COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

FAR-29638

COMMONWEALTH OF MASSACHUSETTS
Appellee

Vs.

PEDRO VAZQUEZ
Appellant

ON APPEAL FROM A JUDGMENT OF THE
HAMPDEN SUPERIOR COURT

APPELLANT'S *CORRECTED* APPLICATION FOR FURTHER APPELLATE REVIEW

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

In this case, two deliberating jurors got into a tense and heated verbal argument inside the deliberation room which spilled out into the courthouse hallways and continued outside the courthouse onto the sidewalk. One of the jurors, a black man, accused the other juror of being racist based on multiple statements and incidences that occurred during deliberations in front of the other jurors. The trial judge did not inquire as to what comments were made or what incidences occurred and thus did not have the necessary information to meaningfully determine whether the jury remained capable of impartially rendering a verdict.

The Commonwealth **conceded** a violation of Defendant/Appellant's constitutional right to an impartial jury and the Appeals Court **agreed** that the trial judge should have delved further into the preverdict reports of racially biased statements. Yet the Appeals Court (Wolohojian, Shin, & Ditkoff, JJ.) still affirmed Vazquez's second degree murder conviction finding no substantial risk of a miscarriage of justice in an unreported decision dated November 29, 2023

(Add./26-30[1]), Appeals Court Docket No. 20-P-1195). In affirming Vazquez's second degree murder conviction, the Appeals Court determined that the Defendant/Appellant did not establish a substantial risk of a miscarriage of justice.

The decision of the Appeals Court substantially affects the interests of justice by affirming the gross injustice of a conviction arising from racial or ethnic bias. Moreover, the decision circumvents this Court's repeated refusal to extend the more rigorous test for postverdict allegations of juror misconduct to preverdict allegations. That is, the Appeals Court has effectively placed the burden on the Defendant/Appellant in a preverdict allegation case to prove by a preponderance of the evidence in a motion for a new trial that the jury was exposed to racially or ethnically charged statements that infected the deliberative process.

Thus, through this application, Defendant/Appellant respectfully seeks further appellate review on the following point:

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[1]The citations to the record and transcripts are as follows: the addendum is Add./[page] and the trial transcripts are marked by their corresponding volume as T[volume]/[page].

> Whether there was a substantial risk of a miscarriage of justice entitling the Defendant/Appellant to a new trial where the lower court failed to conduct a preliminary inquiry into preverdict reports of bias to determine meaningfully whether the jury was exposed to racially or ethnically charged statements and whether the jury remained capable of impartially rendering a verdict?

STATEMENT OF PRIOR PROCEEDINGS

Indictments. On April 30, 2015, the Hampden County grand jury issued indictments charging Defendant/Appellant, Pedro Vazquez[2] ("Vazquez"), in *Count 1* with murder in violation of G.L. c. 265, §1; *Count 2* with illegal possession of a firearm in violation of G.L. c. 269, §10(a); and *Count 3* with possession of a loaded firearm in violation of G.L. c. 269, §10(n).

Trial. Vazquez was tried before a jury (Ritter, J., presiding) over thirteen days beginning on January 29 and ending on February 18, 2020. After closing arguments and the jury charge, the case went to the jury for deliberation on February 14. The jury continued deliberations on February 18 and returned verdicts of guilty as to the lessor included offense of second-

[2]The Appeals Court uses the spelling of the Defendant/Appellant's last name ("Vasquez") as it appears on the indictments. The dockets for the trial court, as well as Appeals Court, however, refer to the correct spelling of the Defendant/Appellant's name as "Vazquez."

degree murder on *Count 1*, and guilty verdicts on *Counts 2* and *3*. T13/80-81; T14/135; T15/125-145, 149.

On February 19, 2020, Vazquez was sentenced to not less than twenty-five years to life with parole on *Count 1*, a concurrent term of incarceration on *Counts 2*, and a consecutive term of incarceration of two and a half years on *Count 3*. Vazquez filed a timely notice of appeal on February 19, 2020. The Appeals Court affirmed Vazquez' second degree murder conviction and vacated the convictions of illegal possession of a firearm and illegal possession of a loaded firearm in an unreported decision on November 29, 2023. (Add./26, 30).

FACTS RELEVANT TO FURTHER APPELLATE REVIEW

The jury began to deliberate on a Friday afternoon and got through approximately two (2) to three (3) hours of deliberations. After they were released, a court officer reported to the lower court that he witnessed a verbal fight between Juror 2 and Juror 4 outside of the deliberation room. According to the court officer, the fight "did not involve statements or anything about the substance of the case. It was more like, 'If you got something to say to me, say it,' and then they started jarring back and forth." (T16/5-6). The court officer

separated the two jurors and sent them in separate directions at different times. T16/5-6.

The court officer then saw the same two jurors having another verbal argument on the sidewalk outside of the courthouse. A few people approached the two jurors on the sidewalk, but the court officer did not see any other member of the jury. T16/6.

Assistant District Attorney Maximilian Bennett ("ADA Bennett") also witnessed the outside altercation from the window of the courthouse. According to ADA Bennett, the two jurors were on the sidewalk near the corner of the casino, face-to-face and going back and forth. A crowd was gathering and making gestures which went on for a little bit. At one point, Juror 4 walked in one direction while Juror 2 walked towards the casino. Juror 2 turned around a few times, said something, then walked into the casino. Juror 4 waited for a little while then also walked into the casino. Although ADA Bennett could not hear what was being said, it was clear that they were yelling at each other, a crowd gathered over the altercation, and the crowd was making gestures to the two jurors. T16/6, 11-12.

