COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPREME JUDICIAL COURT**
NO. FAR-
Appeals Court No. 2021-P-1027

COMMONWEALTH OF MASSACHUSETTS
Appellee,

v.

MAURICE MORRISON,
Appellant.

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK DIVISION OF THE SUPERIOR COURT DEPARTMENT

APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW OF APPELLANT MAURICE MORRISON

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Dated: October 18, 2022

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, defendant Maurice Morrison requests further appellate review by this Court of the decision of the Appeals Court (Commonwealth v. Morrison, 101 Mass. App. Ct. 1118 (2022)) entered on September 29, 2022, attached hereto as Exhibit A. In a summary disposition, the Appeals Court ruled that the communication by a deliberating juror to other jurors of relevant information that was based on that juror's specialized training and experience but was not part of the evidence introduced at trial was not an extraneous matter. Defendant contends that this ruling violates his rights under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights.

STATEMENT OF PRIOR PROCEEDINGS[1]

On October 19, 2016, after six days of deliberations, a Suffolk Superior Court jury found defendant guilty of second degree murder in the shooting deaths of Zouaoui Dani-Elkebir and Karima El-Hakim. Shortly thereafter,

[1] References in this Application are as follows: the transcript from the hearing after the Appeals Court remand are cited as "Remand Tr. [page]; the Record Appendix filed in Morrison II as "RA 2021:[page]"; and the Addendum to Appellant's Brief in Morrison II as "Add.[page]."

defendant became aware that one of the jurors ("Juror A") had posted several comments during the trial and after the verdicts to his Facebook page in violation of the trial judge's explicit daily instructions. Before sentencing, defendant moved for a post-verdict inquiry of Juror A to determine whether he and other jurors had been exposed to extraneous influences. After a hearing at which the trial judge only reviewed the Facebook posts, the motion was denied, and defendant was sentenced to concurrent life sentences with parole eligibility in fifteen years.

In Commonwealth v. Morrison, 97 Mass. App. Ct. 731 (2020) ("Morrison I"), the Appeals Court affirmed defendant's convictions but held that the trial judge had erred in denying defendant's motion for a post-verdict inquiry of Juror A and remanded for further proceedings. Id. at 743-744. After a hearing at which he alone questioned Juror A, the trial judge ruled that Juror A "did not receive any extraneous communication, did not learn any extraneous information, was not subject to any extraneous influence, and did not expose any other juror to extraneous information or influence." (Add. 56) On defendant's further appeal, in a Memorandum and Order Pursuant to Rule 23.0, the Appeals Court affirmed on September 29, 2022. Commonwealth v. Morrison, 101 Mass. App. Ct. 1118 (2022)

("Morrison II") No party is seeking reconsideration or modification of the Appeals Court decision.

STATEMENT OF THE FACTS

After the jury returned its guilty verdicts on November 14, 2016, Juror A made ten Facebook posts about the trial which "discussed the jury's deliberations and described Juror A's understanding of the basis for the verdict, including the jury's evaluation of certain surveillance videos and simultaneous cell phone records." (Add. 51) Juror A explained how the jury, which had been deadlocked, was able to reach a verdict:

> The ah-ha moment. The case of the mysterious man in black. 1 minute and 45 seconds after the murder of two people we see a man running down the opposite side of the street on a security camera. Black hoodie and black pants. Our suspect [the defendant] was seen getting into the victims car wearing a white hoodie. State police once again said it was not the suspect and the defense asked why this person was not identified. The ah-ha moment came when we the jury viewing the video saw two people enter the camera view with white jackets but the further they moved away they became black. The man in black was the suspect. We collaborated [sic] this with an eight second phone call that he made that we synced with the man in black, he was on his phone at this time for 8 seconds. Once again sloppy police work. We would have been a hung jury without this evidence. A jury working together for the truth.

(RA 2021:36) In a subsequent post, Juror A further explained how the jury had resolved its deadlock:

> We were hung up after two days at 7-5 not guilty. It took another three days of us jurors uncovering mistakes in times and security cameras capture of colors at night to get to the truth.

(RA 2021:37)

At the hearing pursuant to the remand by the Appeals Court in Morrison I, Juror A testified, in response to a question posed by the trial judge, that he had experience with surveillance video because he worked for a security company, and that:

> I just brought in what my experience was at work where … we have over 500 cameras, and I said … sometimes night vision cameras could change color of clothing, et cetera. But this was after … this was during the discussion.

