark*, 446 Mass. 620, 628-630 2006; *Commonwealth v. Somers*, 44 Mass. App. Ct. 920, 921-922 (1998).

Herein, the challenged jurors all made similar assertions of bias in favor of alleged sexual assault victims. The jurors had thus indicated that they were likely to reject Salsbury's defense: that this was a date gone wrong that ended up with AT making a false allegation of rape. Eventually, the jurors disbelieved nearly everything that AT said, except for the rape. The jurors had obvious concerns about AT's truthfulness and the pre-existing biases in her favor likely swayed the verdict to guilty on rape despite the jurors disbelieving the majority of her testimony and returning not guilty verdicts on other charges.

The showing of actual bias in favor of the complaining witness was not dispelled by further questioning. Despite the Commonwealth agreeing with Salsbury that further inquiry of the challenged jurors was necessary, the judge conducted no further *voir dire* (Tr.2:114-115). This was also error.

If there is reason to suspect that a juror or jurors are not or may not be indifferent, the judge must inquire fully before declaring jurors indifferent and

allowing them to be seated. *Commonwealth v. Rios*, 96 Mass. App. Ct. 463, 468 (2019). The judge has a duty to conduct a meaningful inquiry into the juror's impartiality in an effort to promote the intelligent exercise of peremptory challenges, especially when a juror's statements call their impartiality into question. *Commonwealth v. Fudge*, 20 Mass. App. Ct. 382, 388 (1985). A judge must be zealous to protect the rights of an accused when conducting *voir dire*. *Clark*, 446 Mass. at 630. Contrary to the Appeals Court decision (Br.25), further questioning would not merely have been preferable, it was required.

In the instant case, there was no inquiry by the judge into the serious problems that were uncovered during attorney-led *voir dire*. *Commonwealth v. Colton*, 477 Mass. 1, 17 (2017). The judge abused his discretion by not, at a minimum, inquiring further of the jurors who expressed clear bias in favor of the complaining witness.

The error in this case was structural. Four of the deliberating jurors stated that they were biased in favor of AT. As Salsbury argued below, his defense was "already hamstrung before the first, you know, word comes out of any witness's mouth" (Tr.2:114). Because those jurors were biased, seating those jurors resulted in structural error, requiring reversal without a showing of prejudice. *Hampton*, 457 Mass. at 163; *Recuenco*, 548 U.S. at 218-219 & n.2.

Because biased jurors were seated on Salsbury's jury, he was denied his rights under the Sixth and Fourteenth Amendments and under Article 12 of the Massachusetts Declaration of Rights to a trial by a fair and impartial jury. *Hampton*, 457 Mass. at 163; *Recuenco*, 548 U.S. at 218-219 & n.2; *Gomez v. U.S.*, 490 U.S. 858, 876 (1989). This Court should grant further review of this claim.

B. Salsbury's rights to a fail trial were violated as the erroneous denial of his motion to strike jurors for cause resulted in the diminution of his peremptory challenges.

"[T]he erroneous denial of the right to exercise a proper peremptory challenge is reversible error without a showing of prejudice." *Somers*, 44 Mass. App. Ct. at 922. Stated differently:

> prejudice generally is shown by the use of a peremptory challenge to remove the juror who allegedly should have been excused for cause together with evidence that the defendant later was forced to accept a juror he would have challenged peremptorily but was unable to because her peremptory challenges has been exhausted.

Commonwealth v. McCoy, 456 Mass. 838, 842 (2010); *Commonwealth v. Nelson*, 91 Mass. App. Ct. 645, 647 (2017); *Commonwealth v. Seng*, 456 Mass. 490, 496 (2010).

During attorney-led *voir dire* on the second day of jury selection, it became apparent that several potential jurors believed that false accusations were not common and that if a complaining witness put herself through trial she was likely

telling the truth. Salsbury then moved to strike the 11 jurors – Jurors 6, 7, 11, 19, 22, 23, 25, 29, 34, 51 and 57 – who indicated that they shared those biases or, in the alternative, conduct further inquiry of those jurors (Tr.2:113-114). The Commonwealth agreed that further inquiry was needed, but the judge denied Salsbury's motion, stating, "I think jurors are not disqualified by virtue of having opinions such as the ones that have been expressed" (Tr.2:114-115).