The jurors returned on the following Tuesday to continue deliberations. Juror 4 and the Jury Foreperson submitted notes to the court. Juror 4's note reported:

> On Friday, February 14th, at 4:15, as I was outside heading through the crosswalk outside of the Court building, Juror number 2, [first name] yelled for me as he was coming down the last three steps. He eventually caught up to me on the sidewalk across the street and continued a confrontation that started during deliberation.
>
> On the sidewalk, it turned into more than words and moved to threats. He continued to provoke me and was trying to start a physical altercation, which I began to walk away from. He got back in front of me when I was near some other gentlemen, who were on the corner. **He called me a racist** in front of them and continued to provoke me. It was now a four-on-one situation of continued threats. I quickly walked away and was not pursued.
>
> (T16/7-8) (emphasis added).

The Jury Foreperson's note reported:

> During Friday's deliberation, there were multiple times I had to remind a person that needed to leave his personal feelings out of it. However, this one had multiple interactions with others, and it became personal between them. This actually continued outside, after we left. **There seems to be preconceived biases with this juror, which he has voiced to the group.** I will start today with reminding them again about leaving their emotions and personal experiences out of the conversation, but I'm not sure there is other steps I need to take, other than your instructions.
>
> (T16/9) (emphasis added).

Defense counsel took the position that the two jurors should be questioned for the very limited purpose of whether they could continue their deliberations in a fair and impartial manner. The Commonwealth agreed but added that the Foreperson should be questioned as to the impact on the other jurors in the room given her note talking about problems of preconceived bias in the deliberation room. T16/13-14, 16.

Questioning of Juror 2: Prior to questioning Juror 2, the judge gave cautionary instructions that:

> To any questions I ask you, you are not to reveal anything that was said during the course of your deliberations.
>
> And you are not to state in any way how you, or any other juror, feels, is leaning, opinion statements, or anything related to the deliberation process.
>
> And you are not to discuss or reveal or mention any part of the evidence during the course of the case while we're having this Sidebar Conference.
>
> You are a deliberating juror, and those discussions in the Jury Room are entirely private, and they are no one's business, except for the single jury of 12 people who will be deliberating in this case.
>
> And when I give you these instructions, I don't mean to be lecturing you or demeaning you at all. It's just these are really, really important because I want you in no way to convey any opinion you may have as to any aspect of this case or the merits of those things.

(T16/17-18). The lower court then proceeded to ask Juror 2 whether there was a verbal altercation outside with another juror. Juror 2 reported there was a verbal altercation that began "inside the Jury Room at the end of the day...[after] deliberations were over" (T16/20) while Juror 2 was putting on their coat. Outside of the courthouse, the verbal altercation was a continuation of what occurred inside when Juror 2 asked Juror 4, "Whatever you had to say inside, why don't you repeat it now?" (T16/22-23). Juror 4 responded "I read you from day one. I knew what you were, and you're a piece of shit." (T16/21). The communications escalated from there and Juror 2, who is a black man, responded "Spoken like a true racist." (T16/21). Juror 4 said "Yeah, and you're a piece of shit." (T16/23). Juror 2 then said "There's a garage over there. I'll be your piece of shit for you." (T16/23). T6/26; T16/19-23.

After the verbal altercation, Juror 2 began to walk towards the casino and they both exchanged additional words. As Juror 4 was walking behind Juror 2 he again called Juror 4 "a piece of shit" and Juror 4 responded, "Yeah, you're still a racist." (T16/22). This was overheard by three bystanders – two Latinos and a black man – and the black man jumped into the conversation.

Juror 2 was not sure what the black man said but it appeared as though it was just someone looking to get into something on a Friday afternoon. T6/21-23.

When asked whether the altercation with another deliberating juror would impact his ability to be fair and impartial, Juror 2 stated:

> ...I don't have a problem myself.
>
> Now, I – I wanted to say this, and I'm sorry to go on, but I did want to say this in full representation of myself. **I did not assume this gentleman was a racist based on one statement.** That is not what I did. I mean, **there were other statements and incidences within the deliberations.**
>
> I never initiated any contact with this gentleman. When I was putting my coat on, he attempted to intimidate me, stood over me, made a comment, and that's what led to outside...[]But I don't make those assumptions. I have black people that don't like me. Then, that's not from race, you know? I – some people might think I'm a piece of shit. **I came to that conclusion based on a label he gave me during deliberations, in front of everybody --**

(T16/35-36). The lower court interrupted Juror 2 at that point and cautioned him not to say "anything about anything that was said or done during the course of deliberations[.]...I can't emphasize that enough." (T16/36). Juror 2 then apologized and confirmed that he could be fair and impartial with all parties involved. T16/36-37.

Questioning of Juror 4: Like Juror 2, the lower court prior to questioning Juror 4, gave cautionary instructions that:

> You are not to reveal anything that was said during the course of your deliberations in the Jury Room.
>
> And you are not to state in any way how you or any other juror feels is leaning, opinion statements, or anything related to the case.
>
> And you are not to discuss or reveal or mention any part of the evidence in this case because that was part of your deliberation process for a couple hours on Friday.
>
> Because you are a deliberating juror, those discussions in the Jury Room are entirely private, and they are no one's business expect for the single jury of 12 people deliberating at a single time.
>
> And when I give you these instructions, I don't mean to be lecturing you or to be demeaning to you, but they're important instructions because we can't reveal the substance of what's going on in the Jury Room.

