COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-287

COMMONWEALTH

vs.

GAI E. SCOTT.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was convicted after a jury trial of assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b).[1] On appeal, the defendant claims that the judge should have admitted additional evidence that would have cast the victim in a negative light; erred in several aspects of the jury charge, including as to the instruction on defense of another; and abused his discretion in responding to a deliberating juror's expression of anxiety and a note from the jury about a possible impasse. We affirm.

Background. In briefest summary, the evidence showed that the defendant shot the victim (his uncle) during a funeral procession for a family member. The defendant conceded that he

[1] He was acquitted of armed assault with intent to murder, G. L. c. 265, § 18 (b).

was the shooter (a fact, moreover, that was amply confirmed by other evidence). The central issue at trial was whether the defendant acted in self-defense or in the defense of another. In closing, defense counsel argued that the victim was a "gang member" and a violent person who had threatened the defendant's family, and the defendant did not "have to wait for [the victim] to actually shoot before he c[ould] defend himself and his family."

Discussion. 1. Exclusion of evidence. a. The defendant's knowledge of the restraining order. The defendant contends that reversal is required because, he claims, the judge excluded evidence that the defendant knew that his sister Janiya had obtained a restraining order against the victim.[2] But the record belies this argument: the jury heard that the defendant told police that he knew that Janiya "put" a restraining order on the victim.[3] Cf. Commonwealth v. Lodge, 431 Mass. 461, 470 (2000) (testimony that victim inquired about obtaining restraining order admissible to show her state of mind only if

[2] The judge initially excluded all evidence of the restraining order based on his understanding that it had not been served on the victim and the defendant was not "actually aware that it had been sought." After defense counsel explained that the defendant had told police about the restraining order, the judge admitted that portion of the interview.

[3] The judge properly instructed that that evidence was admitted for the limited purpose of assessing the "defendant's state of mind and whether or not [the] defendant was acting reasonably in response to some apprehension or fear."

known to defendant). To the extent that the defendant argues that the judge erred in excluding what the defendant told police about what Janiya told him that police told her about serving it on the victim, that argument is unavailing. See Commonwealth v. Jones, 464 Mass. 16, 20 (2012) ("trial judge has general power to exclude evidence that creates substantial danger of confusing issues or misleading fact finder . . . trial judge may exclude marginally relevant evidence as unduly time-consuming, collateral [or] confusing" [quotations and citations omitted]). And to the extent that the defendant argues for the first time on appeal that the judge should have admitted the restraining order itself, evidence that it issued, and the basis for its issuance, no substantial risk of a miscarriage of justice arose. Id. at 20-21.

b. Victim's alleged statements advocating violence after this crime. The defendant contends that, under Commonwealth v. Adjutant, 443 Mass. 649, 650 (2005), the judge should have admitted evidence of social media postings and Internet news reports dated after this crime occurred that contained alleged statements of the victim including rap lyrics advocating violence with firearms.

Adjutant held that "evidence of a victim's prior violent conduct may be probative of whether the victim was the first aggressor where a claim of self-defense has been asserted and

the identity of the first aggressor is in dispute" (emphases added). Id. See also Mass. G. Evid. § 404(a)(2)(B) (2021). Adjutant and its progeny permit admission of evidence of a victim's prior specific acts of violence, but what the defendant proffered here were the victim's subsequent statements. Putting aside issues about whether the victim's statements in social media postings and Internet news reports could be authenticated, see Mass. G. Evid. § 901, the judge did not abuse his discretion in declining to admit them. See Commonwealth v. Deconinck, 480 Mass. 254, 263-264 (2018); Commonwealth v. Chambers, 465 Mass. 520, 529-530 (2013), citing Adjutant, 443 Mass. at 666. The jury heard substantial Adjutant evidence about specific instances of the victim's prior violent acts: several years before this shooting, the victim punched a person riding a bicycle during a road rage incident, and in 2005 he threatened his children's mother with a gun.

