APPENDICES

APPENDICES

Table of Contents

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-1027

COMMONWEALTH

vs.

MAURICE MORRISON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

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

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.[1] 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

[1] 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.

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."[2] 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.

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

[2] 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.

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.[3] 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

[3] 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."

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.[4]

[4] 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

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.[5] 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"

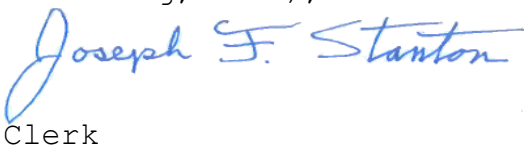
systems may not show an object's true colors may well have lain within the common knowledge possessed by the jury, even if individual jurors may not have been able to articulate what explained that phenomenon." Id. at 220-221, citing Commonwealth v. Junta, 62 Mass. App. Ct. 120, 127-128 (2004) (no medical testimony needed to support argument to jury "that bruises are not immediately visible but may take a day or two to appear").

[5] 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.

[quotation and citation omitted]). We therefore affirm the judge's order, dated August 2, 2021.

So ordered.

By the Court (Meade, Milkey & Massing, JJ.[6]),



Clerk

Entered: September 29, 2022.

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

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-29077

COMMONWEALTH
vs.
MAURICE MORRISON

Suffolk Superior Court No. 1384CR10826
A.C. No. 2021-P-1027

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on February 16, 2023, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: February 16, 2023

To: Cailin M. Campbell, A.D.A.
Jonathan Shapiro, Esquire
Mia Teitelbaum, Esquire

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
1384CR10826

COMMONWEALTH

v.

MAURICE MORRISON

FINDINGS AND RULINGS AS TO POST-VERDICT INQUIRY OF JUROR

A jury convicted Maurice Morrison of two counts of murder in the second degree and one count of unlawful possession of a firearm. The Court sentenced Mr. Morrison to serve concurrent life sentences for the murder convictions and a five-year sentence for the firearm charge.

The Appeals Court affirmed these convictions but remanded for an inquiry into whether a juror's Facebook posts during trial "exposed him and other jurors to extraneous information or influence." *Commonwealth* v. *Morrison*, 97 Mass. App. Ct. 731, 732 (2020). Following the Appeals Court's lead, this Court will refer to this juror as "Juror A." The purpose of this inquiry "is to determine what, if any, extraneous communications the posting juror may have received" about the case or trial, "but which are not reflected in the posts themselves." *Id.* at 743. The court further ordered that, "[o]n remand, the inquiry need not extend to the juror's postverdict posts." *Id.* And it added, "[w]e leave to the sound discretion of the trial judge whether to inquire of other jurors, based on the information obtained during inquiry of juror A." *Id.* at 744.

As explained below, the Court finds that Juror A did not engage in or receive any extraneous communications during the trial of this case, before the jury announced its verdict, other than their Facebook posts and a small number of non-substantive responses in which people clicked to show that they "Liked" a post or to respond with an emoji and nothing else. The Court also finds that Juror A did not seek out or receive any extraneous information and was not subjected to any extraneous influence during the trial, and that Juror A did not do anything that exposed other jurors to extraneous information or influence. In the exercise of its discretion, the Court denies Mr. Morrison's requests to examine Juror A's electronic devices and Facebook account and to question other jurors.

1. **Procedural Background.** This case was tried to a jury in late 2016. The Court (this judge) presided over the trial. The case docket confirms that the trial took place on the following schedule.

Jury empanelment took more than three days. It started on Wednesday, October 19, continued October 20 and 24, and finished the morning of Tuesday, October 25. After the last juror was selected, the Court gave the jury some initial instructions, both parties made brief opening statements, and the Commonwealth began to present evidence.

Consistent with its usual practice, as part of its precharge or initial instructions at the beginning of trial the Court instructed all of the jurors that throughout the trial they (i) had to keep an open mind, (ii) could not communicate with each other about the case until after all evidence had been presented and the jury began its formal deliberations, (iii) could not communicate with anyone else about the case until the trial was over and the jury had reached a verdict, and (iv) could not seek out or pay attention to any information from any source outside of trial that might have any bearing on the case. While instructing the jurors that they could not communicate with anyone else about the case until after they had reached a verdict, the Court explained that they could not communicate about the case in any way, including electronically, and instructed jurors not to text, email, or blog about the case, not to post anything about the case on their Facebook page or any other social media, and not to communicate with others about the case in any case.

The jury heard evidence over seven days, starting just before noon on October 25 and ending just after noon on November 2. The next morning the parties made closing arguments and the Court instructed the jury.

The jury deliberated over six days, starting November 3 and ending November 14, 2016. It deliberated on November 3, 7, 8, 9, 10, and 14. The jury announced its unanimous verdict late in the day on Monday, November 14.

2. **Findings of Fact.** As directed by the Appeals Court, this Court recently held an evidentiary hearing during which it questioned Juror A, who swore or affirmed that they would tell the truth. The hearing took place July 8, 2021. Having listened carefully to Juror A's responses, and paid close attention to how Juror A responded and testified, the Court finds that Juror A was entirely credible and credits all of their sworn testimony. The Court makes the

following findings based on that testimony and on the exhibits marked as evidence during the hearing.

2.1. **Facebook Posts.** The Court first makes findings as to Juror A's Facebook posts about the trial of this case.

Juror A was seated on the jury on October 19, 2016, the first day of jury selection. Later that day Juror A made a post to their Facebook page (Ex. A) stating that "I was put on a jury" along with one other person, the trial "[s]tarts next Tuesday provided they can fill the remaining 13 seats on the jury," and the juror "[c]annot say anything else except it is a murder trial." Four people responded, either by clicking the thumbs-up icon to say that they "Liked" this post, or with a "Wow" emoji, or both.