(T16/39-40). The lower court then asked Juror 4 to tell him what happened. According to Juror 4, "[Juror 2] is kind of volatile. And there were situations with me in there and him, others." (T16/41). Juror 4 began to describe what happened in the deliberation room, that it was very tense and heated, but the court stopped him and said "I don't want to hear anything about inside the room." (T16/42).

Outside, Juror 2 yelled out "Hey" (T16/41) and "Big man!" (T16/42) as Juror 4 was outside already in the crosswalk. The Jury Foreperson witnessed this and walked away. Juror 2 confronted Juror 4 about what Juror 4 said inside and Juror 4 responded with something like "No hard feelings. You know, hopefully we leave here and -- that's it." (T16/43). T16/41-43.

Juror 2 proceeded to get in Juror 4's face and was trying to provoke Juror 4 into hitting him or starting an altercation. Juror 2 then called Juror 4 racist. Juror 4 tried to walk away but Juror 2 got in front of Juror 4 and again called him a racist and wanted to fight. There were three guys standing nearby that sort of got involved. Feeling threatened, Juror 4 again walked away. Juror 2 did not say anything about going into a parking lot to fight. T16/43-44.

The lower court then asked very pointedly whether the argument with Juror 2 had anything to do with the substance of the case. Juror 4 responded "Yeah, I would say yes." (T16/48). Juror 4, however, represented that he could be fair and impartial in deciding the case despite the dispute with Juror 2. T16/48-49.

Questioning of Jury Foreperson: Similar to Juror 2 and Juror 4, prior to questioning the Jury Foreperson the lower court gave cautionary instructions that:

> During this discussion, you are not to reveal anything that was said during the course of deliberations...in the Deliberating Room. And you are not to state in any way, how you or any other juror feels, is leaning, opinions, statements, or anything related to the case or the evidence. And you're not to reveal anything about this case or what anyone has said during the course of those deliberations.
>
> And as a deliberating juror, those discussions in the Jury Room are entirely private, and they are no one's business except for yours and the other 11 deliberating jurors. And it's really important, sacrosanct, the right... that we have to emphasize. And by asking you those questions and by giving you these instructions, I don't mean to be lecturing to you about this, and I don't mean to be demeaning when I say those things, but I'm trying to protect the record to make sure that something is not inadvertently said that might be an issue...or an Appellate issue. And if you think, in any way, that I have any opinion as to the merits of any aspect of this case, I assure you, I have none whatsoever.

(T16/51-52). The lower court then proceeded to ask the Foreperson whether she observed any altercation outside the deliberation room before she left the building. The Foreperson clarified that after she left the building, she observed one of the jurors yelling down the stairs, "Hey, big man! Hey, big man! We need to have some words." (T16/52). The foreperson walked away,

and the two jurors were in the crosswalk and road. She did not stay and watch. T16/52-53.

As for the portion of the Foreperson's note that states "There seems to be preconceived biases with this juror, which he has voiced to the group" (T16/9, 56), the Commonwealth asked the court to inquire further. While the Commonwealth recognized that personal experiences are going to come into deliberations, the Commonwealth was concerned that the Foreperson was reporting someone's preconceived biases in the group – a violation of the judge's instructions and the oath they took. T16/54-55.

The lower court refused to question the Foreperson further as he was "not inclined to intervene as to the internal workings of this group." (T16/56). Defense counsel agreed. The Commonwealth, however, asked that both Juror 2 and Juror 4 be discharged as there are accusations of racism, intimidation, and threats of physical violence. The Commonwealth also recognized that because this altercation started in the Deliberation Room, there is a question about how it has affected the other jurors. Defense counsel strongly opposed excusing the jurors. T16/56-60.

Ultimately, the lower court did not excuse either juror or conduct individual voir dire of the nine (9) remaining deliberating jurors. Rather, the lower court simply repeated instructions from its final charge. T16/61-65.

POINT ON WHICH FURTHER APPELLATE REVIEW IS SOUGHT

Whether there was a substantial risk of a miscarriage of justice entitling the Defendant/Appellant to a new trial where the lower court failed to conduct a preliminary inquiry into preverdict reports of juror bias to determine meaningfully whether the jury was exposed to racially or ethnically charged statements and whether the jury remained capable of impartially rendering a verdict?

REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

I. THE LOWER COURT FAILED TO CONDUCT A PRELIMINARY INQUIRY SUFFICIENT TO DETERMINE WHETHER THE JURY WAS EXPOSED TO RACIALLY OR ETHNICALLY CHARGED STATEMENTS AND WHETHER THE JURY REMAINED CAPABLE OF IMPARTIALLY RENDERING A VERDICT.

Vazquez's convictions must be vacated, and a new trial ordered because he was denied his constitutional right to trial by a fair and impartial jury. Before turning to the merits, Vazquez first sets forth general principles of law to aid this Court's analysis of his argument why further appellate review should be allowed.

A. Summary of Applicable Law.

The Sixth and Fourteenth Amendments to the United States Constitution and articles 12 and 29 of the Massachusetts Declaration of Rights guarantee the right to a trial by an impartial jury. *Commonwealth v. Colon,* 482 Mass. 162, 167 (2019); Commonwealth v. Guisti, 434 Mass. 245, 251 n. 8 (2001). See *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210-211 (2017). The presence of even one juror who is not impartial violates this fundamental federal and state constitutional right. *Colon,* 482 Mass. at 167; *Aldridge v. United States,* 283 U.S. 308, 314 (1931) ("if any [juror] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit").