(Remand Tr. 21-22) As a result of this testimony, the trial judge found that "during deliberations [Juror A] relied upon their work experience and told other jurors that, in their experience, night-vision cameras can make the colors of clothing appear different than they really are." (Add. 55)

The trial judge also asked Juror A whether he talked to anybody or did any research with respect to "making any kind of adjustments in display times regarding surveillance videos?" (Remand Tr. 22) Juror A responded:

> I didn't. Some of the other jurors they may have … they … basically, because I think there were like three of four different time frames on cameras. They kind of figured out to sync them all together.

> That was way above my paygrade. I couldn't … do that math and stuff like that.

(Id. at 22-23) He further testified that "they just did some sort of mathematical formula on those whiteboards they had and figured out to … sync them together." (Id. at 23)

The trial judge denied defendant's request that he inquire further of Juror A as to specifically what information he provided to the other jurors with respect to how night-vision cameras change colors and how and where he obtained that information. (Id. at 24, 32, 35) He also denied defendant's request that he inquire further of Juror A as to the nature and source of the mathematical formula that other jurors had used to synchronize the different surveillance cameras. (Id. at 35-36)

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether a juror's communication to the jury during deliberations of highly prejudicial specialized factual information that was based on his professional knowledge and experience, but which was not part of the evidence introduced at trial, violated defendant's rights under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights.

2. Whether defendant made a "colorable showing" that the "mathematical formula" used by jurors during their

deliberations was extraneous information, thus requiring further inquiry.

ARGUMENT

FURTHER APPELLATE REVIEW IS APPROPRIATE

Point 1. This appeal presents a critically important issue of first impression in the Commonwealth that affects the public interest and the interests of justice. This Court has long held that information that exposes jurors to specific facts that are not part of the trial record is an extraneous matter which, if prejudicial, requires a new trial. See, e.g., Commonwealth v. Fidler, 377 Mass. 192, 200 (1979); Commonwealth v. Hunt, 392 Mass. 28, 39-40 (1984). However, the Court has not decided if the information to which the jury is exposed is an extraneous matter where its source is, as in the present case, the specialized knowledge, training, and experience of one of the jurors. Respected authority in other states considers such information to be extraneous. In People v. Maragh, 729 N.E.2d 701, 704-705 (N.Y. 2000), the New York Court of Appeals held that a new trial was required where two jurors who were nurses provided the other jurors with their own estimates of the victim's blood loss and its medical effects during deliberations. The court concluded that:

> [G]rave potential for prejudice is also present here when a juror who is a professional in everyday life shares expertise to evaluate and draw an expert conclusion about a material issue in the case that is distinct from and additional to the medical proofs adduced at trial. Other jurors are likely to defer to the gratuitous injection of expertise and evaluations by fellow professional jurors, over and above their own everyday experiences, judgment and the additional proofs at trial. Overall, a reversible error can materialize from (1) jurors conducting personal specialized assessments not within the common ken of juror experience and knowledge, (2) concerning a material issue in the case, and (3) communicating that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were in evidence.

See also In re Malone, 911 P.2d 468, 486 (Cal. 1996) ("A juror … should not discuss an opinion based on specialized information obtained from outside sources); People v. Steele, 47 P.3d 225, 248-249 (Cal. 2003) ("juror may not express opinions based on personal experience that is different from or contrary to … the evidence").

In the present case, the jury was exposed to extraneous information when, as the trial judge found, Juror A "relied upon their work experience and told other jurors that, in their experience, night-vision cameras can make colors of clothing appear different than they really are." (Add. 55) As a result, the jury determined that the defendant, who was seen getting into the victims' car wearing a white hoodie, was the same person who was

observed on a security camera only minutes later running away from the scene of the shooting wearing a black hoodie and black pants. (RA 2021:20-21) There was, however, no evidence introduced at trial that this security camera or any other camera used infra-red, night-vision, or any technology that would make white clothing look black or otherwise change the colors of clothing.

In a summary disposition, the Appeals Court determined that no substantial issue was presented by the appeal and affirmed the order of the Superior Court, stating:

> It is axiomatic that jurors are entitled to evaluate the evidence adduced at trial in light of their own life experiences. That principle continues to apply where the relevant life experiences impart specialized knowledge. . . There was no impropriety in juror A's applying knowledge he had gained from previously working with surveillance cameras, or in sharing his perspective with other jurors.