Between the start of the trial itself on October 25 and when the jury announced its verdict on November 14, Juror A made seven more Facebook posts about the trial (Exs. B to H), all in violation of the Court's express order not to do so. They made one post per day on November 2, 3, 7, 8, 9, 10, 11. Juror A made the first six of these posts an hour or more after the jury was excused for that day; they made the last of these posts on Veterans' Day, when the courthouse was closed and the jury had the day off.

None of these pre-verdict, mid-trial Facebook posts revealed anything of substance about the trial. Readers clicked to say that they "Liked" some, but not all, of these posts; several of them also posted emojis as responses. These posts stated as follows and elicited the following reactions, with each post identified by the date and time Juror A made the post.

- Nov. 2 at 5:35 p.m.: "Seeing the light at the end of the tunnel at Boston Superior Court. Closing arguments Thursday." This post did not receive any responses.
- Nov. 3 at 7:16 p.m.: "Jury duty is not going to end well. This will continue into next week now." Two people responded by clicking to say that they "Liked" this post, with a "Sad" emoji, or both.
- Nov. 7 at 6:40 p.m.: "I think I am the only sane person on this jury. We hit the three week mark Tuesday." This post did not receive any responses.

- Nov. 8 at 5:40 p.m.: "Another day down with Jury Duty. Back Tuesday, perhaps we turned a corner today." One person clicked to say that they "Liked" this post.
- Nov. 9 at 5:12 p.m.: "Court will drag on until Thursday, three long weeks now. Getting close." This post did not receive any responses.
- Nov. 10 at 5:16 p.m.: "OMG, back to court on Monday." One person responded with a "Wow" emoji.
- Nov. 11 at 10:32 a.m.: "Day off from Jury duty today to honor our veterans. I need to get this jury duty thing done. Tired of waking up at nights thinking of it." This post did not receive any responses.

Each of these posts also included a photographic image. All but one included a photo of the Suffolk County Courthouse, the John Adams Courthouse next door, or both. The last of these posts included an image of the goddess Justitia, today often called Lady Justice.

After the jury announced its verdict late on November 14, Juror A made ten more Facebook posts about the trial (Exs. I to R). The first of these posts, made on November 14 at 5:20 p.m., announced that the jury had found Mr. Morrison guilty of two counts of second degree murder. The other posts were made on subsequent days. Most of them 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. Two other posts copied parts of stories about the verdict in the Boston Herald and the Boston Globe.

2.2. **No Extraneous Influence.** The Court finds that Juror A did not receive any extraneous communication, did not learn any extraneous information, and was not subject to any extraneous influence during the trial of this case or during the jury's deliberations. Nor did Juror A's Facebook posts during trial expose any other jurors to extraneous information or influence. The Court makes the following further findings.

Juror A never told any of the other jurors that they were making Facebook posts during the trial, or about the substance of any of the items about the trial that they posted to his Facebook page during the trial.

Juror A's pre-verdict postings on Facebook do not suggest that they were subjected to any extraneous influence during the trial. Based on Juror A's

sworn testimony during the recent evidentiary hearing, the Court finds that Juror A was not subjected to any extraneous information and did not receive any extraneous communication or information from any other source or through any other medium or mode of communication.

The Facebook posts marked as Ex. A to Ex. H, together with the "Like" or emoji responses described above, are the only communications about this case that Juror A directed to or received from anyone outside the jury about this case before the jury announced its verdict. Juror A did not engage in any other communications with, make any other communications to, or receive any other communications from anyone about the trial in this case before the jury announced its verdict.

Juror A did not make any other posts or communications about the trial, on or through any medium, before the jury announced its verdict. The Court credits Juror A's testimony that the thumbs-up "Likes" and emoji posts described above were the only responses that they received during the trial to their Facebook posts about serving on this jury. Juror A has never chatted with anyone through Facebook and has never used Facebook Messenger or any other Facebook chat or messaging function or application; they did not communicate with anyone about the trial that way. They also do not and did not use any other social media platforms.

All the thumbs-up "Likes" and emoji responses to their Facebook posts during the trial were sent by people that Juror A already knew; none was sent to them by a stranger. The Court credits Juror A's testimony that they had no other communications during the trial with any of the people who responded to the mid-trial Facebook posts.

The Court also credits Juror A's testimony that in deliberating and reaching a verdict the jury did not consider anything other than the testimony by witnesses, the exhibits admitted into evidence, the facts stipulated to by the parties (which were incorporated into an exhibit), and the jurors' life experiences.[1] And it credits Juror A's testimony that during the trial, before the

---

[1] "Jurors are permitted to draw reasonable inferences from the evidence based on their common sense and life experience." *Commonwealth* v. *Beal*, 474 Mass. 341 (2016); accord, e.g., *Commonwealth* v. *Salazar*, 481 Mass. 105, 117 (2018) ("It is well established that it is proper to ask a jury to rely on their common sense and life experience in assessing evidence and credibility"). Consistent with this case law, the Court instructed the jury that they could only consider the

jury reached and announced its verdict, they did not do any kind of research about the trial, either through the Internet or otherwise. Nor did they do any kind of research or communicate with anyone during the trial about the surveillance videos that were entered into evidence, about surveillance videos in general, or about how colors may appear or change on night-time surveillance videos.

3. **Rulings**. In the exercise of its discretion, the Court concludes that there is no need to conduct any further investigation of Juror A or to question other jurors.

3.1. **Juror A's Devices and Accounts**. At a prior hearing on April 27, 2021, the Court denied a written motion by Mr. Morrison seeking a forensic examination of to all electronic devices that Juror A used during the trial, and also seeking access to information from Facebook about Juror A's account. Morrison had asked the Court to do two things:

- order Juror A "to produce the cell phone, computer, and any other electronic communication device in use by him during the trial and jury deliberations" for a forensic examination by a court-appointed expert for "all incoming or outgoing texts, emails, telephone calls, or other communications sent or received" from October 19 to November 14, 2016, to determine whether Juror A "received any extraneous information about this case;" and
- order that Facebook produce subscriber information for Juror A's account, Juror A's friends list, all times that Juror A connected to or disconnected from their account (without time limit), all posts to the account including comments from October 19 to November 14, 2016, all GPS and location information associated with the account (without time limit), and all chat and Facebook messenger communications for the account during the same period.