c. Preclusion of questions to trooper about meaning of teardrop tattoos. The defendant maintains that the judge should have permitted defense counsel to ask a State Police trooper on cross-examination about his opinion as to the meaning of two tattoos of teardrops near the victim's eye. Putting aside the question whether the trooper was qualified to opine on the meaning of the tattoos, see Commonwealth v. Hinds, 487 Mass. 212, 217-229 (2021), the judge did not abuse his discretion in

sustaining the objection to the line of questioning. The trooper's opinion would not have amounted to "evidence of the victim's specific acts" of violence. Adjutant, 443 Mass. at 665. Evidence of the victim's reputation for violence was not admissible unless known to the defendant, see Commonwealth v. Sok, 439 Mass. 428, 434 (2003). See also Mass. G. Evid. § 404(a)(2)(B)-(C).

d. Evidence of the victim's rap lyrics and relationships with gang members. The defendant also takes issue with the judge's exclusion of other evidence that would have portrayed the victim negatively. The judge excluded evidence of violent rap lyrics written by the victim, and precluded defense counsel from asking him on cross-examination whether in 2005 he left a woman a voicemail message saying he would "spit in her face," and whether he kept in touch with gang members he had associated with decades before. Given the ample evidence that the victim was a gang member, had a violent temper, was a violent person, and had guns (all of which defense counsel pointed to during closing), it was well within the judge's discretion to exclude the proffered evidence. See Commonwealth v. Sylvia, 456 Mass. 182, 192 (2010), quoting Commonwealth v. Simpson, 434 Mass. 570, 578-579 (2001) ("Whether evidence is relevant and whether its probative value is substantially outweighed by its prejudicial effect are matters entrusted to the trial judge's broad

discretion and are not disturbed absent palpable error"). See also Mass. G. Evid. § 403.

2. Jury instructions. a. Defense of another. The defendant argues that the judge erred in his instruction on the defense of another, asserting that the jury would have understood the instruction to mean that he had a duty to attempt to avoid combat before he could act in the defense of others. The defendant objected to the defense of another instruction, and so we review it for prejudicial error. See Commonwealth v. Allen, 474 Mass. 162, 168 (2016).

At the charge conference, defense counsel gave the judge a copy of Allen, which had been decided four months earlier. After reviewing Allen, the judge revised his jury charge on the defense of another, adding this admonition: "Unlike self-defense, which requires that an actor exhaust all reasonable means of retreat before using deadly force, when acting in defense of another, there is no duty to retreat. Rather, the Commonwealth must show that the defendant did not use or attempt to use all proper and reasonable means under the circumstances to avoid the physical combat before resorting to the use of deadly force" (emphasis added). This supplemental language avoided the same ambiguity in the instructions used in Allen. See Allen, 474 Mass. at 169-171. To the extent that other language in the defense of another instruction was similar to

that challenged in Allen,[4] that language certainly did not create reversible error. As in Allen, the jury would not have construed the charge to impose a duty to retreat. Id. at 171.

b. Mistaken belief. In explaining self-defense, the judge instructed that a defendant may use deadly force to protect himself "even if he had a mistaken belief that he was in immediate danger of death or a serious bodily harm." The judge did not specifically instruct that a mistaken belief also applied to the defense of another; the defendant did not object. The defendant now finds fault with that omission, maintaining that he shot the victim based on a mistaken belief that the victim was going to harm his family. Because the defendant did not object to the instruction, we review for a substantial risk of a miscarriage of justice. See Commonwealth v. Glacken, 451 Mass. 163, 166 (2008).

While the judge did not use the words "mistaken belief" when instructing on the defense of another, his instruction communicated that concept. He explained that "the Commonwealth may disprove a claim of defense of another if a reasonable person in the same circumstances as known to the defendant[] would not reasonably have believed that another person or

[4] In Allen, the judge instructed that a defendant "may not use force in defense of another person until he has availed himself of all proper means to avoid physical combat." 474 Mass. at 166 n.6 (emphasis omitted).

persons were in immediate danger of death or serious bodily harm from which they could save themselves only by using deadly force." That instruction, which closely tracked both the defendant's proposed jury instructions and those in the Model Jury Instructions on Homicide,[5] adequately conveyed the concept that the Commonwealth had the burden to prove that the defendant did not shoot the victim based on a mistaken but reasonable belief that another was in danger of death or serious bodily harm. See Commonwealth v. Glass, 401 Mass. 799, 809 (1988).

c. Prior inconsistent statements. The defendant contends that the judge erroneously instructed that prior inconsistent statements were to be considered only in evaluating witness credibility. The defendant maintains that the judge should have instructed that the victim's inconsistent statements to the grand jury could be considered for their truth.