(Exhibit A at 22) (internal citations omitted). Thus, the court authorized the exposure of jurors to information that was clearly material to the trial where defendant was unable to test the source or validity of the information and was therefore deprived of his Sixth Amendment rights of confrontation, of cross-examination, and of counsel. Turner v. Louisiana, 379 U.S. 466, 472 (1965)[2]

[2] It is worth noting that in Commonwealth v. Shiner, 101 Mass. App. Ct. 206 (2022), the Appeals Court recently ruled

It is hard to imagine a more destructive influence on the right to a jury trial than allowing an "expert" juror to introduce their expertise into jury deliberations, particularly since there has been no determination of the extent of their knowledge and no opportunity for the parties to respond to the extraneous matter. See Commonwealth v. Hoose, 467 Mass. 395, 417 (2014) ("The judge is the gatekeeper of evidence and is responsible for making the threshold determination that the expert opinion is sufficiently reliable to go before the jury. The judge's gatekeeping function in the context of expert testimony applies in addition to the judge's general duty to exclude evidence that is irrelevant or for which the probative value is substantially outweighed by the risk of unfair prejudice, confusion or waste of time.") (internal

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that evidence that surveillance cameras which use infra-red or night-vision technology can make clothing appear different in color than to the naked eye was admissible. The court upheld its admissibility because: 1) there was evidence in the record that the camera at issue used infra-red technology; 2) the purpose for which the evidence was admitted was carefully limited; and 3) the witness was subject to vigorous cross-examination by the defendant. In the present case, however, the jury heard identical information from a fellow juror who claimed to have experience with surveillance cameras without any oversight from the trial judge and with no opportunity for the defendant to challenge the admissibility of the "color-changing" evidence or to cross-examine the source of the information.

citations omitted). It almost goes without saying that a physician-juror should not be permitted to comment on or contradict the testimony of expert witnesses in a medical malpractice trial on the basis of their own training and experience or for a lawyer-juror to comment on or contradict the court's instructions on the basis of their education and experience. Yet, the Appeals Court's decision would permit jurors to share their life experiences with other jurors, even "where the relevant life experiences impart specialized knowledge." (Exhibit A at 22) To allow jurors to rely on their specialized education, training and experience as part of their "life experiences" would render meaningless the fundamental principle that all evidence must come from the witness stand. Commonwealth v. Greineder, 458 Mass. 207, 246 (2010)[3]

[3] The two cases the Appeals Court relied on are completely inapposite. In Commonwealth v. Watt, 484 Mass. 742 (2020), two jurors who made observations of gestures made by the defendants in the courtroom during the victim's testimony believed that the gestures were gang signs and discussed this during deliberations. This Court held that the jurors did not inject extraneous influences into the deliberations because they only "applied their life experiences to understand what they saw, as they had been instructed to do." Id. at 758. They did not, as in the present case, introduce "'specific facts not mentioned at trial concerning . . . the matter in litigation.'" Id. at 759, quoting Fidler, 377 Mass. At 200. In Commonwealth v. Caruso, 476 Mass. 275, 289 (2017), there was no issue as to the exposure of the jury to extraneous information. This Court held only that the trial judge did not err in

Point 2. In a post-verdict Facebook post, Juror A stated that the jury had been able to uncover "mistakes in time … to get to the truth." (RA 2021:37) He explained that the jury was able to determine that the man seen fleeing from the scene of the shooting was the defendant by matching the timestamp on the video when the man is seen using a cellphone with the defendant's telephone detail records. (RA 2021:36) He testified at the remand hearing that the jurors were able to do this by figuring out a way to synchronize the times on three or four different surveillance cameras. "[T]hey just did some sort of mathematical formula on those whiteboards they had and figured out to … sync them together." (Remand Tr. 22-23)

The undisputed evidence at trial was that the State Police reconciled the timestamps from the video surveillance footage by cross-referencing the camera times with a control clock provided by the officer's Verizon wireless cellphone and by the E911 clock used by the State Police. (Tr.5:36-38) There was no evidence at trial of a

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admitting into evidence the last access date of a program on the defendant's computer even though the Commonwealth did not establish the accuracy or reliability of the computer's time-keeping function because "[e]vidence that a time stamp indicates a particular time is a sufficient basis for a jury to conclude that the relevant activity took place at that time, particularly when there is no evidence to the contrary in the record." (Id.)

"mathematical formula" or any other methodology to reconcile and "synchronize" the different video cameras. Despite this, the trial judge refused to make any inquiry of Juror A or other jurors as to the nature or source of the "mathematical formula."

Juror A's testimony made at the very least a "colorable showing" that the jury was exposed to an extraneous matter during their deliberations which would have had a prejudicial impact on "hypothetical average jurors" because it corroborated the other extraneous information of the color-changing feature of night-vision cameras. In light of the strength of defendant's showing and the seriousness of the issue, the trial judge was under a duty to conduct a further inquiry of Juror A and the other jurors. Commonwealth v. Philyaw, 55 Mass. App. Ct. 730, 737 (2002).

