SUPERIOR COURT
OF THE STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

Submitted: April 19, 2006
Decided: July 27, 2006

STATE OF DELAWARE	)	
	)	
v.	)	I.D. No. 0510006692
	)	
KEVIN L. DICKENS,	)	
	)	
Defendant.	)	

ORDER

Upon Defendant's Motion for A Mistrial - - *DENIED*

Defendant, a *pro se*, maximum security inmate, was convicted by a jury for throwing excrement on a guard. Now, he asks for a new trial. As presented below, Defendant claims his trial was unfair. Basically, Defendant challenges the court's refusal, on the morning of trial, to continue the case so that he could obtain a psychological evaluation to help explain why he did what he did. Defendant also raises questions about two jurors.

I.

On November 14, 2005, Defendant was indicted for several counts of assault in a detention facility and criminal mischief. As discussed below, Defendant throws human waste on his guards. At his insistence and with the court's permission, Defendant represented himself. He filed several pretrial motions, including requests for severance and *voir dire*. Until the morning of trial, Defendant's motions did not include a request for a mental evaluation.

On March 3, 2006, in a written order, the court granted Defendant's motion to sever Counts I and II from III-VIII and called for trial of Counts III-VIII to start on March 14, 2006. Apparently in response to the severance decision, the State dropped Counts III-VIII on March 10, 2006.

On March 14, 2006, the trial date for Counts III-VIII, the court allowed the State to proceed on Counts I and II. And, the court denied, without prejudice, Defendant's untimely request for a continuance to obtain a mental health examination. (The court also denied Defendant's request for bail reduction while he pursued the evaluation.)

As discussed below, on the trial's second day, March 15 2006, the court excused Juror No. 5 for cause, while Juror No. 9 was allowed to remain seated. On

March 17, 2006, Defendant was found guilty of both counts of assault in a detention facility. Immediately after the jury returned its verdict and upon Defendant's motion, the court held a brief hearing with Juror No. 12. The hearing was *ex parte*, but on the record.

On March 27, 2006, Defendant filed this motion for a mistrial. The motion, in effect, is one for a new trial. The State filed an opposing response on April 4, 2006. Defendant replied on April 19, 2006. This decides Defendant's post-trial motion.

II.

As mentioned briefly above, Defendant first claims that he was not prepared because on the day set for trial of Counts III-VIII, the State dropped those counts and the court went forward on Counts I and II. As a result of this "last minute decision," Defendant did not have time to obtain a mental health evaluation, which he considered vital.

Second, a juror was married to a correctional officer and may have disclosed "inside knowledge about prison system" to other jurors during deliberations. Throughout jury selection, the court was concerned about prison "experts" influencing other jurors due to "contact and knowledge of prison inmates or personnel." Nonetheless, the court denied Defendant's mid-trial motion to excuse

the juror.

Third, moments after the jury returned guilty verdicts, Defendant revealed that a juror was a "former high school mate." The court, however, denied Defendant's motion to set aside the verdict for that reason.

Fourth, Defendant was not allowed to keep the juror profiles in his maximum-security cell, adversely affecting his ability to identify possible juror conflicts, including the two mentioned above.

III.

As to the facts, Defendant all but conceded the indictment's allegations. The State easily proved that Defendant stored human waste in a contraband bucket, which he somehow hid in his maximum security cell. As a guard approached to serve a meal, Defendant threw the excrement through the slot in the cell's door. Some of it hit the guard. Those facts establish a *prime facie* case, justifying the convictions.

As a matter of Delaware's law, Defendant offered no recognized defense. Basically, he attempted to portray the guard as a sadist who baited him and left him with no practical alternative except to act out as he did. According to Defendant, the primary way the guard abused him was by putting things in Defendant's food and taunting him about it.

Assuming Defendant's accusations were true, which is highly

questionable, Defendant was not legally justified in throwing anything, much less human waste, at the guard. As it happened, Defendant's accusations turned out to be largely unconvincing. The evidence showed that food for maximum security inmates is prepared in the prison's kitchen, where it is heavily wrapped in plastic. The food is carried to the maximum security facility by inmates then, served by the guards. While it is theoretically possible that on earlier occasions the guard unwrapped Defendant's meal and tampered with it, that would have required the guard's time and effort. More likely, knowing Defendant was sensitive about his food's being sanitary, the guard cruelly teased Defendant.

Nevertheless, continuing to assume that Defendant's beliefs were true, Defendant assaulted the guard before the guard said or did anything to Defendant on the day in question. Basically, according to Defendant, what he did was retaliatory and, perhaps, preemptive. The evidence, however, left the impression that Defendant's behavior was unjustified and extreme, even when viewed as twisted "prison justice." In any event, as a matter of law, Defendant offered no legitimate defense.