Those statements represent statements of partiality which must be addressed by the judge. *Commonwealth v. August*, 414 Mass. 51, 57 (1992). If there is reason to suspect that a juror or jurors are not or may not be indifferent, the judge must inquire fully before declaring the jurors indifferent and allowing them to be seated. *Rios*, 96 Mass. App. Ct. at 468. The judge erred in neither excusing the challenged jurors for cause nor inquiring further. The Appeals Court resolved this claim simply by stating that the jurors had previously stated that they could be impartial (Br.24-25).

The jurors responses to Salsbury's questions amounted to expressions of uncertainty of impartiality or expressions of partiality, each of which required the judge to excuse the jurors or inquire further of them. *Nelson*, 91 Mass. App. Ct. at 649 & n.8. It is an abuse of discretion to seat a juror who will not state unequivocally that he or she will be impartial. *Colton*, 477 Mass. at 17; *Somers*, 44

Mass. App. Ct. at 921-922. Even a firm declaration of impartiality is not enough when there remains reason to doubt that declaration. *Clark*, 446 Mass. at 628-630.

The judge erred by neither excusing the challenged jurors for cause nor inquiring further into their ability to be impartial. When the judge erroneously refused to excuse the eleven jurors for cause or inquire of them further, Salsbury was forced to use his remaining peremptory challenges to strike as many as these partial jurors as he could (Tr.119-120). Salsbury indicated that he would have used peremptory challenges to strike the remaining jurors that he had challenged for cause – Jurors 7, 19, 23 and 29 – if he had sufficient peremptory challenges (Tr.2:120; 3:4).

Where the judge wrongly denied the challenges for cause, Salsbury was wrongly deprived of one or more of his peremptory challenges, thus interfering with a fundamental procedure of our criminal justice system *Batson v. Kentucky*, 476 U.S. 79, 112 (1986). Reversal is required.

The attorney-led *voir dire* had demonstrated that Jurors 7, 19, 23 and 29 had all prejudged the case. However, with no peremptory challenges left due to the judge's failure to strike or inquire further of seven additional partial jurors, Salsbury was forced to accept these jurors. The standard for reversal has been met as he was forced to accept a juror he would have otherwise challenged, but for the

judge rejecting valid challenges for cause. *Nelson*, 91 Mass. App. Ct. at 647. Since the verdict was the result of a partial jury, the verdict cannot stand.

It is in the public interest to have only unbiased jurors serving on juries. The ruling of the Appeals Court approved the seating of biased jurors and this Court should grant further review to correct this mistake.

CONCLUSION

For the above-stated reasons, this request is founded upon substantial reasons affecting the public interest and it is in the interest of justice that this Court allow Saslbury's request for further appellate review.

ARTHUR E. SALSBURY JR.
By his attorney,

/s/ Alan D. Campbell

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Dated: July 21, 2022

ADDENDUM - TABLE OF CONTENTS

Commonwealth v. Salsbury

Appeals Court of Massachusetts

February 11, 2022, Argued; May 31, 2022, Decided

No. 21-P-348.

Reporter
101 Mass. App. Ct. 102 *; 2022 Mass. App. LEXIS 44 **; 2022 WL 1743634

COMMONWEALTH *vs*. **ARTHUR** E. **SALSBURY, JR.**

Prior History: [1]** Hampshire. INDICTMENTS found and returned in the Superior Court Department on May 15, 2018.

The cases were tried before *Richard J. Carey*, J.

Disposition: Judgments affirmed.

Counsel: *Alan D. Campbell* for the defendant.

Thomas H. Townsend, Assistant District Attorney, for the Commonwealth.

Judges: Present: WOLOHOJIAN, HENRY, & ENGLANDER, JJ.

Opinion by: ENGLANDER

Opinion

ENGLANDER, J. This case raises issues regarding the handling of attorney-conducted juror voir dire in a sexual assault case. The defendant was convicted by a jury in January of 2020 of two counts of rape; the convictions were based upon a sexual assault that had occurred in 2009. During the attorney-conducted voir dire, counsel asked the prospective jurors two questions relevant to this appeal: (1) did they "agree[ ] with the proposition that although false accusations of sexual assault happen, it's rare or infrequent," and (2) did they "believe that if somebody comes forward and … puts themselves through the process of indicating a sexual assault occurred," that it is "very likely" they are "telling the truth." Several members of the venire indicated their agreement with both propositions; over defense counsel's objection, four such members of the venire **[**2]** were seated on the jury.