CONCLUSION

For the foregoing reasons, this Court should grant further appellate review of the decision of the Appeals Court.

Respectfully submitted,

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Dated: October 18, 2022

Certificate of Compliance

I hereby certify that the foregoing application for leave to obtain further appellate review complies with the rules of court that pertain to the filing of such applications, including, but not limited to: Mass. R. A. P. 27.1(b) (contents of application; form); Mass. R. A. P. 20(a)(4) (format and pagination of text); and Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 27.1, ascertained as specified by Mass. R. A. P. 16(k), because it is produced in the monospaced font Courier New at size 12, 10 characters per inch, and contains fewer than 10 total non-excluded pages, as defined by Mass. R. A. P. 27.1(b).

/s/Jonathan Shapiro
Jonathan Shapiro

Certificate of Service

This is to certify that I have this day served the foregoing document on counsel for the Commonwealth, Cailin M. Campbell, Assistant District Attorney, One Bulfinch Place, Boston, MA 02114, cailin.campbell@state.ma.us, via the Odyssey File and Serve System.

/s/Jonathan Shapiro
Jonathan Shapiro

Dated: October 18, 2022

EXHIBIT LIST

Document	Exhibit
Decision of Appeals Court (Morrison II)	A

EXHIBIT A

101 Mass.App.Ct. 1118
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Maurice MORRISON.

21-P-1027
|
Entered: September 29, 2022

By the Court (Meade, Milkey & Massing, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** A Superior Court jury convicted the defendant of two counts of murder in the second degree and one count of unlawfully possessing a firearm. After the defendant learned that one juror (juror A) had posted about the trial on Facebook, the defendant filed a motion for postverdict inquiry to investigate whether the jury had been subjected to extraneous information or influence. The trial judge denied that motion. On appeal, the court affirmed the defendant's convictions, but reversed the denial of his motion for postverdict inquiry and remanded for further proceedings. See Commonwealth v. Morrison, 97 Mass. App. Ct. 731, 743-744 (2020).

On remand, the trial court judge found that juror A did not "receive any extraneous information, did not learn any extraneous information, was not subject to any extraneous influence during the trial of this case or during the jury's deliberations, and did not expose any other juror to extraneous information or influence." As a result, the judge ruled that further inquiry was not warranted.[2] On the defendant's further appeal, we affirm.

We begin by noting that, "[w]ith few exceptions ..., 'it is essential to the freedom and independence of [jury] deliberations that their discussions in the jury room should be kept secret and inviolable.' " Commonwealth v. Heang, 458 Mass. 827, 858 (2011), quoting Commonwealth v. Fidler, 377 Mass. 192, 196 (1979). "A trial judge has broad discretion in determining whether a postverdict 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. Murphy, 86 Mass. App. Ct. 118, 122 (2014), quoting Commonwealth v. Guisti, 434 Mass. 245, 251 (2001), S.C., 449 Mass. 1018 (2007).

Juror A made his Facebook posts both during and after the trial. The defendant submitted copies of these posts in support of his initial motion for further inquiry, and they therefore were part of the appellate record before the previous panel. See Morrison, 97 Mass. App. Ct. at 740-741 (discussing posts made "during the trial and the jury's deliberations" as well as "after the jury returned their verdict"). In that earlier appeal, the court's principal concern was whether any potential responses to juror A's posts had resulted in his, or other jurors', exposure to extraneous information or influence from third parties. See Morrison, supra at 741-743, citing Guisti, 434 Mass. at 249-253. For this reason, the court indicated that the judge's focus on remand should be on juror A's preverdict posts, and that his "inquiry need not extend to the juror's postverdict posts."[3] Morrison, supra at 743. After all, what outside parties might have communicated to juror A after the verdict had been reached was essentially beside the point.

***2** On remand, the judge conducted an evidentiary hearing during which he examined juror A. Because that hearing revealed that the only responses that third parties had made to juror A's Facebook posts lacked any real substance (amounting instead to mere thumbs-up "likes" or reaction emojis), the judge found that the jury's deliberations were untainted by extraneous information or influences from

outside parties. In the current appeal, the defendant makes no challenge to those findings or rulings. Instead, he argues that the record reveals other improprieties in the jury's deliberations. First, he argues that juror A improperly injected into the jury's deliberations his own specialized knowledge about whether night vision video surveillance recordings depicted the true colors of objects being recorded.[4] Second, he argues that jurors improperly used an unspecified mathematical formula to synchronize the timing of various video recordings and phone calls.