"It is a fundamental tenant of our system of justice that a conviction cannot stand if the defendant proves that the jury's deliberations were infected by racial or ethnic bias." *Commonwealth v. McCalop*, 485 Mass. 790, 790-791 (2020). While "[a]ll forms of improper bias pose challenges to the trial process," *Pena-Rodriguez*, 580 U.S. at 208, racial and ethnic bias in the jury system is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the

administration of justice." *Id.* at 224. To prevent such systemic injury and loss of confidence in jury verdicts, racial bias must be addressed. *Id.* Ignoring concerns about the influence of racial bias in the jury room "might well offend fundamental fairness." *McCalop*, 485 Mass. at 799, quoting *Commonwealth v. Tavares*, 385 Mass. 140, 155 n. 25 (1982).

There are two distinct procedures this Court has delineated for reports of potential racial or ethnic bias that are dependent on when the report was made – preverdict or postverdict. *Commonwealth v. Ralph R.*, 490 Mass. 770, 780-781 (2022). See also *Commonwealth v. Quiles*, 488 Mass. 298, 315 (2021).

Where, like here, a report is made preverdict, the responsibility to make further inquiry "lay solely and exclusively in the hands of the judge." *Commonwealth v. Ralph R.*, 100 Mass.App.Ct. 150, 160 (2021), *review granted*, 489 Mass. 1104 (2022). That preliminary inquiry should include (1) a preliminary investigation into what statements were made, (2) if there were statements denoting racial or ethnic bias, and (3) whether the statements impacted the ability of the jurors to render a fair and impartial verdict. *Id.* at 160 n. 12. The judge must also be satisfied that the claimed bias will not

affect the ability of the remaining jurors to render an impartial verdict. *Quiles*, 488 Mass. at 314-317.

B. The Jury Foreperson's Report of Preconceived Biases, Juror 2's Report of Racist Statements by Juror 4, and Juror 4's Admission That The Fight Involved the Substance of the Case Triggered The Judge's Duty To Conduct A Preliminary Inquiry.

As all three (3) reports were made preverdict, the responsibility was on the lower court to make further inquiry. *Ralph R.*, 490 Mass. at 781-782, see also *Ralph R.*, 100 Mass.App.Ct. at 160. Here, the initial reports, detailed more fully and in context *supra* pp. 5-14, were:

1. The Jury Foreperson submitted a note in reference to either Juror 2 or Juror 4 that stated that "[t]here seems to be preconceived biases with this juror, which he has voiced to the group." (T16/9). The lower court did not question the Jury Foreperson about their report;

2. Juror 2 reported an altercation with Juror 4 inside the deliberation room that continued outside of the courthouse. Juror 4 made comments such as calling Juror 2 "a piece of shit" that caused Juror 2 to call Juror 4 a racist several times. Juror 2 reported that he did not assume Juror 4 was a racist based on one statement, rather "there were other statements and incidences within deliberations…that [he] came to that conclusion based on a label [Juror 4] gave [him] during deliberations, in front of everybody." (T16/20-23, 35-36); and,

3. Juror 4 wrote a note that said Juror 2 called him a racist. Juror 4 did not report that he called Juror 2 "a piece of shit." Upon questioning by the lower court, however, Juror 4 reported that there were

> situations between Juror 4 and Juror 2 and others in the deliberation room that were very tense and heated. Juror 4 also reported that the argument with Juror 2 involved the substance of the case. (T16/7-8, 41-42, 48).

Each juror's individual report of some form of racial or ethnic bias and statements inside the jury room in front of other jurors was sufficient to trigger the lower court's obligation to conduct a preliminary investigation. At a minimum, that inquiry should have included an inquiry into what statements were made, if there were statements denoting racial or ethnic bias, and whether the statements impacted the ability of each juror to render a fair and impartial verdict. *Ralph R.*, 100 Mass.App.Ct. at 160, n. 12. See also *Ralph R.*, 490 Mass. at 784-785. The lower court failed to conduct such an inquiry.

Instead, at several points, the lower court strongly warned the jurors not to reveal anything that occurred in the deliberation room. More specifically, prior to questioning each juror, the lower court warned each juror not to reveal anything that was said during deliberations or in the jury room, not to state any opinion statements, and that all discussions in the jury

room are entirely private and no one's business outside of the deliberating jurors. T16/17-18, 39-40, 51-52.

The lower court also proceeded to interrupt and emphasize those instructions when Juror 2 tried to explain the statements Juror 4 made in the jury room in front of the other jurors that Juror 2 felt were racist. T16/36. Likewise, when Juror 4 tried to explain what happened in the jury room with Juror 2 and "others," (T16/41), the lower court interrupted and warned Juror 4 that he did not want to hear anything about inside the room. T16/42.