[*103] The defendant contends on appeal that his convictions must be vacated because by agreeing with both propositions, each of the four jurors demonstrated a bias that was inconsistent with considering and deciding the defendant's case fairly and impartially. For the reasons discussed below, we disagree. The questions at issue were abstract, and posed in terms of probabilities, not absolutes. Our cases recognize that "[e]very prospective juror comes with his or her own thoughts, feelings, opinions, beliefs, and experiences that may, or may not, affect how he or she 'looks' at a case." *Commonwealth v. Williams, 481 Mass. 443, 450-451, 116 N.E.3d 609 (2019)*. Having the opinions or beliefs at issue here does not in itself demonstrate bias as to judging the facts of a particular case. In this case, the judge's determination that the jurors' answers during voir dire did not demonstrate a partiality or bias was within his discretion. We accordingly affirm.

Background. In October 2009, the victim was offered a ride by a man whom she did not know, which she accepted. The victim fell asleep in the car and woke up when it stopped in the woods. The man raped her repeatedly at knifepoint, before shoving her out of the vehicle. The victim fled to **[**3]** a nearby home and immediately reported what had occurred. Many years later, the defendant was identified as the victim's assailant, when his deoxyribonucleic (DNA) matched the DNA of semen found on the victim.

In January of 2020, jury empanelment began for the defendant's trial for two counts of aggravated rape and one count of assault by means of a dangerous weapon. Fourteen jurors were to be chosen, and the Commonwealth and the defendant each were allotted fourteen peremptory challenges. See *Mass. R. Crim. P. 20 (c)*, 378 Mass. 889 (1979). Seven jurors were seated on the first day of selection, after the Commonwealth used seven preemptory challenges, and the defendant used six.

The matters at issue arose on the second day of jury selection. At the beginning of that day (with a new venire), the judge briefly described the allegations against the defendant, reminded the potential jurors that the defendant was innocent until proven guilty, and instructed them regarding the government's burden of proof. Prior to commencing the voir dire, the judge framed "[t]he question" as "whether notwithstanding [the] seriousness of the charges, you can fulfill your responsibility of being a fair and impartial juror to

decide **[**4]** the case based solely upon the evidence presented in this courtroom and the Court's instructions on the law." The judge then spoke to each potential juror individually **[*104]** and asked several questions, including: (1) whether the potential juror or any member of his or her family had "been accused of, a witness to, or a victim of" sexual assault; and (2) whether "anything about the nature of the charges" would make the potential juror "unable to sit as a fair and impartial juror." Each of the four jurors at issue answered "no" to these questions.

Following the judge's questioning, the attorneys conducted a further voir dire, asking questions to the venire as a whole. The Commonwealth's first question was "how common do you think it is for someone to falsely accuse another of a sexual assault?" Several jurors indicated that they thought false accusations of sexual assault were rare — juror no. 7 (a juror at issue here) agreed that false accusations occurred "very, very, very rarely" and juror no. 29 (another juror at issue here) indicated that false accusations were "not particularly common but I'm sure it happens."

The defendant then followed up on the Commonwealth's questioning and asked **[**5]** the potential jurors to raise their cards if they "agree[d] with the proposition that although false accusations of sexual assault happen, it's rare or infrequent." After reviewing the raised cards, the defendant then asked, "[I]f somebody comes forward and, quote, puts themselves through the process of indicating a sexual assault occurred, who believes that they must be telling the truth?" Juror no. 17 indicated that he agreed with that proposition, while other unidentified jurors indicated that such a witness would be "very likely" to be telling the truth. Defense counsel then asked the potential jurors whether they agreed that "it's very likely." Jurors responded nonverbally by raising their cards in response to this question.

The defendant moved to strike for cause the thirteen potential jurors who indicated that they believed both (1) that false accusations were rare, and (2) that if a witness comes forward with a sexual assault allegation, the witness is very likely telling the truth. As an alternative to striking the jurors immediately, the defendant requested additional voir dire. The Commonwealth agreed that further inquiry was appropriate.

The judge denied the defendant's motion, **[**6]** and stated that "jurors are not disqualified by virtue of having opinions such as the ones that have been expressed." The judge excused juror no. 17, however, because juror no. 17 had expressed that "a person … must be telling the truth as opposed to qualifying it." The defendant noted his objection to the remaining twelve potential **[*105]** jurors subject to his motion, and then used his remaining peremptory challenges to strike seven of the twelve potential jurors to whom he had objected.[1]

Ultimately, four of the fourteen jurors empanelled for the defendant's trial had been the subject of the defendant's motion to strike for cause. After trial, the jury found the defendant guilty of two counts of the lesser included charge of rape, and not guilty of assault by means of a dangerous weapon. This appeal followed.