When defense counsel cross-examined the victim about his grand jury testimony, she did not request that the prior testimony be admitted for its truth. See Commonwealth v. Lester, 486 Mass. 239, 253 (2020). The defendant's written request for jury instructions did not seek an instruction that the jurors should consider the victim's grand jury testimony for

[5] See Model Jury Instructions on Homicide 33 (2013), citing Commonwealth v. Young, 461 Mass. 198, 209 & n.19 (2012), and Commonwealth v. Barbosa, 463 Mass. 116, 135-136 (2012).

its truth. At the charge conference, defense counsel asked the judge to instruct the jury that "if the Commonwealth didn't ask that [prior inconsistent statements] be limited and the witness adopted the statement, then it comes in for all purposes," and to instruct as to "certain times" the defendant adopted prior inconsistent statements. Defense counsel never explained when those "certain times" were, nor did she specify that they should include the victim's grand jury testimony. After the judge's charge, defense counsel did not object to the absence of an instruction that the grand jury testimony could be considered for its truth. Where the defendant did not bring to the judge's attention "in specific terms" his view that the victim's grand jury testimony was admissible for its truth, it is doubtful that he preserved the issue for appellate review. Commonwealth v. Pfeiffer, 482 Mass. 110, 128 (2019). See Mass. R. Crim. P. 24 (b), 378 Mass. 895 (1979). Even if we were to review the issue for prejudicial error, see Lester, 486 Mass. at 252, we would find none.

In Lester, the court noted that "[i]t is unrealistic to expect that during the course of a trial, the judge is going to be able to catalog every out-of-court statement, and then give an appropriate final instruction as to whether each out-of-court statement was admitted substantively or to impeach in the absence of a request from counsel." Lester, 486 Mass. at 253.

Further, some out-of-court statements have a "dual relevancy," i.e., they are admissible both for their truth and to impeach the witness. Id. As a result, Lester held, the party concerned about the purpose for which the prior statement is admitted has the "burden" to request the appropriate instruction at the time when the statement is admitted, and the "better practice" is for the judge to give the instruction at that time. Id. Where no such request is made when the evidence comes in, "the proponent of the evidence may not be heard to object during the final instructions as to the instruction on the limited use of prior inconsistent statements." Id. at 254.

Here, the victim's grand jury testimony played a minimal part in the defense strategy. In closing, defense counsel did not mention the victim's grand jury testimony, nor did she urge the jurors to consider it for its truth. Even assuming that, without the guidance of Lester, the judge should have instructed the jurors that they could consider the victim's grand jury testimony for its truth, on this record there is not "'a reasonable possibility that the error might have contributed to the jury's verdict.'" Lester, 486 Mass. at 254-255, quoting Commonwealth v. Odgren, 483 Mass. 41, 46 (2019).

d. Consideration of Adjutant evidence. The defendant claims that the judge's instructions improperly restricted the jury's consideration of the victim's prior acts of violence, see

Adjutant, 443 Mass. at 650, to self-defense and the identity of the first aggressor, and did not permit the jury to consider those acts in determining if the defendant acted in the defense of another.[6] The judge's instruction was not erroneous; the Supreme Judicial Court has declined to extend the Adjutant doctrine to situations involving the defense of another. See Commonwealth v. Camacho, 472 Mass. 587, 596 n.12 (2015) ("we decline to extend the Adjutant doctrine to cases involving defense of another" [citation omitted]).

e. Lack of Bowden instruction. The defendant argues that the judge erred in declining to instruct the jury on the defense claim that the police investigation was inadequate. See Commonwealth v. Bowden, 379 Mass. 472, 486 (1980). "There was no error because the giving of such an instruction is never required." Commonwealth v. Williams, 439 Mass. 678, 687 (2003). See Commonwealth v. Norris, 483 Mass. 681, 692 n.12 (2019) ("'a judge is not required to instruct on the claimed inadequacy of a police investigation'" [citation omitted]).