Toward the end of the recent evidentiary hearing, Morrison made an oral request to renew this prior motion. In essence, he asked the Court to reconsider its prior ruling in light of Juror A's sworn testimony.

---

evidence and any reasonable inferences they chose to draw from the evidence; it further explained that drawing an inference involves taking some known information, applying one's intelligence, life experience, and common sense, and drawing a conclusion.

In the exercise of its discretion, the Court declines to reconsider or revise its prior on-the-record ruling denying this motion. Having found that Juror A was not subjected to any extraneous influence and did not receive any extraneous information during the trial, the Court concludes that further investigation of Juror A's electronic devices and Facebook account is not needed. See *Commonwealth* v. *Werner*, 89 Mass. App. Ct. 689, 697–699 (2012) (affirming similar ruling). Mr. Morrison's "unsupported speculation that the desired subpoenaed documents" and electronic devices "might include previously undisclosed communications of extraneous information to the jurors" is not enough to justify subjecting a juror to such an intrusive investigation. *Id.* at 699.

3.2. **Other Jurors.** Mr. Morrison has not shown that there is any factual basis to suspect or fear that any of the other jurors were or may have been exposed to extraneous information or influences during the trial or during the jury deliberations. The Court therefore concludes, in the exercise of its "sound discretion," that there is no good reason to question any other juror about possible extraneous influences. Cf. *Morrison*, 97 Mass. App. Ct. at 744.

A criminal defendant who claims jurors communicated about the trial with outside parties before reaching a verdict "bears the burden of demonstrating that the jury were ... exposed to ... extraneous matter." *Morrison*, 97 Mass. App. Ct. at 741, quoting *Commonwealth* v. *Fidler*, 377 Mass. 192, 201 (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." *Id.*, quoting *Commonwealth* v. *Guisti*, 434 Mass. 245, 251 (2001), quoting in turn *Commonwealth* v. *Dixon*, 395 Mass. 149, 151–152 (1985). "In other words, there must be something more than mere speculation" of juror misconduct before interrogating jurors about their service. *Dixon, supra*, quoting *United States* v. *Barshov*, 733 F.2d 842, 851 (11th Cir.1984), cert. denied, 469 U.S. 1158 (1985).

Mr. Morrison has not made a colorable showing that any of the other jurors were exposed to extraneous matters during trial. There is no evidence that any other juror was or even may have been exposed to any extraneous information or influence. The Court has found that Juror A was not subjected to extraneous information or influence and did not tell other jurors about his pre-verdict Facebook posts. Though Mr. Morrison showed that Juror A made public Facebook posts about the case during the trial, he has not mustered evidence

that any other juror engaged in similar, or any other kind of, communications about the case during the trial.

Mr. Morrison contends that Juror A's discussion of color shifts in night-time surveillance video footage, in his post-verdict Facebook posts and during the recent evidentiary hearing, is sufficient evidence that Juror A and other jurors were in fact exposed to extraneous information. The Court disagrees.

Mr. Morrison knew that Juror a worked for a security company when the jury was empaneled but did not strike Juror a from the jury.

During the recent hearing, Juror A volunteered that during the jury's deliberations they 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.

Juror A's apparent reliance on his own experience as an aid to interpreting the surveillance video evidence presented at trial was permissible; it does not provide any ground for bringing in other members of this jury for questioning.

If jurors interpret evidence at trial based on their personal experience with similar things, that does **not** constitute the impermissible use of extraneous information that would justify further inquiry of all jurors or the granting of a new trial. See *Commonwealth* v. *Watt*, 484 Mass. 742, 758–760 (2020) (prior knowledge of gang symbols); *Commonwealth* v. *Caruso*, 476 Mass. 275, 289 (2017) (prior knowledge as to accuracy of electronic devices' time-keeping mechanisms). "To expect jurors to perform their duties without the benefit of their life experiences is unrealistic and undesirable." *Watt, supra*, at 759; accord *Caruso, supra* ("Jurors may rely on their own common sense and life experience in their role as fact finders.").

In *Watt*, the trial judge conducted an evidentiary hearing after the trial, questioning two jurors who reported observing hand gestures during the trial. *Id.* at 757. They both saw one defendant glaring at and making hand gestures toward the surviving shooting victim. And they both interpreted the gestures as gang symbols and discussed them during the jury deliberations. See 484 Mass. at 757. One of these jurors, a journalist, said that he had become familiar with gang symbols while working with police assigned to the gang unit. *Id.* at n.19. "[T]he judge concluded that neither the gestures nor any ensuing discussion about them constituted extraneous influences," and declined to

question the other jurors or grant a new trial. *Id.* at 758, 760. The Supreme Judicial Court held that this was not an abuse of discretion. *Id.*

The *Watt* juror's prior familiarity with gang symbols was not impermissible extraneous information, but instead was experience that the juror could permissibly bring to bear to help interpret what the juror observed in the courtroom. *Id.* Similarly, if an impartial physician serves as a juror in a wrongful death case based on allegations of medical malpractice, use of their medical knowledge to interpret the evidence is not an impermissible use of extraneous information, because "jurors may rely on their common sense, experience, and any expertise they may have on a given subject." *Blank* v. *Hubbuch*, 36 Mass. App. Ct. 955, 957 (1994); accord, e.g., *Kendrick* v. *Pippin*, 252 P.3d 1052, 1066 (Colo. 2011) (en banc) (use of engineering and mathematics expertise to calculate speed, distance, and reaction times); *State* v. *Heitkemper*, 196 Wis.2d 218, 226 (Wisc. Ct. App. 1995) (pharmacist juror's knowledge about effect of particular drug); *Hard* v. *Burlington Northern R. Co.*, 870 F.2d 1454, 1462 (9th Cir. 1989) (special knowledge of x-ray interpretation).