The court will address the facts relating to Defendant's continuance request and the challenged jurors as needed below. In summary as to those matters, the court would have granted a trial continuance if Defendant had a good reason for

one. Further, the court did not excuse Juror 9 because Defendant had her profile during jury selection and he did not challenge her when he had the opportunity before she was seated. Similarly, Defendant's challenge to his schoolmate came far too late, after the verdict was announced, and the juror did not even remember Defendant. Finally, Defendant not only had the juror profiles during jury selection, they were with him whenever he was in the courtroom throughout the trial.

IV.

On Defendant's motion, a new trial may be granted if required in the interest of justice.[1] The court has broad discretion in deciding a motion for a new trial.[2] The same standard gives the court "broad discretion in determining the mode and depth of investigative hearing into allegations of juror misconduct and the appropriate remedy."[3] Applications for continuances are also discretionary.[4]

In exercising its discretion here, the court has carefully considered whether its rulings were correct and whether Defendant was prejudiced by them. Not only is the court satisfied that its decisions were correct, the court cannot imagine

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[1] Super. Ct. Crim. R. 33.

[2] *Durham v. State,* 867 A.2d 176, 177 (Del. 2005).

[3] *Massey v. State,* 541 A.2d 1254, 1257 (Del. 1988).

[4] *Bailey v. State,* 521 A.2d 1069, 1088 (Del. 1987).

how this case could be presented to any rational jury in a way that would produce an acquittal.

V.

A. Trial Continuance's Denial

As to the court's "last minute decision" to go forward with Counts I and II instead of Counts III-VIII, and Defendant's insistence on a continuance to obtain a psychological evaluation, the indictment's counts, effectively, were interchangeable. They largely involved the same acts, witnesses, and crime scene. Severance was granted to minimize possible jury prejudice resulting from a perceived pattern of behavior and, therefore, switching Counts I and II for Counts III-VIII did not result in undue hardship.

Defendant's alleged "issues of abuse," which prompted his request for a mental health examination, would have been raised by him in either trial. So, the scheduling change made no meaningful difference. Defendant had months before trial to demand an examination. Furthermore, even though it is doubtful that any valid mental defense could have been made, the court allowed Defendant the opportunity to obtain a post-trial examination, leaving open the possibility of a mistrial had the evaluation produced information that could have made a difference.

In fact, at Defendant's request, the court authorized the Public Defender

to perform a post-trial, Psycho-Forensic Review. In that evaluation, which is summarized in the presentence report, but which the court has not completely shared with the State, a clinician discounts the things that, according to the clinician, "could easily be interpreted as elements of antisocial personality disorder . . . ." (The court observes that those things might include Defendant's throwing excrement at others. The court also mentions that Defendant was evaluated at the Delaware Psychiatric Center in 1994, where the Director of Forensic Psychiatry, a licensed psychiatrist, formally diagnosed Defendant as having "Intermittent Explosive Disorder." Finally, the court understands that Defendant later declined two evaluations because they would not be on his terms.) The clinician also mentions, but does not comment on, Defendant's "belief system that does not allow him to recognize that others can and do exercise authority over him."

Instead, relying on Defendant's accounts of incidents before and after Defendant's imprisonment, the clinician emphasizes that Defendant "appears to be exhibiting symptoms of Post Traumatic Stress Disorder (PTSD)." At most, the clinician recognizes:

> If Kevin suffers from PTSD, then he certainly would qualify for a finding of Guilty but Mentally Ill. If it is PTSD, it certainly would have affected his thinking and behavior during the events leading up to his charges and as such that information should have been made available for

the jury to consider.

The court questions the clinician's opinions and the "facts" on which they rest. Nevertheless, before sentencing, the court will ask Defendant if he wants the court to share the Public Defender's Psycho-Forensic Review with the State, and whether he prefers that the court enter the verdict as "guilty, but mentally ill," under 11 *Del. C.* §§401(b) and 408. If the court enters a "guilty, but mentally ill" verdict at Defendant's request, the court will eliminate any prejudice, theoretical or real, that Defendant suffered when the court denied his untimely request for a mental health evaluation on the morning of trial.

B. Juror No.9

Defendant's claim that Juror No. 9, the juror whose husband is a correctional officer should have been dismissed for cause is groundless. Throughout jury selection and trial, Defendant had the juror profiles at hand. For Juror No. 9, "Spouse Occupation" was listed as: "SCI PRISON." Spouse's employer was: "CHESTER STATE PRISON." In other words, the occupation of the juror's spouse was manifest, and Defendant was content when she was seated. At least, he was silent and Defendant otherwise was not reticent.

Mid-trial, a question arose concerning another juror, Juror No.5. The juror reported to the bailiff that the juror had relatives who are police officers and an

acquaintance "that had been incarcerated in Smyrna." The juror then volunteered:

> So I feel as though, because I do know what the system is like and I tried to help this person with the incident that he was facing . . . . My detective police officer cousin and sergeant police officer cousin here in Wilmington said there's nothing that I could personally do to stop the rapes that go on down there at the prison. All right.
>
> So I've also done prison ministry. So I know the dimensions and sizes of things that are there. All right.