Discussion. Both the Federal and Massachusetts Constitutions require that each juror be "impartial as to the persons involved and unprejudiced and uncommitted as to the defendant['s] guilt or past misconduct" (citation omitted). *Williams, 481 Mass. at 447*. The Supreme Judicial Court in *Williams* described the process and standard for determining juror bias as follows:

> "[I]f it appears that a juror might not stand indifferent, **[**7]** the judge must hold an individual voir dire, the scope of which is within the judge's sound discretion. See *Commonwealth v. Flebotte, 417 Mass. 348, 355, 630 N.E.2d 265 (1994)*. Concluding whether a prospective juror stands indifferent also is within the judge's discretion. *Commonwealth v. Ruell, 459 Mass. 126, 136, 943 N.E.2d 447*, cert. denied, *565 U.S. 841, 132 S. Ct. 153, 181 L. Ed. 2d 69 (2011)*. However, this discretion is not unfettered; the judge's conclusion must be supported by a voir dire that sufficiently uncovers whether the prospective juror can fairly evaluate the evidence and follow the law."

Id.[2]

On appeal, we review the judge's decision to reject a for-cause

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[1] The defendant used his last peremptory challenge to strike a juror who was not subject to his motion to strike for cause.

[2] The *Williams* court also quoted *G. L. c. 234A, § 67A*, which permits the court or the parties to examine potential jurors to determine whether they are "sensible of any bias or prejudice." *481 Mass. at 447*. That statute states in pertinent part:

> "To determine whether a juror stands indifferent in the case, if it appears that … the juror may not stand indifferent, the court shall, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may cause a decision to be made in whole or in part upon issues extraneous to the issues in the case."

G. L. c. 234A, § 67A.

challenge for abuse of discretion. See *Ruell, 459 Mass. at 136*. **[*106]** The judge's discretion in this area is "entitled to great deference," because it is the trial judge who observed and spoke with the prospective juror. *Williams, 481 Mass. at 462* (Gants, C.J., concurring). Indeed, "[t]here **[**8]** are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empanelling of a jury" (citation omitted). *Commonwealth v. Lattimore, 396 Mass. 446, 449, 486 N.E.2d 723 (1985)*.

With these principles in mind, we turn to the voir dire record of the four jurors at issue. The defendant urges that by agreeing to the two propositions at issue, each juror revealed a bias that rendered them incapable of impartiality in a sexual assault case. We do not agree. The questions themselves were not tied to any facts that corresponded to the defendant's case; rather, they were abstract questions of probabilities. The jurors were asked whether they thought false accusations were "rare," and whether a victim who comes forward was "very likely" telling the truth. By answering in the affirmative, that they believed false accusations were "rare," the jurors did not indicate how they would decide a case before them, and they plainly did not rule out a conclusion that particular allegations, once heard, were not true. The same is the case with the notion that a victim's truthfulness was "very likely"; it is an opinion of probability, based upon life experience; **[**9]** it is not a viewpoint on concrete facts.[3]

The cases the defendant relies upon do not require a different result. In *Commonwealth v. Long, 419 Mass. 798, 803-804, 647 N.E.2d 1162 (1995)*, a juror expressed doubt about his own impartiality be- **[*107]** cause the defendant was Cambodian, and the juror would not unequivocally state that he could consider the case impartially. In *Commonwealth v. Somers, 44 Mass. App. Ct. 920, 921, 691 N.E.2d 225 (1998)*, a juror said that he did not know whether he could be impartial due, in part, to his views on gun control. Here, all four jurors stated unequivocally that they could be impartial. Finally, in *Commonwealth v. Clark, 446 Mass. 620, 628-629, 846 N.E.2d 765 (2006)*, a juror stated that she believed African-Americans were more likely to commit crimes, but explained further that "it would depend on the person's circumstances," and said that she could be impartial. The juror was not excused for cause. See *id. at 629*. The *Clark* court's conclusion that the verdicts must be set aside because the record was not sufficient to determine the juror's impartiality was specifically tied to the juror's expression of racial stereotyping. See *id. at 630*. The questioning here did not involve such characteristics of a witness or defendant.