Much the same is true here. Juror A could use their prior familiarity with surveillance video footage to help them interpret and understand the surveillance video evidence presented at trial. That would not constitute the use of extraneous information, and thus provides not basis for questioning the other jurors. See *Watt*, 484 Mass. at 757–760; *Blank*, *supra*.

ORDER

Having found that Juror A did not receive any extraneous communication, 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, the Court exercises its discretion not to question other jurors about possible extraneous influences and to deny Defendant's renewed motion for a forensic examination of Juror A's electronic devices and for discovery into Juror A's Facebook account.

Kenneth W. Salinger
Justice of the Superior Court

2 August 2021

18-P-1585 Appeals Court

COMMONWEALTH vs. MAURICE MORRISON.

No. 18-P-1585.

Suffolk. December 2, 2019. - June 26, 2020.

Present: Green, C.J., Blake, & Kinder, JJ.

Homicide. Firearms. Evidence, Videotape, Hearsay, State of mind, Consciousness of guilt. Social Media. Practice, Criminal, Hearsay, Motion in limine, Interrogation of jurors.

Indictments found and returned in the Superior Court Department on September 4, 2013.

The cases were tried before Kenneth W. Salinger, J.

Jonathan Shapiro (Mia Teitelbaum also present) for the defendant.

Cailin M. Campbell, Assistant District Attorney (Mark Lee, Assistant District Attorney, also present) for the Commonwealth.

GREEN, C.J. Early on the morning of May 13, 2013, two victims were discovered dead in the front seats of a taxicab that had crashed into a building near the intersection of Parker Street and Crescent Avenue in Chelsea. After trial in the

Superior Court, a jury convicted the defendant of two counts of murder in the second degree and one count of unlawful possession of a firearm. On appeal, the defendant contends that the evidence was insufficient to support his convictions, and claims error in the admission of certain hearsay statements made by one of the victims. In addition, the defendant contends that the trial judge erred in denying his postverdict motion to conduct inquiry of a juror who made a number of posts about the trial to his Facebook page while the trial was underway, including while the jury were deliberating, and made additional Facebook posts after the jury verdict. We affirm the defendant's convictions and discern no error in the admission of testimony describing the victim's statements. However, we remand for an evidentiary hearing to allow for an inquiry into whether the juror's Facebook posts exposed him and other jurors to extraneous information or influence.

Background. We summarize the relevant facts and trial testimony, reserving other facts for discussion as they become pertinent to the issues raised. At about 4 A.M. on May 13, 2013, Chelsea police received a report that a vehicle had crashed into a wall near the intersection of Crescent Avenue and Parker Street in Chelsea. When officers arrived at the scene, emergency personnel informed them that two people were dead in the vehicle, a taxicab. Autopsies performed on the two victims

later confirmed that each died of two gunshot wounds to the back of the head.

The male victim found in the driver's seat of the taxicab, Zouaoui Dani-Elkebir, was a taxicab driver. The female victim found in the front passenger's seat of the taxicab, Karima El-Hakim, was a known drug user and in a relationship with Dani-Elkebir.

Frank Gerena, a friend of the defendant who regularly gave him rides, was with the defendant on May 13, 2013. Early that morning, the defendant called Gerena and asked for a ride to a McDonald's restaurant. At 3:04 A.M., Gerena and the defendant went through the "drive-through" at the McDonald's restaurant. The two men smoked marijuana together, and Gerena then dropped the defendant off at his home at 786 Broadway in Chelsea. The defendant requested that Gerena return around 4 A.M. to pick him up again on Eleanor Street.

Dani-Elkebir's cell phone, recovered by police from the taxicab in which both victims were found, revealed that an individual listed as "Logan" was the last person with whom Dani-Elkebir communicated on May 13. Police later traced the number associated with Logan to the defendant. Phone records listed text messages and telephone calls between Dani-Elkebir and Logan arranging for Dani-Elkebir to pick Logan up for a ride. At 3:35 A.M., Dani-Elkebir texted Logan and indicated he would arrive to

pick him up in "2 mn." At 3:36 A.M. and again at 3:41 A.M., Logan called Dani-Elkebir.

A witness, an admitted drug user who was familiar with the defendant and both victims, saw Dani-Elkebir's taxicab parked on Eleanor Street at 3:45 A.M. on May 13. Dani-Elkebir was in the driver's seat, a female smoking "crack" cocaine was in the front passenger's seat, and the defendant was in the backseat. The witness observed the taxicab drive away and "[take] a left onto Broadway."

Sherri Marin lived on Parker Street in Chelsea, one and one-half blocks from where the victims were discovered by emergency responders. At 3:47 A.M. on May 13, Marin was awakened by what she believed were gunshots.[1] Marin was unsure from which direction the sound of the gunshots came. After she heard the gunshots, Marin heard footsteps moving past the window of her first-floor bedroom and saw emergency vehicles go down Parker Street, toward Spencer Avenue.

At 3:37 A.M. (earlier than the defendant had requested), Gerena returned to Eleanor Street to pick up the defendant, as the defendant had earlier requested. After about fifteen

[1] When Marin awoke, she looked at her bedroom clock to check the time. The clock read 3:47 A.M. At trial, Marin testified that she was unsure whether her clock was accurate on May 13 and that she sometimes set her clock ahead a minute.

minutes,[2] the defendant approached Gerena's car from the direction of Broadway "out of breath and ready to go."[3] The defendant suggested they drive to Revere to "make a play," which Gerena understood to mean make a drug deal. Gerena drove the defendant to Revere, waited in the car while the defendant got out for a few minutes, and then drove the defendant back to Gerena's house in Everett.

When they arrived at Gerena's house, the defendant told Gerena he needed to "clean the dagger." The defendant went into the bathroom and shut the door, at which time Gerena heard "a bunch of clanging that sounded like [metal] was hitting the toilet." When the defendant emerged from the bathroom, he showed Gerena a small, black firearm in his hands. The defendant and Gerena watched an Internet video recording

[2] Still images from surveillance video recordings from the La Cueva Sports Bar admitted in evidence showed an unidentified pedestrian arriving at the corner of Broadway and Eleanor Street at 3:50:45 A.M.