The juror's exclamation prompted the court to ask:

> Why isn't this something that you discussed with us after the Prothonotary asked all the jurors about these sorts of things?

To which the juror replied:

> I didn't understand – I thought you meant if I had personally been on the other side. That's why I didn't raise my hand when all the other people were raising their hands, because I personally hadn't been locked up myself.

The juror also admitted having mentioned those things to other jurors, which violated the court's cautionary instructions.

As the court explained to Defendant before excusing Juror No.5 over his objection, the juror had to go because the juror had not paid attention during the initial screening and the juror was conversing improperly with other jurors. And, of course, the juror had personal knowledge of Delaware's prison system and the prison

at Smyrna itself. The juror also was obviously biased.

The court also questioned Juror No.9 and is satisfied that her marriage to an out-of-state correctional officer did not impair her ability to render a fair and objective verdict. Unlike Juror No.5, who had done prison ministry work in Smyrna, Juror No. 9 did not have firsthand knowledge of Delaware's prison system, much less Smyrna.

Furthermore, as a practical matter, the evidence against Defendant was overwhelming and Defendant did not deny committing the alleged offenses, but instead wished to justify them somehow. This being so, absent Defendant's showing identifiable prejudice because the court excused one juror and seated an alternate, or because the court allowed another juror with whom Defendant was initially content to remain on the jury, the claim must be denied.[5]

C. Juror No.12

As to Defendant's post-verdict revelation that Juror No. 12 was a "high school mate," the court is satisfied that Defendant either recognized her before the verdict and only advances the issue to gain a post-trial advantage or, as the juror told

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[5] *See Massey,* 541 A.2d at 1257 (holding that Defendant alleging juror misconduct must show actual prejudice or the existence of "egregious circumstances," that is, "circumstances, that if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice in favor of Defendant)".

the court, Defendant's prior connection was so limited it made no lasting impression.

When Defendant raised the issue, right after the jury announced its verdict, the court was unwilling to bring the juror back into the courtroom so that the *pro se* Defendant could attempt, perhaps, to renew acquaintances with that juror, and intimidate her. Instead, the court questioned the juror, *ex parte*, attempting unsuccessfully to jog the juror's memory. As the record shows, the juror repeatedly denied knowing Defendant. She seemed surprised by the inquiry.

Defendant's claim that, despite the juror's denials and the fact that the juror was in a different year than Defendant, Juror No. 12 nonetheless must have known of him due to his "popularity" in high school is speculative and immaterial.[6] Defendant's reliance on *Flonnory v. State* is misguided.[7] *Flonnory* concerned "highly prejudicial improper and inadmissible information" being communicated by one juror to other jurors.[8] Flonnery's jurors were exposed to information regarding his alleged criminal history concerning guns and murder, which made their ability to remain impartial impossible. In this case, Defendant has offered no evidence that Juror No.

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[6] *See Skinner v. State,* 575 A.2d 1108, 1120 (Del. 1990) ("The mere fact that a juror is a casual acquaintance of a witness is not a basis for disqualification.").

[7] *Flonnory v. State,* 778 A.2d 1044 (Del. 2001).

[8] *Id.* at 1056.

12 might have known something bad about him, assuming the juror lied about knowing Defendant at all. And, if the juror knew something, in contrast to *Flonnery*, there is no claim that other jurors were tainted here.

Likewise, Defendant's reliance on *Banthar v. State* is misplaced.[9] In *Banthar,* the forelady failed to answer truthfully whether she had been the victim of a violent crime.[10] Here, the court is easily convinced that Juror No. 12 was unaware that she and Defendant attended the same high school 25 years ago and that the juror did not compromise Defendant's right to a fair trial.[11]

D. Juror Profiles

With respect to the court's decision not to force the Department of Correction to allow Defendant access to the juror profiles while in his maximum-security cell, the decision was in response to DOC officers' concern for prison safety. Whether the concern was prudent and justified is unimportant. Defendant received the juror profiles at practically the same time as a defense attorney, and he had access to them throughout jury selection and trial. The court is satisfied that nothing good could have come from allowing Defendant to take the juror profiles into the State's

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[9] *Banthar v. State,* 823 A.2d 467 (Del. 2003).

[10] *Id.* at 484.

[11] *See Harrington v. Hollingsworth,* 1992 WL 91165 (Del. Super.)

maximum-security prison and, Defendant's claims notwithstanding, it had no bearing on how Defendant handled the juror issues.

VI.

For the foregoing reasons, the court remains satisfied that Defendant received a fair trial and Defendant's "Motion for Mistrial," which is a motion for a new trial, is **DENIED.**

/s/ Fred S. Silverman
Judge

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