3. Jury deliberations. a. Events during deliberations. After about four and one-half hours of deliberations, the jury sent a note to the judge stating that one juror was "confused,"

[6] The judge did instruct that the jury could consider the victim's threats of violence against the defendant or any other person in determining if the defendant acted in the defense of another.

and asked the judge to "meet with her in order to provide her with a deeper definition of self-defense." The judge told the jury that he would not meet with an individual juror, emphasizing that any "individual juror's views on the evidence or how the law applies to that evidence[] is part of the deliberative process ought not to be disclosed to the court," and that he would provide further instructions on the law if the jury requested it through the foreperson.

The day after the jury sent that note, after about five more hours of deliberations, the jurors informed the judge that they could not reach a unanimous verdict. The judge instructed them pursuant to Commonwealth v. Tuey, 62 Mass. 1, 3-4 (1851), as modified by Commonwealth v. Rodriquez, 364 Mass. 87, 98-101, 101-102 (1973) (Tuey-Rodriquez instruction). The judge ordered them to resume deliberations, and they did so for another hour and twenty-two minutes that day.

The next morning, juror no. 13 transmitted to the judge a note from a hospital emergency room nurse. The note stated that the previous evening, juror no. 13 was evaluated "for anxiety, stress and transient thoughts of harming herself," and she had reported that "her participation on jury duty is the reason for her feelings of being overwhelmed." The note informed the judge that juror no. 13 "was judged to be medically stable" and that a mental health clinician had determined that she was "not . . .

intending to harm herself," but the note was sent to allow the judge "to factor this information into decisions regarding [juror no. 13]'s on going participation on jury duty." The judge informed counsel that, two days previously, juror no. 13 had been "quite emotional" at the end of the day, and that the foreperson was aware of her distress and "has been somewhat involved in helping her to cope with all this."

In discussing with counsel how to respond, the judge outlined three possible options: (1) do nothing and allow the jury to continue deliberations; (2) discharge juror no. 13 on the basis of the note, replace her with an alternate juror, and instruct the jury to begin deliberating anew; or (3) meet with juror no. 13, "and perhaps the foreperson," inquire as to juror no. 13's well-being, and tell her that if she feels overwhelmed, she or the foreperson is to communicate that to a court officer. After consulting with the defendant, defense counsel expressed concern about juror no. 13's "having to discuss her personal psychiatric issue in front of . . . strangers," and then told the judge, "we want to hear what this [juror] has to say." The judge told the parties that he would conduct a colloquy with juror no. 13, reiterating, "I am going to have the fore[person] present, as well."

In the presence of counsel, the defendant, and the foreperson, the judge explained to juror no. 13 the options he

had discussed with counsel, then asked how she was feeling and whether she felt able to continue deliberations. He mentioned that it was his "understanding" that the foreperson had "talked to [her] a little bit about what [she was] experiencing," and said that the foreperson "is kind of my agent in the jury room," "[i]n the sense that I want her to let me know if there's anything that I ought to be aware of during deliberations, and that includes the wellbeing of jurors." Juror no. 13 explained that she had said at the hospital that she wanted "to jump out the window" if deliberations continued, meaning it as "a joke," but hospital personnel took it seriously. She repeatedly said that she wanted to remain on the jury. The judge told her that he had noticed that she had paid attention throughout trial, she was "valuable" as a juror, and her "views . . . [and] judgments are as important to this case as anyone else's," and so it was appropriate for her to continue deliberations. Even so, the judge stressed to juror no. 13 the importance of her mental health, cautioning, "what I would want you to do is to ask our fore[person] to let me know if you're feeling overwhelmed again." The judge told the foreperson to send him a note if any other concern arose.

After that colloquy, defense counsel told the judge that she was concerned that the foreperson had taken on "sort of a mothering role" to juror no. 13, which might compromise the

independence of both jurors. Counsel told the judge that "it was the right thing to do" for the judge "to say let us know if there's another problem"; even so, counsel asserted that the judge should replace juror no. 13, and objected to the judge's ruling declining to do so.