As the Commonwealth argues, there is at least some doubt whether these arguments are properly before us. That is because the court arguably rejected such arguments in the earlier appeal, and, regardless, the defendant's contentions fall outside the scope of remand that the court ordered. See Morrison, 97 Mass. App. Ct. at 741-744. At the same time, as the defendant points out, the court did not prohibit the judge from considering issues raised by the postverdict posts, and in any event, an appellate court can in "rare instances" necessary to "prevent manifest injustice," revisit the holding of an earlier appeal in the same case. See Sheppard v. Zoning Bd. of Appeal of Boston, 81 Mass. App. Ct. 394, 397-398 (2012), and cases cited. Without resolving whether the court's earlier opinion answered the questions the defendant now seeks to raise, we turn to the merits.

It is axiomatic that jurors are entitled to evaluate the evidence adduced at trial in light of their own life experiences. Commonwealth v. Watt, 484 Mass. 742, 758-760 (2020). That principle continues to apply where the relevant life experiences impart specialized knowledge. Id. at 757 n.19 (jurors' own knowledge about gang signs from career as journalist and from watching television did not constitute extraneous information). See Commonwealth v. Caruso, 476 Mass. 275, 289 (2017) (jurors entitled to rely on accuracy of computer time-keeping function, "[e]ven in the year 2000," based on "their own common sense and life experience"). There was no impropriety in juror A's applying knowledge he had gained from previously working with surveillance cameras, or in sharing his perspective with other jurors.[5]

***3** The defendant's second argument also fails, because he has not established any impropriety in the jurors attempting their own methods to synchronize the times shown on the various video recordings and phone records. In testimony that the judge on remand credited, juror A made it clear he did not conduct any outside research or otherwise consult any outside sources about this synchronization issue. Nor has the defendant made any colorable showing that other jurors did so either.[6] Absent that showing, the judge was not required to examine other jurors, and he did not abuse his discretion in ruling that no further inquiry was required. See Murphy, 86 Mass. App. Ct. at 122 (requiring defendant show "more than mere speculation" [quotation and citation omitted]). We therefore affirm the judge's order, dated August 2, 2021.

So ordered.

Affirmed

All Citations

Slip Copy, 101 Mass.App.Ct. 1118, 2022 WL 4541152 (Table)

Footnotes

1 The panelists are listed in order of seniority.

2 Through a supplemental motion, the defendant specifically sought to have juror A's computers and cell phones examined, and for the Commonwealth to request juror A's Facebook records.

3 The court explained that the postverdict "posts largely described the jury's evaluation of the evidence, along with the juror's opinions of the conduct of the attorneys in the case. There is no indication in the posts of any intrusion of extraneous information into the jury's deliberations and, unlike the juror's preverdict posts, there is no risk that responses by third parties to his postverdict posts could bring extraneous information or influence to bear on the jury's deliberations." Morrison, supra at 743-744.

4 Juror A referenced this issue in two of his postverdict Facebook posts. In addition, at the evidentiary hearing held on remand, juror A testified that, based on his "experience [ ] at work [for a security company] ... where [there is] ... over 500 cameras," he told other jurors that, "sometimes night vision cameras could change color of clothing."

5 We additionally note that the phenomenon that night vision video cameras may not portray the true colors of objects being recorded is well known, and the court recently observed that the scientific principles underlying the phenomenon are indisputable. See Commonwealth v. Shiner, 101 Mass. App. Ct. 206, 215-223 (2022), petition for further appellate review pending (finding no error in judge's allowing in evidence lay demonstration of this phenomenon). The court further commented there, albeit in dicta, that "in light of the ubiquity of such [night vision] technology, the phenomenon that surveillance systems may not show an object's true colors may well have lain within the common knowledge possessed by the jury, even if individual jurors may not have been able to articulate what explained that phenomenon." Id. at 220-221, citing Commonwealth v. Junta, 62 Mass. App. Ct. 120, 127-128 (2004) (no medical testimony needed to support argument to jury "that bruises are not immediately visible but may take a day or two to appear").

6 The defendant points to juror A's testimony that other jurors "may have" consulted outside sources about how to synchronize the timeframes. However, upon further examination, juror A clarified that no one "indicate[d] that they read something, looked at something, [or] considered something outside the evidence to do that." Viewed in context, juror A's testimony that other jurors "may have" considered outside sources signifies only that he could not speak from personal knowledge as to what other jurors "may have" done outside his presence.

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