The instant case, in all material respects, is indistinguishable from this Court's decision in *Commonwealth v. Ralph R.*, 490 Mass. 770 (2022). There, the jury foreperson was concerned about continuing to deliberate the following week when, in her view, the jury would never reach a verdict because there were "a lot of discriminating comments among the group." *Id.* at 774-775. The lower court did not think the foreperson was sincere with their concerns and neither party disagreed nor objected. *Id.* at 775. The jury continued to deliberate on Monday morning and after a few hours sent a note that they were deadlocked. *Id.* At that point, the prosecutor requested that the judge inquire (1)

which jurors the foreperson was referring to previously when they reported "discriminating comments" and (2) whether they were able to deliberate based on the facts and circumstances of the case. *Id.* The judge refused but did give a *Tuey-Rodriguez* instruction and the jury resumed deliberations. This Court determined the judge erred by not investigating what the foreperson meant by "discriminating comments." *Id.* at 779.

Here, as in *Ralph R.*, the lower court erred by not investigating or following even the minimum procedures required for preverdict allegations of juror misconduct.

C. It Was An Abuse Of Discretion Not To Conduct An Individual Inquiry Of Each Deliberating Juror.

Individual inquiry of each deliberating juror is not required every time there is a preverdict allegation of jury bias. *Ralph R.*, 490 Mass. at 781-782. However, "where the jury's impartiality has been called into question sufficiently during trial, there must be a finding of impartiality supported by facts in the record." *Id.* at 782; citing *Commonwealth v. Jacobs*, 488 Mass. 597, 608 (2021) ("When a trial judge learns that the jury were exposed to an extraneous influence, the judge is required to determine whether the jurors are able to remain impartial"); and *Commonwealth v.*

Philbrook, 475 Mass. 20, 31 (2016) ("we give deference to the judge's conclusion, arrived at following extensive individual voir dire, that the remaining jurors had not been influenced by the comments [by three jurors suggesting premature deliberations] and continued to be impartial").

The lower court did not conduct any individual inquiry of any other jury member despite each credible report -- the Foreperson, Juror 2, and Juror 4 -- that the argument began in the deliberation room in front of the other jurors. Because the other jurors were exposed to such an extraneous influence, it was necessary in this case that the lower court conduct an individual inquiry of each deliberating juror. The failure to do so was an abuse of discretion and prevented the lower court from determining whether all deliberating jurors remained impartial.

D. The Lower Court's Abuse of Discretion Resulted in a Substantial Risk of a Miscarriage of Justice Requiring a New Trial.

As in *Ralph R.*, by not objecting, Vazquez waived structural error. 490 Mass. at 786. Thus, this Court reviews for a substantial risk of a miscarriage of justice. *Id.* "An 'error creates a substantial risk of a miscarriage of justice unless we are persuaded that it

did not 'materially influence[]' the guilty verdict[s]." *Id.*, quoting *Commonwealth v. Horne*, 476 Mass. 222, 228 (2017).

The parties as well as the Appeals Court agree that there was error. (Add./28-29). In the Appeals Court's view, however, there is "no substantial risk that the error here affected the result of the trial." (Add./29). In an attempt to justify their view and distinguish this case from *Ralph R.*, the Appeals Court points to the strength of the Commonwealth's case and that there was no indication that race played any role in the case. (Add./29). The Appeals Court then reasons that although the lower court should have inquired further, the foreperson and jurors involved in the altercation said they could remain fair and impartial. (Add./29). There are several flaws to the Appeals Court's reasoning.

First, the Appeals Court is simply wrong that "there is no indication that race played any role in this case, whereas *Ralph R.* revolved around a Black youth's interaction with the Boston police." (Add./29). The juvenile in *Ralph R.*, like Vazquez, is Hispanic, not black. *Ralph R.*, 490 Mass. at 779 n.1.

Second, the lower court did not know what statements were made and, as such, did not have enough

information to meaningfully determine whether any of the jurors remained fair and impartial. The Appeals Court cannot do so now. Likewise, where the lower court did not fully determine the nature of the error, the Appeals Court has no basis to conclude that "the nature of the error was not such that we have serious doubt that the impartiality of the jury was affected." (Add./29).

Third, even if the Appeals Court were able to make an after-the-fact impartiality finding of the foreperson and two jurors involved in the altercation, they entirely disregard the remaining nine (9) deliberating jurors that were not individually questioned despite being exposed to potentially racist "statements and incidences" in the deliberation room. (T16/20-23, 35-36).

Fourth, the Appeals Court completely fails to consider that "[a] guilty verdict arising from racial or ethnic bias **not only poses a substantial risk of a miscarriage of justice** but also, 'if left unaddressed, would **risk systemic injury to the administration of justice.'**" *Ralph R.*, 490 Mass. at 786 (emphasis added). Identical to *Ralph R.*, "on this record, [this Court] cannot be certain whether comments reflecting racial, ethnic, or other improper bias were made and, if they

were, whether they created a substantial risk of a miscarriage of justice." 490 Mass. at 786. Accordingly, Vazquez' conviction should be vacated, and the case remanded for a new trial.

CONCLUSION

For the reasons set forth above, Defendant/Appellant Pedro Vazquez respectfully requests that this Court allow further appellate review.