About two hours and twenty minutes later, the jury sent a note stating:

> "After 48 hours of impasse, we the [j]ury, are concerned that not all pre-existing conditions [] related to cognitive reasoning & understanding were fully disclosed or even understood during the selection process of the [j]ury. This act of non-disclosure has created an impasse, due to [j]ury members' inability to understand the Massachusetts law as it is written, and [j]ury members' inability to remain impartial & unbiased. How do we proceed from here?" (emphases in original).

The judge then conducted individual voir dire of the jurors, during which each said that he or she was impartial, understood and could fairly apply the law, and had not been exposed to extraneous influences.[7] The judge found that the jurors were not at an impasse, and instructed them to either

[7] The judge noted that because of the placement of the apostrophes in the two phrases "[j]ury members' inability," the note seemed to refer to more than one juror. During individual voir dire of the foreperson, the judge asked if the note referred to more than one juror; she replied that it did not, but that she used the plural "deliberately." When the judge later offered to ask the foreperson what she meant by that, the defendant declined the offer. Cf. Commonwealth v. Chalue, 486 Mass. 847, 861 & n.14 (2021) (Tuey-Rodriquez instruction could be interpreted as coercive if judge knows identity of small number of hold-out jurors).

resume deliberations or send another note informing him if they were at an impasse. After deliberating for another thirty-four minutes, the jury returned its verdicts.

b. Judge's refusal to discharge juror no. 13. The defendant argues that the judge committed reversible error in his response to the nurse's note presented by juror no. 13. He argues that juror no. 13 was "mentally unstable" and so the judge should have discharged her, and that the judge's telling juror no. 13 that the foreperson was his agent in the jury room improperly created a "caretaking alliance" between the two jurors which gave rise to structural error.[8]

"The discharge of a deliberating juror is a sensitive undertaking and is fraught with potential for error. It is to be done only in special circumstances, and with special precautions." Commonwealth v. Tiscione, 482 Mass. 485, 489 (2019), quoting Commonwealth v. Connor, 392 Mass. 838, 843

[8] At trial, the defendant did not object to the foreperson's presence at the colloquy with juror no. 13. He did not raise the issue in his brief but did raise it at oral argument. Even if the issue were properly before us, see Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019), we would discern no substantial risk of a miscarriage of justice. Though it may be the better practice for a judge to hold a voir dire of a deliberating juror outside the presence of any other juror, particularly when discussing a juror's mental health, there may be reasons why the judge did so here that are not apparent from this record, precisely because there was no objection. Cf. Chalue, 486 Mass. at 865 (judges must respond with "agility and leeway" to situations involving jurors' personal problems, which sometimes is "no easy task").

(1984). "During deliberations, a juror properly may be discharged 'only [for] reasons personal to [that] juror, having nothing whatever to do with the issues of the case or with the juror's relationship with his [or her] fellow jurors.'" Id., quoting Connor, supra at 844-845. "Allowing discharge only for personal reasons ensures that such action will not affect the substance or the course of the deliberations" (quotation and citation omitted). Id. In certain limited circumstances where a deliberating juror is "experiencing severe emotional or mental distress, well beyond that level of distress that often accompanies deliberations," a trial judge has discretion to discharge the juror. Commonwealth v. Leftwich, 430 Mass. 865, 874 (2000). See Tiscione, 482 Mass. at 490-491. Cf. Commonwealth v. Williams, 486 Mass. 646, 651-659 (2021) (where juror's problem was rooted in relationship to other jurors, it was not "personal solely to him," and he remained capable of serving on jury).

After his colloquy with juror no. 13, the judge found that she was capable of continuing to deliberate, noting from her demeanor that she "seems quite relaxed and comfortable in continuing as a sitting juror." Unlike this court, the judge had the opportunity to see her and to assess her cognitive functioning. We cannot and do not second-guess his assessment. See Commonwealth v. Lao, 443 Mass. 770, 777 (2005) (judge with

opportunity to "observe firsthand the demeanor of each prospective juror" determines impartiality). From juror no. 13's statements in the colloquy, including that she wanted to remain on the jury and that in her view hospital personnel had overreacted to her statement that deliberations made her want to "jump out the window," the judge had ample basis for his finding that she was capable of continuing to deliberate. That deliberations may result in conflict or strong emotions is not grounds to discharge a juror. See Williams, 486 Mass. at 652 (juror's difficulty deliberating was colored in part by his relationship with other jurors and his view of the evidence, and not entirely "personal" to him).[9]

