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

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[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).

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[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]

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[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

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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.

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[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

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[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

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[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

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[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.