Respectfully submitted,
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By and through counsel,

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CERTIFICATION

I certify that this brief complies with the applicable Massachusetts Rules of Appellate Procedure. Pursuant to Mass.R.App.P. 27.1(b), the argument section of the brief complies with the applicable length limit of no more than 10 pages in monospaced font:

/s/ Ashley P. Allen
Ashley P. Allen

CERTIFICATE OF SERVICE

I, Ashley P. Allen, hereby certify under the pains and penalties of perjury that I filed and served the foregoing via the Odyssey e-filing system on this 17th day of January, 2024:

/s/ Ashley P. Allen
Ashley P. Allen

103 Mass.App.Ct. 1114
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Pedro VASQUEZ.[1]

1 As is our usual practice, we take the spelling of the defendant's name as it appears on the indictments.

20-P-1195
|
Entered: November 29, 2023

(Wolohojian, Shin & Ditkoff, JJ.[4]),

4 The panelists are listed in order of seniority.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** A Superior Court jury convicted the defendant of murder in the second degree as a lesser included offense of murder in the first degree, illegal possession of a firearm, and illegal possession of a loaded firearm. On appeal the defendant argues that the trial judge erred by failing to adequately investigate preverdict reports that raised the possibility of racial bias on the part of a juror and by denying the defendant's request for an instruction on involuntary manslaughter. As we are unpersuaded by these arguments, we affirm the murder conviction. Pursuant to Commonwealth v. Guardado, 491 Mass. 666 (Guardado I), S.C., 493 Mass. 1 (2023) (Guardado II), we vacate the convictions of illegal possession of a firearm and illegal possession of a loaded firearm.

Background. 1. The evidence. The defendant and victim dated for several years and at some point were married. Their relationship was volatile. In the summer of 2014, they split up, and the victim moved in with her brother. The defendant, armed with a gun, came to the brother's house and threatened to kill the victim. The couple nonetheless resumed their relationship in the months that followed, but split up again about two weeks before the murder. After this last breakup, the defendant called the victim repeatedly. The victim's son overheard the defendant tell her on one call that, if she did not get back together with him, "You'll see what's going to happen." The victim replied that the defendant needed to move on with his life.

At approximately 5:40 A.M. on January 5, 2015, Springfield police officers responded to a report of shots fired. They discovered the victim slumped over in the driver's seat of a Jeep with her foot on the accelerator. She had died from a single gunshot wound to the head. The bullet had entered the back of her head and exited through the right side of her forehead.

The police located a home security camera nearby and recovered the recording from the homeowner. Shortly into the recording, the Jeep can be seen coming to an abrupt stop across the street. About four minutes later, the rear driver's side

door opens, and a man and woman can be heard arguing loudly in Spanish. The Commonwealth offered two witnesses for purposes of translating the audio from Spanish to English, both of whom testified that the woman can be heard saying, "Give me the keys, Pedro." At about five and one-half minutes into the recording, the man is seen getting out of the rear seat of the Jeep. Simultaneously, a gunshot rings out. The man then runs down the street.

Four witnesses who were familiar with both the defendant and the victim identified them as the people speaking on the recording. Three of the witnesses also identified the defendant from the video footage, based on his clothes, height and build, and manner of walking.

2. Dispute between jurors. After thirteen days of trial, the jury began deliberating at about 12:45 P.M. on a Friday; the judge dismissed them just before 4 P.M. Soon thereafter, a court officer informed the judge that he witnessed an argument between juror no. 2 and juror no. 4 outside the jury room. The argument did not concern the case but was more in the nature of, "If you got something to say to me, say it," and then "jarring back and forth." The court officer separated the jurors and sent them on their way.

***2** The argument did not end there, however. With both the court officer and the prosecutor watching from a window, the jurors confronted each other on the sidewalk outside the courthouse, "kind of face-to-face, going back and forth." This "went on for a little bit," attracting onlookers. Eventually, the jurors separated, although juror no. 2 "turned around a few times and said something else." While the prosecutor could not hear what the jurors were saying, it was clear to him that "they were yelling at each other."

When court resumed the following Tuesday, the judge informed the attorneys that he had received two notes from the jury. The first note, from juror no. 4, stated:[2]

> "On Friday, February 14th, at 4:15, as I was outside heading through the crosswalk outside of the Court building, Juror number 2 ... yelled for me as he was coming down the last three steps. He eventually caught up to me on the sidewalk across the street and continued a confrontation that started during deliberation.
>
> "On the sidewalk, it turned into ... more than words and moved to threats. He continued to provoke me and was trying to start a physical altercation, which I began to walk away from. He got back in front of me when I was near some other gentlemen, who were on the corner. He called me a racist in front of them and continued to provoke me. ... It was now a four-on-one situation of continued threats. I quickly walked away and was not pursued."

The second note, from the foreperson, stated:

> "During Friday's deliberations ..., there were multiple times I had to remind a person that needed [sic] to leave his personal feelings out of it. However, this one had multiple interactions with others, and it became personal between them. This actually continued outside, after we left. There seems to be preconceived biases with this juror, which he has voiced to the group. I will start today ... with reminding them again about leaving their emotions and personal experiences out of the conversation, but I'm not sure if there is [sic] other steps I need to take, other than your instructions."

[2] We quote from the transcript of the judge's reading of the notes, as the notes themselves are not in the record appendix.

After consulting with the attorneys, the judge decided to conduct a voir dire of juror no. 2, juror no. 4, and the foreperson. Speaking first with juror no. 2, the judge asked him to describe the nature of his dispute with juror no. 4, while cautioning him not to reveal anything about the jury's deliberations. Juror no. 2 explained that the argument started in the jury room and continued outside the courthouse when he asked juror no. 4 to repeat what he had said inside. Juror no. 4 reportedly responded, "I read you from day one. I knew what you were, and you're a piece of shit." This prompted juror no. 2 to say, "Spoken like a true racist." When juror no. 4 again called juror no. 2 a "piece of shit," juror no. 2 replied, "Yeah, you're still a racist."