As to the defendant's argument that, during his colloquy with juror no. 13, the judge improperly referred to the foreperson as "kind of [his] agent in the jury room," we discern

[9] The defendant asks us to infer that juror no. 13 was the same juror referred to in the note asking the judge to individually instruct a juror on the law of self-defense, and also the same juror referred to in the note about inability to understand the law, "pre-existing conditions," and "cognitive limitations." This we cannot do. The judge, who saw the jurors' body language in the courtroom, commented that it was his "impression" that any division among them was "not due to" juror no. 13. More importantly, the judge properly and repeatedly cautioned the jurors not to disclose to him information about their deliberations, and so we decline the defendant's invitation to try to divine that information from the transcript. Cf. Commonwealth v. Torres, 453 Mass. 722, 732-733 (2009) (judge properly interviewed deliberating juror to determine if note about her desire to go home was "mere euphemism" for difficulty in adhering to minority position).

no error. In his jury charge, the judge had already explained the foreperson's role, including that she was the "first among equals" and was "responsible . . . for communicating with the court, if necessary, during deliberations," but "has no greater say or vote during deliberations" and "in that sense, is exactly equal to all other jurors." The judge's comment that the foreperson was his "agent in the jury room" essentially restated the same concept and was immediately followed by his repeated reminders to juror no. 13 that her views were as important as those of any other juror. After that colloquy with juror no. 13, the jury continued to deliberate for nearly another three hours, not including the break during which the judge conducted individual voir dire of the jurors and determined that each remained impartial, including juror no. 13. The judge's comment that the foreperson was his "agent" did not amount to any extraneous influence on juror no. 13. See Commonwealth v. Chalue, 486 Mass. 847, 864 (2021) (though judge should not have given partial Tuey-Rodriquez instruction to lone hold-out juror, reversal not required because jury continued deliberations for seven and one-half hours). Cf. Commonwealth v. Blanchard, 476 Mass. 1026, 1028-1029 (2017) (after deliberating jury exposed to extraneous information in judge's trial binder, judge questioned each juror about ability to disregard it and ordered jury to deliberate again; not required to declare mistrial).

c. Judge's denial of mistrial. The defendant argues that the jury's note on the third day of jury deliberations reporting a second "impasse" required the judge to declare a mistrial. The defendant objected when the judge declined to declare a mistrial. Whether to declare a mistrial is a matter for the judge's discretion. See Commonwealth v. DaCosta, 96 Mass. App. Ct. 105, 111 (2019), quoting Commonwealth v. Gallagher, 408 Mass. 510, 517 (1990).

Though the jurors' note stated that they were at "an impasse," based on his subsequent individual voir dire of each juror, the judge properly ruled that they were not in fact at an impasse. See Commonwealth v. O'Brien, 65 Mass. App. Ct. 291, 296 (2005) (despite jurors' note stating they were at an "impasse," judge properly found that they were not). See also Commonwealth v. Torres, 453 Mass. 722, 733 (2009) (note stating that juror was biased and could not understand evidence did not constitute deadlock). Based on his assessment of the jurors' demeanor and credibility, see Lao, 443 Mass. at 777, the judge determined that each was impartial, and thus properly instructed them to either resume deliberations or report an impasse to the court.

The defendant now claims that the judge should have told the jurors that they could not resume deliberations unless they agreed to do so. The judge offered to give that instruction,

but the defendant declined it. No substantial risk of a miscarriage of justice arose from its absence. The jurors' consent to resume deliberations would have been required only if the jurors had in fact reached a second impasse. See G. L. c. 234A, § 68C. See also Commonwealth v. Jenkins, 416 Mass. 736, 737 (1994).

Conclusion. For the foregoing reasons, we affirm the defendant's conviction of assault and battery by means of a dangerous weapon.

Judgment affirmed.

By the Court (Wolohojian, Desmond & Grant, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: August 27, 2021.

[10] The panelists are listed in order of seniority.