[3] Massachusetts State Police Trooper Joel Balducci testified that he determined how long it might take a person to travel on foot from the scene of the crash at the intersection of Crescent Avenue and Parker Street to the corner of Broadway and Eleanor Street. He ran up Parker Street, across Broadway to Clark Avenue, through an alleyway between two buildings, across the parking lot next to 786 Broadway, and then to the front of that address. That route was approximately 1,317 feet long. Trooper Balducci also testified that he conducted a simulated timed run along that route at the slowest possible pace he could, and that he completed the route in two minutes and forty-four seconds. The distance from the front of 786 Broadway to the corner of Broadway and Eleanor Street is approximately 200 feet.

detailing how to disassemble a firearm, and the defendant then disassembled the firearm into two pieces. After he had disassembled the firearm, the defendant asked Gerena to take him for a ride so he could dispose of the firearm. Gerena drove on Route 99 toward Boston, across the Route 99 bridge, and then looped back toward Chelsea; as Gerena drove across the Route 99 bridge on the return trip, the defendant tossed something (which Gerena assumed to be the firearm pieces) out of the passenger's side window.

Gerena then drove with the defendant to a park in the East Boston section of Boston. The defendant got out of Gerena's car and disappeared for about five minutes. When the defendant returned to Gerena's car he had a bookbag that he said he "needed to get rid of." Gerena stopped the car somewhere on Condor Street and threw the bag in a trash barrel in front of someone's house. Gerena then dropped the defendant off at 786 Broadway and went home.

About a week later, the defendant told Gerena that the police were looking for the defendant. The defendant instructed Gerena that if the police asked where Gerena was on May 13, Gerena should tell them he was scratching lottery tickets with the defendant at a corner store near Gerena's house.

Lekia Lewis was friends with El-Hakim shortly before her death. Lewis knew the defendant as Logan, a crack cocaine

dealer from whom she and El-Hakim obtained drugs. Between two and three weeks before El-Hakim was killed, Lewis and El-Hakim were together at a house at 765 Broadway in Chelsea where they and others would "hang out" and smoke crack cocaine. There, El-Hakim told Lewis that, because the defendant had "hurt" her, she was blackmailing him for "[s]eventy-five dollars and drugs." When Lewis advised El-Hakim against blackmailing the defendant, El-Hakim told Lewis "she was going to continue to [blackmail him] because he hurt her."[4] When Lewis told El-Hakim that Lewis did not believe El-Hakim was blackmailing the defendant, El-Hakim made a phone call. After El-Hakim hung up the phone, she walked "out [of] the house, off the porch, and met with the defendant" on the sidewalk in front of 765 Broadway. Lewis watched out the window as El-Hakim grabbed something from the defendant. When El-Hakim returned inside, she said, "see," and showed Lewis "[m]oney and crack" in her hands.

Discussion. 1. Sufficiency of evidence. The defendant argues that the Commonwealth's case was built entirely on

[4] Dr. Katherine Lindstrom, from the Office of the Chief Medical Examiner for the Commonwealth of Massachusetts, performed autopsies on both victims. As corroboration of El-Hakim's claim to have been hurt, Dr. Lindstrom testified that, during her autopsy of El-Hakim, she observed "some older appearing injuries, some yellow bruising to her left side of the jaw and neck, upper neck, as well as her jaw was wired shut." The bruise was older, as it was no longer blue or purple, and began on El-Hakim's jaw and went "down onto her neck and upper chest [area]."

circumstantial evidence, rendering the evidence "insufficient to prove beyond a reasonable doubt that it was possible for [the] defendant to have committed the crimes."[5]

"Circumstantial evidence alone may be sufficient to meet the burden of establishing guilt." Commonwealth v. Woods, 466 Mass. 707, 713, cert. denied, 573 U.S. 937 (2014). See Commonwealth v. Chin, 97 Mass. App. Ct. 188, 195 (2020). "The inferences drawn by the jury need only be reasonable and possible and need not be necessary or inescapable." Commonwealth v. Casale, 381 Mass. 167, 173 (1980). The Commonwealth does not need to prove that "no one other than the accused could have performed the act," id. at 175, but the question of the defendant's guilt "must not be left to conjecture or surmise," Commonwealth v. Anderson, 396 Mass. 306, 312 (1985).

[5] "Murder in the second degree is the unlawful killing of a human being with malice aforethought." Commonwealth v. Bruneau, 472 Mass. 510, 518 (2015), quoting Commonwealth v. McGuirk, 376 Mass. 338, 344 (1978), cert. denied, 439 U.S. 1120 (1979). Malice aforethought "has three 'prongs': (1) specific intent to cause death; (2) specific intent to cause grievous bodily harm; or (3) knowledge of a reasonably prudent person that, in the circumstances known to the defendant, the defendant's act is very likely to cause death." Commonwealth v. Judge, 420 Mass. 433, 437 (1995). The defendant's arguments on appeal are directed solely to the sufficiency of the evidence to establish his identity as the person who shot the two victims; he does not challenge the sufficiency of the evidence of the nature of the victims' deaths to satisfy the elements of murder in the second degree as to the person who shot them in the backs of their heads.

We review "the evidence presented at trial, together with reasonable inferences therefrom, in the light most favorable to the Commonwealth to determine whether any rational jury could have found each element of the offense beyond a reasonable doubt." Commonwealth v. Robinson, 482 Mass. 741, 744 (2019). See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). We conclude that the evidence was sufficient to allow a rational jury to find beyond a reasonable doubt that the defendant committed murder in the second degree and carried a firearm without a license.