We are bolstered in our view by the recognition, in the case law, that all jurors come to the court room with opinions based upon life experience. Indeed, **[**10]** they are expected to do so: "It would neither be possible nor desirable to select a jury whose members did not bring their life experiences to the court room and to the jury deliberation room." *Williams, 481 Mass. at 451*. A system of picking jurors must allow for such a variance in views, and not unnecessarily label such abstract views as disqualifying "bias." Rather, the question in every case is whether the juror can impartially view the evidence and find the facts in accordance with the judge's instructions. See *Commonwealth v. Bryant, 447 Mass. 494, 501, 852 N.E.2d 1072 (2006)* Such impartiality is of course achievable despite abstract views about the likelihood, divorced from context, that a person alleging sexual assault is telling the truth.

In choosing jurors we accordingly leave it largely to the judge, who has questioned the jurors and seen them firsthand, to evaluate the impartiality of particular jurors. See *Commonwealth v. Colon, 482 Mass. 162, 168, 121 N.E.3d 1157 (2019)*. Here, the defendant argues, as a fallback position, that the judge failed to ask enough questions to be able to reach his conclusion. In particular, the defendant contends that the judge should have further questioned the twelve jurors challenged for cause.

We are not persuaded that the judge committed reversible error here. As indicated, the judge questioned **[**11]** each of the four jurors individually, and he did so after emphasizing that the charges were allegations only, and that the defendant was presumed inno- **[*108]** cent until proven guilty by the Commonwealth. The judge thus had already probed whether the jurors' views of sexual assault allegations affected their ability to be impartial, and he was satisfied as to their

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[3] We note, in addition, that the questions themselves incorrectly implied that they could be, and perhaps should be, answered "yes" or "no." Yet, *either* a "yes" or "no" answer could have been challenged as showing a bias. For example, the jurors at issue agreed that false sexual assault allegations were "rare," and they have been challenged as biased by the defendant. Had these jurors answered that they believed false allegations were not rare, they could have been similarly challenged as having a bias against the victim's testimony. A potential juror could only avoid this issue by qualifying his or her answer, which the juror may well not have felt comfortable doing under the circumstances.

The propriety of the questions has not been raised before us. The process for attorney-conducted voir dire is addressed by statute and by court rule. See, e.g., *G. L. c. 234A, § 67D*; *Rule 6(3) of the Rules of the Superior Court* (2017). The trial judge has discretion to manage the process and the content of attorney voir dire, including by requiring attorneys to disclose proposed questions to the judge in advance. See *Commonwealth v. Dabney, 478 Mass. 839, 848, 90 N.E.3d 750*, cert. denied, ***139 S. Ct. 127, 202 L. Ed. 2d 78 (2018)***.

impartiality. He also viewed the jurors when they answered the questions put to them by the lawyers. It bears repeating that the answers the defendant challenges, on their face, indicate an open mind as to what the jurors might conclude in any particular case. Moreover, the opinions are far from extraordinary or unusual; for example, the Supreme Judicial Court itself has recognized studies showing that false accusations of sexual assault are rare. See *Commonwealth v. King, 445 Mass. 217, 239 n.20, 834 N.E.2d 1175 (2005)*, cert. denied, *546 U.S. 1216, 126 S. Ct. 1433, 164 L. Ed. 2d 136 (2006)*, citing United States Department of Justice, First Response to Victims of Crime 2001, at 10 (2001).

The judge of course could have — and it would have been preferable — followed up with the jurors challenged for cause, advised them (again) that the testimony of every witness must be examined without bias, and asked each of them whether in light of their views they could **[**12]** decide the case impartially, in accordance with the judge's instructions. However, as this court stated in *Commonwealth v. Nelson, 91 Mass. App. Ct. 645, 650, 79 N.E.3d 440 (2017)*, "although further questioning would have been preferable, we conclude that the judge did not abuse [his] 'large degree of discretion[ ]' … in finding that [the jurors] could be fair and impartial." In short, the judge did not abuse his discretion in concluding that the jurors were indifferent, and the jurors' answers to the attorney-directed voir dire questions do not require reversal of the jury's ultimate verdicts.

Judgments affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify, as required by Mass. R. App. P. 16(k), that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. A. P. 16(a)(1)-(8); Mass. R. A. P. 16(d)-(h); Mass. R. A. P. 18; and Mass. R. A. P. 20. This brief complies with the length and typeface limitations in Rule 20(a)(2) and 20(a)(4), based on a proportional font and word count. The argument section has less than 2000 non-excluded words in Times New Roman size 14, and was prepared using Wordperfect X7.

/s/ Alan D. Campbell
Alan D. Campbell

CERTIFICATE OF SERVICE

I certify that I served the defendant's brief and appendix, through the EfileMA website, on Thomas Townsend.

/s/ Alan D. Campbell
Alan D. Campbell