After consulting again with the attorneys,[3] the judge asked juror no. 2 if his dispute with juror no. 4 would interfere with his ability to be fair and impartial. Juror no. 2 replied, "Absolutely not," and then, unprompted, provided further details about the dispute, stating among other things: "I did not assume this gentleman was a racist based on one statement. ... I mean, there

were other statements and incidences within the deliberations. ... I came to that conclusion based on a label he gave me during deliberations, in front of everybody." The judge interrupted at this point and warned again not to reveal anything about the deliberations. Juror no. 2 apologized and confirmed several times that he could be fair and impartial.

[3] During this second discussion, the prosecutor reported that he had recently learned that juror no. 2 had prior interactions with the Hampden County District Attorney's Office "that ended negatively." The prosecutor requested further inquiry into these interactions, which defense counsel opposed. The judge stated that he would address the issue by asking juror no. 2 if he could be fair and impartial to both parties.

***3** The judge next spoke to juror no. 4. After cautioning him not to reveal anything about the deliberations, the judge asked him to explain what happened. Juror no. 4 replied that juror no. 2, whom he described as "kind of volatile," confronted him about something he had said in the jury room, called him a "racist," and tried to provoke a fight. Juror no. 4 stated that he "wanted no confrontation" and walked away. When the judge asked whether he had spoken to any of the other jurors about the incident, juror no. 4 said he had not.

At the prosecutor's request, the judge then asked whether the argument had "anything to do with the substance of the case," to which juror no. 4 replied, "Yeah, I would say yes." The judge did not probe further. Instead, the judge asked juror no. 4 if he could be fair and impartial despite the argument, and juror no. 4 confirmed that he could.

Last, the judge spoke to the foreperson. After providing the same warning about not revealing anything about the deliberations, the judge asked the foreperson whether she had witnessed an altercation outside the courthouse. The foreperson replied that she heard one juror yelling at another juror, "Hey, big man! We need to have some words," but she witnessed nothing further because she left. She also stated that there was "tension" in the jury room and described the atmosphere as "uncomfortable." When the judge asked whether she had spoken to the other jurors about what she observed, the foreperson said she had not and confirmed that she could be fair and impartial.

Once the foreperson stepped back from sidebar, the prosecutor requested that the judge inquire about what she meant in her note by "preconceived biases." In response defense counsel observed that "one person's personal experience is another's preconceived bias." The judge then reread the portion of the note about "preconceived biases" and stated, "I think that's her perception. It might not be accurate." When the judge indicated that he was "not inclined to intervene as to the internal workings of this group," defense counsel affirmed that he did not want the judge to inquire further of the foreperson.

The prosecutor then requested that both juror no. 2 and juror no. 4 be discharged, stating that there were "accusations of racism and threats of violence occurring in this jury." Defense counsel objected and suggested it would instead be appropriate for the judge to repeat his instructions about the conduct of deliberations. Agreeing with defense counsel's suggestion, the judge brought the jury back to the courtroom and reminded them to approach their deliberations with respect for their fellow jurors, to decide the case based on the evidence, and not to be swayed by prejudice, sympathy, or personal likes or dislikes toward either party. Defense counsel indicated he was satisfied.

The jury resumed their deliberations at 10:20 A.M. and returned their verdicts at 3:22 P.M. the same day.

Discussion. 1. Potential juror bias. When a judge receives a credible preverdict report "that reasonably suggests that a statement reflecting racial, ethnic, or other improper bias was made during jury deliberations," the judge must conduct an inquiry to determine whether the jury remains impartial. Commonwealth v. Ralph R., 490 Mass. 770, 784 (2022). The defendant argues that the inquiry here was inadequate because the judge did not probe into whether racially biased statements were made in the jury room and, if so, whether they infected the jury's deliberations. The Commonwealth concedes that there was error.

***4** At the time of his inquiry, the judge did not have the benefit of Ralph R., 490 Mass. at 784, which clarifies that, when there is any possibility that statements reflecting improper bias infected jury deliberations, the judge has the duty to ferret out what statements were made and determine whether they affected the jury's impartiality. The court in Ralph R., supra at 785, concluded that the judge erred by not investigating what a juror meant when she reported "discriminating comments" in the jury room. The defendant argues that the judge similarly erred here by not exploring the foreperson's report of "preconceived

biases"; juror no. 2's report that he believed juror no. 4 was racist based on "statements and incidences within deliberations" and a "label" that juror no. 4 gave him "in front of everybody"; and juror no. 4's report that his dispute with juror no. 2 had to do with the substance of the case. We agree that under Ralph R. the judge should have delved further into these reports to determine whether racially biased statements were made during deliberations.

We do not agree, however, with the defendant's suggestion that the error automatically entitles him to a new trial. In Ralph R., 490 Mass. at 786, the court rejected the contention that a judge's failure to investigate a claim of juror bias is a structural error not subject to waiver. As the court explained, "[t]o presume prejudice in this context would ignore the distinction, one long recognized by [the] court, between properly preserved and waived claims." Id., quoting Commonwealth v. LaChance, 469 Mass. 854, 857 (2014), cert. denied, 577 U.S. 922 (2015). Thus, where a defendant fails to object to a judge's failure to investigate, the standard on appeal is whether the error gave rise to a substantial risk of a miscarriage of justice. See Ralph R., supra.