The evidence was sufficient to establish that the defendant had the opportunity to commit the murders. The defendant sought a taxicab ride from Dani-Elkebir less than an hour before the crash was reported to the police and was the last person to communicate with Dani-Elkebir before his death. As the Commonwealth observed in its closing argument, the defendant arranged a taxicab ride with Dani-Elkebir while he was being driven around in the early morning hours by his friend Gerena, and arranged with Gerena to pick him up shortly after he arranged his ride with Dani-Elkebir. Dani-Elkebir's last text message to the defendant at 3:35 A.M. indicated that Dani-Elkebir would arrive to pick up the defendant in two minutes. At 3:45 A.M., Dani-Elkebir was seen driving a taxicab in which a

woman (inferably El-Hakim)[6] was seated in the front passenger's seat, smoking crack cocaine, and the defendant was seated in the back.

The evidence also was sufficient for the jury to infer that, as the taxicab was driving up Parker Street, the defendant shot both victims in the back of the head, left the taxicab, and ran down Parker Street as he fled. Based on the taxicab's position at the scene of the crash, it was rationally inferable that the taxicab was traveling up Parker Street from Broadway when the victims were shot. The defendant, as a back seat passenger in the taxicab, was in a position to shoot both victims in the back of the head. Within minutes after the taxicab turned left on Broadway with the defendant and the two victims inside, gunshots awoke a resident on Parker Street, who then heard footsteps running past her home. When the defendant arrived at Gerena's car (a ride that the defendant had prearranged earlier that morning) his demeanor was rushed and he was out of breath.[7]

[6] A jury could rationally infer that the woman in the front passenger's seat was El-Hakim; El-Hakim was in a relationship with Dani-Elkebir, used crack cocaine, and was found deceased in the front passenger's seat of Dani-Elkebir's taxicab.

[7] The defendant contends that it was impossible for him to have traveled the distance from the site of the shooting to La Cueva Sports Bar in three minutes and forty-five seconds, the difference in time between 3:47 A.M., the time that Marin testified she heard gunshots, and 3:50:45 A.M., the time that

The evidence also supports a rational inference that the defendant had a motive to commit the murders. At the time El-Hakim was murdered, she was actively blackmailing the defendant and intended to continue doing so.[8] A rational jury also could have inferred that the defendant was aware he was being blackmailed by El-Hakim. El-Hakim told Lewis she was blackmailing the defendant for money and drugs, and in an effort to prove to Lewis she was telling the truth, El-Hakim called the defendant, who then appeared and delivered money and drugs to El-Hakim.

The defendant also had the means to commit the crimes and demonstrated consciousness of guilt. When the defendant met Gerena after the murders, he possessed a firearm which he

the Commonwealth claims the defendant was seen on the bar's surveillance video recording. Though the police reconciled the time-stamp on the bar's video recording with the actual time, there was no evidence at trial confirming the accuracy of the time on Marin's bedroom clock, and Marin testified that she sometimes set her clock a minute ahead. But even if Marin's clock were considered synchronized with the time-stamp on the bar's surveillance video recording, the difference between the two times is longer than Trooper Balducci testified it took him to travel from the crash site to the defendant's house, just 200 feet short of the corner of Broadway and Eleanor, running at the slowest possible speed.

[8] A jury could infer that the yellow bruising Dr. Lindstrom observed in the autopsy of El-Hakim was the "hurt" that El-Hakim described as the reason for her blackmail.

proceeded to disassemble.[9] It is a reasonable inference that the item the defendant threw out the window of the car on the Route 99 bridge was the firearm he had previously disassembled at Gerena's house. The defendant also asked Gerena to lie to police when questioned about his whereabouts on May 13, evidencing consciousness of guilt. Taken together, the evidence, viewed in the light most favorable to the Commonwealth, was sufficient to permit a rational jury to conclude that the defendant shot and killed the two victims with malice aforethought. See Commonwealth v. Bruneau, 472 Mass. 510, 518 (2015).

The defendant's arguments that the "Commonwealth failed to prove beyond a reasonable doubt that the crimes were not committed by a third party" and that the police investigation of the crimes was "inadequate" and "raised a reasonable doubt as to [the] defendant's guilt," are unavailing.

[9] There was sufficient evidence that the defendant knowingly possessed a firearm without a license. See G. L. c. 269, § 10 (a). Gerena testified that he saw the defendant holding a firearm in his hand when he exited the bathroom, and again saw the defendant holding the firearm when the defendant disassembled it. See Commonwealth v. Brown, 50 Mass. App. Ct. 253, 257 (2000) (indicating that actual possession may be proven by observation of defendant with firearm). In addition, no evidence was presented at trial that the defendant had a firearm license. See Commonwealth v. Allen, 474 Mass. 162, 174 (2016) ("licensure is an affirmative defense, not an element of the crime . . . , the defendant [bears] the burden of producing evidence that he held a license" [quotation omitted]).

The defendant's third-party culprit theory sought to suggest that a drug dealer named "Tony" dealt drugs in the same area as the defendant and had a motive to kill El-Hakim.[10]

The defendant also points to a surveillance video recording from 765 Broadway showing an individual who appeared to be wearing dark clothing walking on Broadway from the direction of Parker Street minutes after Marin heard gunshots. The defendant argued, and the police agreed, that the individual shown on that surveillance video recording was not the defendant, who was seen on surveillance video footage outside La Cueva Sports Bar wearing light-colored clothing. Though the police could not identify the individual depicted on the 765 Broadway surveillance video recording, they did not pursue an investigation to identify that individual.

