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SJC-12185

COMMONWEALTH vs. ANTHONY VILLALOBOS.

October 26, 2017.

Practice, Criminal, Jury and jurors, Conduct of juror, Voir dire.

Anthony Villalobos appeals from his convictions of involuntary manslaughter, as a lesser included offense of murder in the second degree, and assault and battery and from the denial of his motion for a new trial. The Appeals Court affirmed his convictions in a divided opinion. Commonwealth v. Villalobos, 89 Mass. App. Ct. 432 (2016). See id. at 444-447 (Rubin, J., dissenting). We granted Villalobos's application for further appellate review, 475 Mass. 1102 (2016), and now reverse the convictions and remand for a new trial.

1. Sleeping jurors. The issue that divided the Appeals Court was the trial judge's failure to conduct a voir dire after the prosecutor reported that some jurors fell asleep during the trial. "[A] judicial observation that a juror is asleep, or a judge's receipt of reliable information to that effect, requires prompt judicial intervention." Commonwealth v. McGhee, 470 Mass. 638, 643-644 (2015), quoting Commonwealth v. Beneche, 458 Mass. 61, 78 (2010). "[I]f a judge receives a complaint or other information suggesting that a juror was asleep or otherwise inattentive, the judge must first determine whether that information is 'reliable.'" McGhee, supra at 644. If the judge determines that the information is not reliable, no intervention is necessary. See Commonwealth v. Vaughn, 471 Mass. 398, 412-413 (2015) (where counsel's assertions that juror was sleeping during charge were not found reliable, judge did not abuse discretion by taking no further action). If, however, the judge does find the information reliable, he or she "must take further steps to determine the appropriate intervention."

McGhee, supra. "Typically, the next step is to conduct a voir dire of the potentially inattentive juror, in an attempt to investigate whether that juror 'remains capable of fulfilling his or her obligation to render a verdict based on all of the evidence.'"<sup>1</sup> Id., quoting Commonwealth v. Dancy, 75 Mass. App. Ct. 175, 181 (2009). The judge has "substantial discretion in this area," and on appeal, "[t]he burden is on the defendant to show that the judge's response to information about a sleeping juror was 'arbitrary or unreasonable.'" McGhee, supra, quoting Beneche, supra.

Villalobos has met his burden. Indeed, this case is much like McGhee, in which we determined that the judge's failure to intervene gave rise to "serious doubt that the defendant received the fair trial to which he [was] constitutionally entitled." McGhee, 470 Mass. at 645, quoting Commonwealth v. Braun, 74 Mass. App. Ct. 904, 906 (2009). As the Appeals Court explained, during Villalobos's trial, the prosecutor reported one day that one juror "had fallen asleep 'several times' during the testimony," and the next day, that a different juror "was sound asleep during the cross-examinations." Villalobos, 89 Mass. App. Ct. 435-436. The judge, who did not have the benefit of McGhee, did not give any indication that he doubted the reliability of the prosecutor's reports, yet he did not question the jurors to determine whether they had in fact fallen asleep and, if so, what portions of the evidence they might have missed. Instead, the judge simply observed each juror for the rest of the day. Id. Similarly, in McGhee, supra at 642-645, one juror reported that another juror had fallen "sound asleep" and was even snoring, but the trial judge declined to take action.

Moreover, like in McGhee, the trial judge appears to have been under the mistaken impression that he could not intervene unless he personally observed a juror sleeping. See Villalobos, 89 Mass. App. Ct. at 436 ("The prosecutor [stated], 'I think that both sides deserve to have jurors that are able to stay awake,'" and the judge stated, 'Obviously, but I have to notice it'" [emphasis added]). Cf. McGhee, 470 Mass. at 645 ("The judge's reason for taking no further action . . . was essentially that he had not himself seen the juror sleeping"). On the contrary, the receipt of reliable information from any

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<sup>1</sup> This is not to say that a voir dire is always necessary; there may be circumstances where a judge received reliable information that a juror is sleeping and properly exercises his or her discretion to intervene without conducting a voir dire.

source, not just the judge's own observation, that a juror is sleeping requires prompt judicial intervention. The judge's apparent belief that he lacked discretion to do anything other than observe the jurors was itself an error of law. Cf. Commonwealth v. Ramos, 402 Mass. 209, 216 (1988), and cases cited ("A ruling that the court has no power to direct an act, when in fact the act is discretionary, is an error of law").

The Commonwealth argues that the sleeping jurors missed minimal and relatively inconsequential portions of the testimony. Based on only the record before us, however, we cannot be sure that this is true. The purpose of a voir dire is to investigate the report that one or more jurors were sleeping and to determine what, if anything, the sleeping jurors missed. Because the judge did not conduct a voir dire, we do not have these essential findings.<sup>2</sup>

In the circumstances of this case, the judge's response to the prosecutor's reports leaves us with "serious doubt that the defendant received the fair trial to which he is constitutionally entitled." McGhee, 470 Mass. at 645, quoting Braun, 74 Mass. App. Ct. at 906. "The serious possibility that a juror was asleep for a significant portion of the trial" is a structural error and can never be considered harmless. McGhee, *supra* at 645-646. The convictions must be vacated.

2. Remaining issues. Villalobos also argues that the evidence was insufficient to support his convictions. For the reasons explained by the Appeals Court, Villalobos, 89 Mass. App. Ct. at 433-435, we disagree. Accordingly, Villalobos may be retried for the offenses of which he was convicted. Because of our disposition, we need not reach the other issues decided by the Appeals Court.

Judgments reversed.

Elda S. James (Mathew B. Zindroski also present) for the defendant.

Amanda Teo, Assistant District Attorney (David J. Fredette, Assistant District Attorney, also present) for the Commonwealth.

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<sup>2</sup> At oral argument, a question arose as to whether the reportedly sleeping jurors deliberated or were alternates. The Commonwealth has since acknowledged that at least one of the jurors in question did in fact deliberate. We therefore need not address in this case whether a trial judge can cure the failure to intervene by making the sleeping juror an alternate.