The claim was plainly waived in this case. The defendant did not request that the judge inquire further of juror no. 2 or juror no. 4 and arguably invited the judge not to ask the foreperson what she meant by "preconceived biases." Nor did the defendant request that the judge conduct a voir dire of the other jurors. Instead, the defendant stated he was satisfied with the judge's proposal to repeat some of the instructions and then return the jury to deliberating.

Our review is therefore limited to determining whether there was a substantial risk of a miscarriage of justice. This requires us to consider "the strength of the Commonwealth's case, the nature of the error, the significance of the error in the context of the trial, and the possibility that the absence of an objection was the result of a reasonable tactical decision." Commonwealth v. Azar, 435 Mass. 675, 687 (2002). We will not reverse a conviction under this standard unless "we have a serious doubt whether the result of the trial might have been different had the error not been made." Commonwealth v. LeFave, 430 Mass. 169, 174 (1999).

We see no substantial risk that the error here affected the result of the trial. The Commonwealth's case was strong. The victim was heard on the security recording arguing with a man she called "Pedro," the defendant's first name, moments before he shot her. Numerous witnesses who were familiar with the defendant identified him as the man in the recording. Several of these witnesses testified that they recognized the defendant's voice "right away" and were "sure" and had no doubt that it was him. The defendant also had a motive to commit the murder and had threatened to kill the victim in the past. And importantly, there is no indication that race played any role in this case, whereas Ralph R. revolved around a Black youth's interaction with the Boston police.

Moreover, unlike in Ralph R., where the judge took no steps to determine whether the jury remained impartial, the judge in this case conducted individual inquiries of the jurors involved in the altercation and the foreperson, who witnessed it. All confirmed that they could be fair and impartial. So while we conclude that the judge should have inquired further, the nature of the error was not such that we have serious doubt that the impartiality of the jury was affected. In addition, and again unlike in Ralph R., it appears that defense counsel made a tactical decision not to object, perhaps wishing to protect a juror who had a personal dispute with the prosecutor's office or sensing that a dispute between jurors could advantage the defendant.

***5** For these reasons we conclude that the defendant has not established a substantial risk of a miscarriage of justice on this record. Our ruling does not preclude the defendant from filing a motion to question the jurors under Commonwealth v. Fidler, 377 Mass. 192 (1979), or from raising his claim of juror bias in a motion for a new trial. The Commonwealth acknowledged at oral argument that these remedies remain available to the defendant.

2. Failure to instruct on involuntary manslaughter. "An instruction on involuntary manslaughter is required where any view of the evidence would permit a finding of manslaughter and not murder." Commonwealth v. Pierce, 419 Mass. 28, 33 (1994). "Malice is what distinguishes murder from manslaughter," so "a verdict of manslaughter is possible only in the absence of malice." Commonwealth v. Pagan, 471 Mass. 537, 546, cert. denied, 577 U.S. 1013 (2015), quoting Commonwealth v. Vizcarrondo, 427 Mass. 392, 396 (1998), S.C., 431 Mass. 360 (2000). Thus, "[w]hen it is obvious ... that the risk of physical harm to the victim created a plain and strong likelihood that death will follow, an instruction on involuntary manslaughter is not required." Pierce, supra.

The evidence in this case, viewed in the light most favorable to the defendant, did not support an instruction on involuntary manslaughter. The evidence was that the defendant shot the victim in the back of the head at close range. "Absent some evidence that the defendant's knowledge was impaired, intentionally discharging a firearm in the direction of another person creates a plain and strong likelihood of death" (footnote omitted). Commonwealth v. Mack, 423 Mass. 288, 290 (1996). The defendant's appellate argument that he meant only to scare or intimidate the victim is unavailing. There was no such evidence at trial; the sole issue was the identity of the shooter. The judge was "not required to instruct on a hypothesis that [was] not supported by the evidence." Commonwealth v. Santo, 375 Mass. 299, 305-306 (1978). See Commonwealth v. Pina, 481 Mass. 413, 424 (2019) (defendant's claim that "he meant to fire a warning shot" was "entirely speculative" and did not warrant involuntary manslaughter instruction); Pierce, 419 Mass. at 34 (where defense was alibi and no evidence was offered that victim's wounds were inflicted unintentionally, it would have been error for judge to give involuntary manslaughter instruction).

3. Firearms convictions. After trial in this case, the Supreme Judicial Court held in Guardado I, 491 Mass. at 686-693, that absence of licensure is an element of the offenses of unlawful possession of a firearm and unlawful possession of a loaded firearm. In Guardado II, 493 Mass. at 7-12, the court held that, although the Commonwealth presented insufficient evidence of absence of licensure at the original trial, the prohibition against double jeopardy did not bar a retrial.

After the issuance of Guardado II, the parties filed a joint status report in which they state that the Guardado decisions entitle the defendant to a new trial on his firearms convictions. Upon our independent review, we agree. We therefore vacate the convictions of unlawful possession of a firearm and unlawful possession of a loaded firearm, with the Commonwealth remaining free to retry the defendant if it so chooses. See Guardado II, 493 Mass. at 12.

Conclusion. The judgments of conviction of unlawful possession of a firearm and unlawful possession of a loaded firearm are vacated. The judgment of conviction of murder in the second degree is affirmed.

***6** So ordered.

All Citations

103 Mass.App.Ct. 1114, 222 N.E.3d 514 (Table), 2023 WL 8253676