Where "the Commonwealth has presented sufficient evidence that the defendant committed the crime, the fact that the

[10] Tony lived on the corner of Parker Street and Spencer Avenue. His house was raided by police shortly after El-Hakim had purchased drugs from him. Before El-Hakim was killed, Lewis and El-Hakim were threatened by associates of Tony, after being presumed to have "snitched" on him. After El-Hakim was killed, Lewis was threatened again. After El-Hakim's death, Heather Gormley told police "she was in fear that she would be labeled as a snitch and killed like [El-Hakim]." A confidential informant told police that he had heard "El-Hakim had snitched on Tony" and her killing was in retaliation for snitching. After learning that Tony was incarcerated at the time of the shooting, police concluded that threats made by Tony or his associates had "no significance in [the] homicide investigation."

defendant has presented evidence that he did not does not affect the sufficiency of the evidence unless the contrary evidence is so overwhelming that no rational jury could conclude that the defendant was guilty." Commonwealth v. O'Laughlin, 446 Mass. 188, 204 (2006). In light of the evidence supporting the defendant's guilt, evidence that Tony or the unidentified individual depicted on the 765 Broadway surveillance video recording could instead have committed the crimes merely "contradict[ed] the Commonwealth's evidence; it did not show it to be 'incredible or conclusively incorrect.'" Id., quoting Kater v. Commonwealth, 421 Mass. 17, 20 (1995). Moreover, the Commonwealth did not have the burden to prove that someone other than the defendant did not kill Dani-Elkebir and El-Hakim. See Casale, 381 Mass. at 175.

2. Hearsay. The defendant also argues that the trial judge erred in denying his motion in limine to exclude Lewis's testimony regarding El-Hakim's statements that she was blackmailing the defendant, as it was inadmissible hearsay. The defendant contends this evidence was erroneously admitted because "[El-Hakim]'s statement related to her past memory rather than her future intent" and there was insufficient evidence presented that "the defendant was aware of [El-Hakim]'s intent." We conclude that the judge did not err in admitting

Lewis's testimony, as it fell within the hearsay exception for state of mind. See Mass. G. Evid. § 803(3)(B)(i) (2020).

"Generally, determinations as to the admissibility of evidence lie 'within the sound discretion of the [trial] judge.'" Commonwealth v. Jones, 464 Mass. 16, 19-20 (2012), quoting Commonwealth v. Dunn, 407 Mass. 798, 807 (1990). We review the judge's ruling for an abuse of discretion.[11]

There is no dispute that El-Hakim's statements to Lewis ordinarily would constitute hearsay. See generally Mass. G. Evid. §§ 801(c), 802 (2020). In certain instances, "an exception to the hearsay rule permits the admission of evidence of a murder victim's state of mind as proof of the defendant's motive to kill the victim." Commonwealth v. Castano, 478 Mass. 75, 85 (2017). "Statements, not too remote in time, which indicate an intention to engage in particular conduct, are admissible to prove that the conduct was, in fact, put in effect." Commonwealth v. Ortiz, 463 Mass. 402, 409 (2012), quoting Commonwealth v. Avila, 454 Mass. 744, 767 (2009).

"Such evidence is admissible 'when and only when there also is evidence that the defendant was aware of that state of mind

[11] An abuse of discretion occurs where the judge "made 'a clear error of judgment in weighing' the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

at the time of the crime and would be likely to respond to it.'" Castano, 478 Mass. at 85, quoting Commonwealth v. Qualls, 425 Mass. 163, 167 (1997), S.C., 440 Mass. 576 (2003). There need not be direct evidence that the defendant was aware of the victim's state of mind, "so long as the jury reasonably could have inferred that he or she did learn of it." Castano, supra.

The judge did not abuse his discretion in admitting Lewis's testimony, as it served to illustrate El-Hakim's state of mind concerning the defendant's motive to kill her. See Castano, 478 Mass. at 85. See also Mass. G. Evid. § 803(3)(B)(i) (2020). Contrary to the defendant's contention, El-Hakim's statement to Lewis was forward-looking, not one of memory. El-Hakim "indicate[d] an intention to engage in particular conduct," when she told Lewis she was going to continue to blackmail the defendant. Ortiz, 463 Mass. at 409, quoting Avila, 454 Mass. at 767. The statement was coupled with evidence that the defendant was aware of El-Hakim's state of mind and likely to respond to it, as El-Hakim met with the defendant and returned with money and drugs for the purpose of addressing Lewis's skepticism of her claim to be blackmailing the defendant. See Castano, supra.

3. Postverdict juror inquiry. After the jury returned their verdict, the defendant became aware that one of the deliberating jurors (to whom we shall refer as "juror A") had posted several comments during the trial and the jury's

deliberations to his Facebook page, in violation of the trial judge's daily instructions.[12] The same juror posted additional comments to his Facebook page after the jury returned their verdict.[13] The defendant moved, after the verdict but before

[12] On October 19, 2016, juror A posted that he had been selected as a juror in a four-week murder trial, a post that elicited four reactions (including at least one each of "Like" and "Wow") but no posted comments. On November 2, the juror posted a comment saying, "Seeing the light at the end of the tunnel at Boston Superior Court. Closing arguments Thursday." On November 3, the juror posted, "Jury duty is not going to end well. This will continue into next week"; the post elicited two reactions (one "Like" and one "Sad") but no posted comments. On November 7, the juror posted a comment stating, "I think I am the only sane person on this jury. We hit the three week mark Tuesday." On November 8, the juror commented, "Another day down with Jury Duty. Back Tuesday, perhaps we turned a corner today," a post that elicited a "thumbs up" reaction but no comments. On November 9, the juror posted, "Court will drag on until Thursday, three long weeks now. Getting close. Pictured Suffolk Superior Court." On November 10, the juror posted, "OMG, back to court on Monday," eliciting another "Wow" reaction, but no posted comments. On November 11, the juror posted, "Day off from Jury duty today to honor our veterans. I need to get this jury duty thing done. Tired of waking up at nights thinking of it." On November 14, the juror posted that the jury had reached a guilty verdict.

[13] In addition to his November 14 post announcing the verdict, the juror made eight posts on November 15, and another on November 16. Two of the posts simply linked newspaper stories about the trial in the Boston Herald and Boston Globe, and two commented on the diversity of the jurors' backgrounds. One commented on the absence of direct evidence and the evolution of the jurors' votes on a verdict over the course of five days of deliberations. One post noted that the defendant's attorney also represented "Whitey" Bulger and Muhammad Ali, but commented, "I did not care for his defense tactics during the trial." Another post praised the performance of the trial prosecutor. Two commented on the juror's disappointment in the sloppiness of the police investigation.

sentencing, for postverdict inquiry of juror A, to determine whether he and other jurors had become subject to extraneous influence as a result of those Facebook posts. After a hearing, in which no evidence was presented other than images of the Facebook posts themselves, the trial judge denied the motion. The judge characterized the preverdict posts as saying, in essence, "I'm on a jury," and observed that there was no indication that the juror received any response to his posts other than a "thumbs up" indicating that an unidentified person approved the sentiment expressed in the post. Regarding the postverdict posts, the judge observed that, though they described to some extent the deliberative processes of juror A and his fellow jurors, the posts did not indicate any extraneous information or influence in the jurors' deliberations. We agree that the posts made by juror A after the jury returned the verdict furnish no cause for further inquiry, but conclude the judge should have inquired of juror A regarding the posts he made before the verdict was returned.

"[W]hen a defendant claims []he was prejudiced by a juror's communications with outside parties during trial, []he 'bears the burden of demonstrating that the jury were . . . exposed to . . . extraneous matter.'" Commonwealth v. Werner, 81 Mass. App. Ct. 689, 693-694 (2012), quoting Commonwealth v. Fidler, 377 Mass. 192, 201 (1979), overruled on another ground by

Commonwealth v. Moore, 474 Mass. 541 (2016). "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. Guisti, 434 Mass. 245, 251 (2001), quoting Commonwealth v. Dixon, 395 Mass. 149, 151-152 (1985). "An extraneous matter is one that involves information not part of the evidence at trial 'and raises a serious question of possible prejudice.'" Guisti, supra, quoting Commonwealth v. Kater, 432 Mass. 404, 414 (2000). "Where a case is close, as here, a judge should exercise discretion in favor of conducting a judicial inquiry." Dixon, supra at 153.

In Guisti the Supreme Judicial Court concluded that the trial judge abused her discretion in declining to conduct postverdict inquiry of a deliberating juror who had sent a message commenting on the length of her jury service to a "Listserv" to which she subscribed. See Guisti, 434 Mass. at 249-250 & n.4. In concluding that a postverdict inquiry was required, the court observed that, though the content of the juror's message did not suggest that the juror had been subject to extraneous influence, the juror "may have received responses to her e-mail postings." Id. at 252. The court concluded that, "due to the large number of persons who would have received the

juror's messages and could have responded, the juror left herself vulnerable to receiving information about the case at issue prior to the rendering of the verdicts." Id. at 253.

In Werner, the trial judge was presented with circumstances similar to those in the present case. After the jury returned their verdict, the defendant discovered that two deliberating jurors had made several Facebook posts during the trial, and that Facebook "friends" had posted comments in response to some of the posts. Werner, 81 Mass. App. Ct. at 691. The judge conducted a hearing, in which the jurors were asked about their posts and any responses to them. Id. at 692-693. After the hearing, the judge concluded that none of the responses contained extraneous matters. Id. at 693. We affirmed, concluding that the judge "appropriately allowed the defendant's motion for an evidentiary hearing," id. at 696, and that the judge's determination of the jurors' credibility was within her province,[14] id. at 698, and that the postings themselves reflected "the type of 'attitudinal expositions' on jury service . . . that fall far short of the prohibition against extraneous influence," id. at 697.

[14] The judge credited the jurors' testimony that they received no extraneous information about the case or influencing their deliberations, in any responses to their postings. See Werner, 81 Mass. App. Ct. at 698.

The Commonwealth suggests that the present case is unlike either Guisti or Werner, since juror A's Facebook posts show no comment made in response to his social media posts. We believe the Commonwealth reads both cases too narrowly. As both Guisti and Werner recognized, though an Internet post by a deliberating juror can itself demonstrate exposure of the juror to extraneous influence, it need not do so to provide the "colorable showing" a defendant must make to warrant a postverdict inquiry. See Guisti, 434 Mass. at 252-253; Werner, 81 Mass. App. Ct. at 696-697. In particular, a juror's public comment on his jury service in a pending case, seen by a wide number of observers, risks serving as an implicit invitation to those observers to communicate with the juror. Moreover, as should be obvious, in the present era of multiple channels of communication, the mere fact that the medium in which the juror posts his public comment does not reflect responsive comment does not mean that the juror received no communication to his comment through any other medium. The very purpose of the inquiry directed by the Supreme Judicial Court in Guisti, and conducted by the trial judge in Werner, is to determine what, if any, extraneous communications the posting juror may have received, but which are not reflected in the posts themselves.

We note as well that, though the circumstantial evidence was sufficient to support the defendant's guilt in the present

case, it was not overwhelming, as reflected in part by the jury's lengthy deliberations. See Commonwealth v. Kincaid, 444 Mass. 381, 386 (2005) ("If . . . the judge finds that extraneous matter came to the attention of the jury, the burden then shifts to the Commonwealth to show beyond a reasonable doubt that [the defendant] was not prejudiced by the extraneous matter" [quotation and citation omitted]); Werner, 81 Mass. App. Ct. at 698 (given overwhelming evidence of guilt, "[e]ven if an extraneous influence had been discovered, the Commonwealth likely would have been able to prove the defendant was not prejudiced").

We conclude that the trial judge erred in denying the defendant's motion for a postverdict inquiry of juror A regarding the question of extraneous influence received in response to his preverdict Facebook posts.

On remand, the inquiry need not extend to the juror's postverdict posts. As the trial judge observed, correctly we think, those 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 concluded deliberations. We leave to the sound discretion of the trial judge whether to inquire of other jurors, based on the information obtained during inquiry of juror A.

Conclusion. The defendant's convictions of murder in the second degree and unlawful possession of a firearm are affirmed. The order denying the defendant's motion for postverdict juror inquiry is reversed, and the case is remanded to the Superior Court for further proceedings in accordance with this opinion.

So ordered.